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DECISION



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

FILE: B-208149

DATE: August 3, 1982

MATTER OF: Cascade Pacific International

DIGEST:

Where a small business firm bidding on items set aside for small business as well as on items not set aside represents in the bid that it is a regular dealer and that the supplies to be furnished will not be manufactured or produced by small business, the bid is nonresponsive with respect to the set-aside items.

Cascade Pacific International protests the rejection of its bid to furnish item 19 under General Services Administration solicitation FTP-CP-F0128-A-2-10-82. The solicitation invited bids on 39 items, some of which, including item 19, were set aside for small business. Cascade's low bid on item 19 was rejected because the firm represented in its bid that the supplies to be furnished would not be manufactured or produced by a small business concern.

We deny the protest summarily.

Standard Form 33 required that a bidder represent, inter alia, (1) whether it is a regular dealer or a manufacturer, (2) whether it is a small business concern, and (3) if it is a small business but not a manufacturer, whether "all supplies to be furnished hereunder will not be manufactured or produced by a small business concern * * *." Cascade represented that it was a regular dealer and a small business, but that all of the supplies will not come from small business. Cascade's bid on item 19 was rejected because of this last representation, since a bid by a nonmanufacturer on a small business set-aside item must reflect the bidder's intention to furnish a product manufactured by small business in order to be responsive.

Cascade points out that the representation in issue refers to "all supplies to be furnished," and asserts that it indicated that all supplies will not be manufactured or produced by small business because its oids on the solicited items that were not set aside are for products that will be furnished by large business. Cascade also notes that it listed its source for item 19 in the bid, and asserts that the contracting officer should have known that the source was a small business concern. Cascade suggests that the contracting officer at least should have contacted the bidder to clarify the matter. Cascade admits that in a 1981 GSA procurement which also was partially set aside, Cascade annotated the Standard Form 33 representation to indicate precisely which items bid on would be manufactured or produced by small business and which would not. The firm asserts that it did not do so here, however, because it was concerned that such an annotation might be considered an improper bid qualification.

A responsive bid is one that on its face is an offer to perform, without exception, the exact thing called for in the invitation. The Government's acceptance of the offer effectively binds the bidder to perform according to the invitation's requirements. See Edw. Kocharian & Company, Inc., 58 Comp. Gen. 214 (1979), 79-1 CPD 20.

A bid on a total small business set-aside must establish the bidder's intention to furnish only products manufactured or produced by small business for the bid to be responsive. See Culligan, Inc., 58 Comp. Gen. 307, 309 (1979), 79-1 CPD 149. Otherwise, the Government's acceptance of the bid simply would not legally obligate the firm to furnish small business products consistent with the set-aside. Rather, the contractor would be free to provide the suppliers from either small or large business manufacturers as its private business interest might dictate. See Jack Young Associates, Inc., B-195531, September 20, 1979, 79-2 CPD 207.

We appreciate Cascade's concern that the representation in issue refers to all items, yet this was only a partial set-aside. Nonetheless, the legal principle in partial set-asides is the same as that in total set-asides. Where particular items are set aside for small business concerns, a dealer's bid to supply them that expressly indicates that they will not be furnished by small business must be rejected as nonresponsive since acceptance of the bid would not legally obligate the contractor to furnish small business items.

Moreover, we suggest that Cascade should have realized that the representation's import was to the set-aside items, since the bidder's size status was irrelevant to eligibility for award of the unrestricted items. In this connection, we believe that Cascade's concern that an annotation like the one made in its 1981 bid would have "qualified" the bid improperly was not well-founded. An improper bid qualification is an express exception to a material term or condition of a solicitation, see Redeye Enterprises; Standard Equipment Company, B-204814, B-204814.2, March 25, 1982, 82-1 CPD 283, and we do not see how an annotation that the set aside items would be furnished from small business could be so considered. On the other hand, we think the agency can avoid a recurrence of this problem by the simple expedient of inserting language in the solicitation that makes the small business representation in this kind of solicitation applicable only to the set-aside item. We are recommending to GSA that its partial set-aside solicitations contain such a notice in the future.

Regarding the suggestion that the contracting officer should have known that the item 19 supplier identified in Cascade's bid was a small business, in view of Cascade's express representation, at best the bid would have been considered ambiguous and thus nonresponsive. See Prestex, Inc., 59 Comp. Gen. 140 (1979), 79-2 CPD 411.

Cascade's final point is that before rejecting the bid for item 19, the contracting officer should have contacted the firm for an explanation. A bid's responsiveness, however, must be determined from the bid itself. Franklin Instrument Co., Inc., B-204311, February 8, 1982, 82-1 CPD 105. Thus, a contracting officer may not contact a bidder after opening for a change in or explanation of an otherwise unacceptable bid in order to render it acceptable. Le Prix Distributors, Ltd., B-206552, July 6, 1982, 82-2 CPD ____.

The protest is summarily denied.

Milton J. Rosler
for Comptroller General
of the United States



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

B-208149

August 3, 1982

The Honorable Gerald P. Carmen
Administrator of General Services

Dear Mr. Carmen:

We refer to the bid protest filed in our Office by Cascade Pacific International against the rejection of its bid to furnish item 19 under General Services Administration solicitation FTP-CP-F0120-A-2-10-82. The solicitation invited bids on a number of items, some of which, including item 19, were set aside for small business. Cascade's low bid on item 19 was rejected because the firm represented on Standard Form 33 that the supplies to be furnished would not be manufactured or produced by a small business concern.

Enclosed is a copy of our decision of today summarily denying the protest on the basis that the Government's acceptance of Cascade's bid would not legally obligate Cascade to furnish a small business product.

As the decision indicates, however, the representation on Standard Form 33 that is in issue refers to whether "all" supplies to be furnished are from small business. Cascade's protest illustrates that a literal reading of the representation may well lead a bidder on a partial set-aside who is bidding on nonrestricted items as well as on items set aside to indicate that "all" the supplies will not come from small business, and thereby render the bid nonresponsive with respect to the restricted items.

We therefore recommend that future partial set-aside solicitations contain a provision indicating that the small business representation is applicable only to the set-aside items.

Sincerely yours,

for Milton J. Dow Car
Milton J. Dow Carr
Comptroller General
of the United States

Enclosure