

DECISION



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THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20540

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FILE: B-181163

DATE: June 25, 1974

MATTER OF: United Paint Manufacturing, Inc. D. 3727

- DIGEST:
1. Allegation that specifications are unduly restrictive because product required by specifications is manufactured by only two suppliers is not substantiated since stated features of specifications are found to meet the minimum needs of the Government and all firms competent in the field of application of product were free to bid.
 2. Large business concerns may supply product specified to small business contractor under small business set-aside since requirement that end item be manufactured or produced by small business concern is not applicable to construction contract envisioned by solicitation.
 3. Protester advised that it is assumed that contracting office will take allegations concerning low bidder's responsibility set forth in letter to GAO, copy of which protester sent to contracting office, into consideration prior to making award and that if contracting officer finds bidder responsible there would be no basis to disturb finding absent demonstration of fraud in determination.

3 Invitation for bids (IFB) N62474-74-B-1029, issued on March 21, 1974, by the Western Division, Naval Facilities Engineering Command, 800 called for bids for roof repairs to Building No. 511, Naval Communications Station, Stockton, California, in accordance with D. 3728 NAVFAC Specifications No. 12-74-1029. The specifications as issued called for the application of spray-in-place polyurethane foam with a silicone rubber roof coating. The physical properties of the silicone rubber coating were set forth in paragraph 6.2 of the

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specifications. The procurement is a total set-aside for small business. Paragraph 10(b) of Section 1A of the IFB contained the following definition of a small business:

"(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 contracts end items manufactured or produced by small business concerns: Provided, that this additional requirement does not apply in connection with construction or service contracts."

4 By letter of April 26, 1974, United Paint Manufacturing, Inc. (United Paint), protested on the grounds that the physical properties of the silicone rubber coating listed in the specifications described a proprietary product of Dow Corning corporation (Dow), *D. 3729* and since there are only two manufacturers of the silicone rubber coating, Dow and the General Electric Corporation (GE), the *C. 303* specifications are unduly restrictive. United Paint also argues that since both Dow and GE are large business concerns, the procurement is violative of the prohibition (set out in 10(b) of the IFB, quoted above) against large business firms supplying materials as vendors under procurements restricted to small business firms. United Paint further stated that one of its products "DIATHON," an acrylic elastomer rubber coating, was not only nonproprietary, but is equal or superior in performance to the silicone rubber coating called for by the specifications. In this connection, Amendment No. 002 was issued by the procuring activity to amend the specifications so as to avoid any implication that the product of only one silicone rubber coating manufacturer was acceptable. However, the amendment did not allow the use of United Paint's "DIATHON" which has an acrylic base.

Bids were opened on April 29, 1974, with the following five firms responding to the IFB:

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	<u>Total Bid</u>
D. K. Lane, dba Western Applicators	\$ 89,494.00
Robert Friddle Co.	97,275.50
Unicote Systems Corp.	98,503.00
Acme Roof & Paint	112,575.00
The Ellis Co.	131,542.00

Regarding the question of whether the specifications are unduly restrictive, Armed Services Procurement Regulation (ASPR) 1-1201(a) states that specifications shall state only the actual minimum needs of the Government and should not have any restrictive features which might limit acceptable offers to one supplier's products, or the products of a relatively few suppliers. However, we do not believe this would prevent the insertion into a specification of requirements for supplies which only two suppliers are able to produce, provided these requirements represent the minimum needs of the Government. It should also be observed that the restrictive specifications complained of affect only the suppliers and therefore all firms competent in the field of application of the product were free to bid, as was done here by five firms.

Our Office has consistently held that the administrative agencies have the primary responsibility for drafting specifications which reflect the minimum needs of the Government, and in the absence of evidence of a lack of a reasonable basis for the action taken we are not required to object to same. B-175942, August 24, 1972; B-174103(1), November 18, 1971.

United Paint alleges, however, that the Civil Engineering Laboratory (CEL) at Port Hueneme, California, has stated that DIATHON is highly acceptable for use by the Navy over sprayed urethane foam roofs. However, this same activity recommended that the procuring activity use the silicone rubber coating rather than DIATHON. We have been advised that CEL's recommendation was based on several factors including (1) ease of application, (2) weathering characteristics, and (3) known longer term performance properties. We have also been advised that these factors have

been established by short term laboratory and field data generated by CEL, information obtained through contacts with the roofing industry, and information from the United States Bureau of Reclamation Research Laboratory (USBR), Denver, Colorado. The USBR has investigated available coating systems for urethane foams over the last five to eight years. Regarding DIATHON, CEL admits that it is easy to apply, lower in cost than the silicones, and would appear to have the flexibility necessary for protecting urethane foam roofs. However, CEL states that DIATHON's longer term performance characteristics have not been established. Also, according to CEL, since DIATHON has a relatively high solid content, it must dry for a minimum time under proper humidity-temperature conditions before coming in contact with moisture such as dew or rain. If moisture contact occurs too soon after application, the coatings tend to resolubilize and wash from the roof.

In the present case sufficient evidence has not been submitted to overcome the validity of the procuring activity's determination that the silicone rubber coating was the only coating which would meet its needs.

Concerning the next contention that since Dow and GE are large business firms they should not be permitted to supply materials under a procurement which is restricted to small business firms, we note that the second tier restriction to small business firms set out in paragraph 10(b), quoted above, does not apply to construction or service contracts. In that connection, paragraph 12 of Section 1A of the solicitation states that the contract will be executed on Standard Form 23, which is the form for construction contracts. Therefore, the exception in paragraph 10(b) is applicable.

Accordingly, the protest is denied.

In a May 16 letter, United Paint raises some question as to whether Western Applicators would be a responsible contractor. The determination of a proposed contractor's responsibility is largely within the discretion of the contracting officer. The contracting activity must handle the day-to-day administration of the contract and bear the brunt of any difficulties experienced by reason of the contractor's lack of ability. Since we note that United Paint submitted a copy of the May 16 letter to the

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contracting officer, we assume that it will take the allegations contained therein into consideration prior to making any award. In that connection, we would point out that it is the position of our Office that if the contracting officer pursuant to applicable regulations finds that Western Applicators is a responsible bidder there would be no basis for disturbing the finding absent a demonstration of fraud in the determination.

F. A. [Signature]
Deputy Comptroller General
of the United States

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