

B. Jajikse  
Proc II

**DECISION**



**THE COMPTROLLER GENERAL  
OF THE UNITED STATES**  
WASHINGTON, D.C. 20548

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FILE: B-192052

DATE: December 21, 1978

MATTER OF: Ammark Corporation

[Allegation that Awardee Did Not Qualify as a Small Business Because the Firm Intended to Furnish a Product of Foreign Manufacture]

DIGEST:

1. Fact that brand name item may have been foreign product does not work waiver of application of Buy American Act or permit offer by other than small business where procurement was totally set aside for small business participation. Given protester's belief that brand name item was only manufactured abroad, clarification should have been sought prior to bidding.
2. Whether <sup>the</sup> second low offeror will comply with certification in <sup>the</sup> bid to furnish <sup>domestic</sup> end product for purposes of Buy American Act is a question going to responsibility and does not present a question for GAO review, on ~~present~~ record.
3. <sup>the</sup> Protester's allegation that <sup>the</sup> awardee is not small business should have been submitted ~~pursuant to regulation to contracting officer for conclusive determination by SBA.~~ <sup>small bus</sup> - 4 -
4. Procuring activity is advised that offer of foreign end item should not be viewed as negating small business self-certification, per se. Matter should have been submitted to SBA for resolution.

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Ammark Corporation protests the award to Braukmann Controls Corporation (Braukmann) under IFB 553-20-78, issued by the Veterans Administration Hospital (VA), Allen Park, Michigan for thermostatic heating control valves. The procurement was solicited as a total small business set-aside.

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Ammark believes that the Braukmann bid should have been rejected for the same reasons which VA cited in rejecting Ammark's low bid, that the firm did not qualify as a small business because it intended to furnish a product of foreign manufacture. Ammark does

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not deny that it intended to furnish a foreign manufactured item, arguing that its product is equal to the allegedly foreign made Danfoss Type RA-6 heating controls and valves specified as the brand name item. Ammark also contends that Braukmann cannot be considered a small business due to the "number of people employed and the size of the factory and office facilities of [Braukmann's] parent company."

Contrary to Ammark's view that it should have been awarded the contract, it was not entitled to award, unless it was the low responsive, responsible qualified offeror. Even though the solicitation identified a brand name item which Ammark believed was manufactured abroad, the protester was not reasonably misled into believing that the foreign place of manufacturer of the brand name item thereby became a desirable characteristic of the required item. The acceptability of an offered product and the bidder's eligibility must be determined in the context of all the solicitation provisions. As quoted below, the solicitation required the contractor to furnish items manufactured in the United States by small business concerns. Given Ammark's belief that the brand name item was only manufactured abroad, it should have sought clarification prior to bidding rather than assume that an express solicitation provision requiring the equipment to be manufactured in the United States would not be given effect.

Ammark indicated in the Buy American Act provision of the IFB that it was offering a product manufactured in West Germany. VA therefore viewed Ammark as not eligible for award under paragraph 6 of the General Conditions of the solicitation, which provides that:

."\* \* \*. A 'small business concern' is a concern, including its affiliates, which is independently owned and operated, is not dominant in the field \* \* \* and can further qualify under the criteria set forth in regulations of the Small Business Administration \* \* \*. In addition to meeting these criteria, a manufacturer or a regular dealer submitting bids or proposals in its own name must agree to furnish in the performance of the contract end items manufactured or produced in the United States \* \* \* by small business concerns. \* \* \*."

As indicated above, Ammark does not challenge this basis per se for rejection of its bid, rather, it contends that the same rationale that led to rejection of its bid should have resulted in rejection of the Braukmann bid. The record shows, however, that Braukmann offered to furnish a domestic end product for purposes of the Buy American Act by certifying in its bid that it would furnish a domestic source end product. Ammark bid a foreign end item. VA had no reason to question Braukmann's agreement to furnish end items meeting the requirement in the solicitation's notice of total small business set-aside that the contracted items be produced or manufactured in the United States by small business concerns. Braukmann also has assured VA that its products conform to the Buy American Act, indicating, contrary to Ammark's belief, that Braukmann has manufacturing personnel and facilities in the United States.

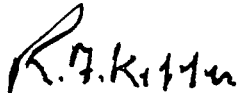
Braukmann's bid obligates it to supply a domestic source end product for purposes of the Buy American Act. Arizona Industrial Machinery Co., B-191178, July 25, 1978, 78-2 CPD 68. Whether an offeror will be able to meet its agreement, or not, is an issue going to its responsibility. However, this Office does not review protests concerning affirmative determinations of responsibility except in circumstances not relevant to this case. Central Metal Products, Inc., 54 Comp. Gen. 66 (1974), 74-2 CPD 64 and Yardney Electric Corporation, 54 Comp. Gen. 509 (1974), 74-2 CPD 376.

Although Ammark may believe that the contracting officer should have questioned Braukmann's size status, the contracting officer has authority to and ordinarily should accept at face value a small business size certification by a bidder, in the absence of a timely objection or of evidence raising doubt that the certification is made in good faith. Eller & Co., B-191986, June 16, 1978, 78-1 CPD 441. Ammark could have, but did not, pursue this avenue under the appropriate SBA procedures by submitting its protest of Braukmann's size certification, pursuant to 13 C.F.R. 121.3-5 (1978) as amended at 43 Fed. Reg. 12500 (March 31, 1978). CF. Dr. Robert S. Ray Associates, B-191236, February 27, 1978, 78-1 CPD 160.

We do note that Ammark also represented in its bid that it was small. In a number of decisions we have held that the requirement of the small business definition that domestically manufactured end items be furnished

is separate and distinct from the Buy American Act requirement that preference be given to domestic source end products. American Amplifier and Television Corporation 53 Comp. Gen. 463 (1974), 74-1 CPD 10; Southwest Tool & Die Co., 49 Comp. Gen. 41 (1969). Consequently, the indication in Ammark's bid that a foreign product would be furnished should not have been viewed by the contracting officer as negating Ammark's self-certification. Rather, we believe that it would have been appropriate for the contracting officer to question the self-certification and refer the matter to SBA. We have by separate letter of today so advised the Administrator of Veterans Affairs. As noted above, however, Ammark does not challenge the contracting officer's conclusion that it would not have furnished items manufactured in the United States.

Regarding Ammark's complaint that Braukmann is not a small business in view of the number of persons said to be employed by and the production capacity claimed of its parent, Ammark's remedy again was to timely protest to SBA through VA under the regulation cited above.

  
Acting Comptroller General  
of the United States