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DECISION



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

40349

FILE: D-179749

DATE: January 15, 1974

MATTER OF: American Amplifier and Television Corporation

DIGEST: (1) Bid of small business concern under formally advertised small business set-aside which included representation that contract end item would not be manufactured or produced by small business concerns properly rejected. Bidder advised that even though it contemplated subcontracting a portion of work to large business, it could have properly made an affirmative representation as its contribution to end item would be significant.

(2) Requirement of small business definition that end items to be furnished be manufactured or produced in United States is separate and distinct from Buy American Act requirement that preference be given to domestic source end products. Therefore, terms "manufactured or produced" as used in small business definition not regarded as "manufacturing" process within contemplation of Buy American Act. See cases cited.

Invitation for bids (IFB) No. N00600-74-B-0005, issued July 25, 1973, by the United States Naval Regional Procurement Office, Washington, D.C., is for the procurement of an audio-visual system for the National Naval Medical Center, Bethesda, Maryland. The system is to be constructed and installed in an auditorium at the Naval Medical Research Institute. The procurement is a total set-aside for small business. Pursuant to Armed Services Procurement Regulation (ASPR) 1-706.5(c), the IFB contained the following definition of a small business concern:

"(b) Definition. A 'small business concern' is a concern, including its affiliates, which is independently owned and operated, is not dominant in the field of operation in which it is offering on Government contracts, and

can further qualify under the criteria set forth in regulations of the Small Business Administration (Code of Federal Regulations, Title 13, Section 121.3-8). In addition to meeting these criteria, a manufacturer or a regular dealer submitting offers in his own name must agree to furnish in the performance of the contract end items manufactured or produced by small business concerns; Provided, that this additional requirement does not apply in connection with construction or service contracts."

On August 15, 1973, the two bids received were opened. While the bid of Lederers Sound Service was low, its bid was rejected as nonresponsive because Lederers failed to sign either the original or the duplicate bid. An examination of the American Amplifier and Television Corporation (AAT) bid revealed that it had completed the Standard Form 33 Small Business representation in the following manner:

"The Offeror represents and certifies as part of his offer that: (Check or complete all applicable boxes or blocks.)

1. SMALL BUSINESS (See par. 14 on SF 33-A.)
He is, is not, a small business concern. If offeror is a small business concern and is not the manufacturer of the supplies offered, he also represents that all supplies to be furnished hereunder will, will not, be manufactured or produced by a small business concern in the United States, its possessions, or Puerto Rico."

As a result of this representation, AAT's bid was declared to be nonresponsive. Since the only two bids received were determined nonresponsive, the IFB was cancelled.

AAT contends that the rejection of its bid as nonresponsive is not in the best interests of the Government because it is a small business firm and all the major items proposed to be furnished by it are manufactured by small business firms.

However, AAT states that it is not possible to furnish a system of the type specified without using some parts manufactured by a large business firm. In this connection, AAT points out that the tape recorders it proposed to furnish are manufactured by a large business firm. Although they comprise less than 5 percent of the system, AAT contends that it could not therefore complete the small business representation other than as it did. Thus, AAT concludes that the Navy is in error when it states that AAT could properly have represented that all supplies furnished under the contract would be manufactured or produced by a small business. AAT states that the Navy's position is contrary to the language and clear meaning of the clause involved. Accordingly, AAT contends that its bid was improperly rejected and the solicitation improperly canceled.

The position of the Navy is that AAT's bid was nonresponsive because it failed to agree to provide supplies manufactured or produced by small business. However, the Navy points out that it believes AAT's nonresponsiveness was due to the misconception that a concern cannot be considered a small business if it supplies an end product containing any non-small business manufactured components. Relying on 49 Comp. Gen. 41 (1969), the Navy states that it would have been proper for AAT to check the box representing that the supplies will be manufactured or produced by a small business concern because AAT would make a significant contribution to the end item by assembling and installing the system. Although both bids received under this IFB were nonresponsive, the Navy is of the opinion that there is reasonable assurance of adequate competition between small businesses and, therefore, proposes to issue a new solicitation for this requirement totally restricted to small business.

Where a bid on a total small business set-aside fails to indicate the intention of the bidder to furnish products manufactured or produced by small business concerns, the bid is properly rejected as nonresponsive. See B-175337, January 3, 1973; B-170114, February 24, 1971; B-169888, December 14, 1970; B-165847, February 24, 1969. Therefore, AAT's bid was properly rejected since it indicated that the "supplies to be furnished . . . will not be manufactured or produced by a small business concern . . ." Furthermore, the Navy is correct in pointing out that the extent of large business subcontracting AAT proposes does not preclude it from affirmatively representing that the end item will be manufactured or produced by a small business concern. In

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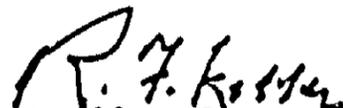
49 Comp. Gen. 41, supra, in reference to a similar requirement that a small business must agree to furnish contract end items manufactured or produced by a small business concern, we stated that "so long as the small business firm, which has subcontracted a major portion of the work to large business, makes some significant contribution to the manufacture or production of the contract end item, the contractual requirement that the 'end item' be manufactured or produced by small business concerns has been met." Since the large business subcontracting AAT proposes amounts to "less than 5%" of its bid, it is clear that the contribution of AAT, a small business firm, would be "significant."

Finally, AAT argues that this Office's concurrence in the Navy's interpretation of the above provision with respect to the meaning of "manufactured or produced" will enable AAT to use foreign-made products without regard to the Buy American Act (41 U.S.C. 10). The rationale for this position is stated to be that AAT would be considered the manufacturer or producer of all supplies included in the system and, therefore, the complete system would be a domestic source end product.

The requirement of the Small Business definition that end items to be furnished shall be manufactured or produced in the United States is separate and distinct from the Buy American Act requirements that preference be given to domestic source end products. Therefore, we do not subscribe to the view that the terms "manufactured or produced" as used in the small business definition must be regarded as "manufacturing" processes within the contemplation of the Buy American Act. See B-169279, June 1, 1970, and cases cited, concerning a discussion of the term "manufactured" as used in the Buy American Act. See also 52 Comp. Gen. 886, 903 (1973).

Accordingly, the protest is denied.

Deputy


Comptroller General
of the United States