

DECISION



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

23623

FILE: B-208742

DATE: November 19, 1982

MATTER OF: Keco Industries, Inc.

DIGEST:

1. Contract history of predecessor company qualifies successor company for waiver of first article testing.
2. Bidder is a small business for priority under labor surplus area set-aside where SBA certifies that bidder is a small business.

Keco Industries, Inc. (Keco), protests award to Engineered Air Systems, Inc. (EAS), of a contract under invitation for bids (IFB) No. 41608-82-B-0260 issued by the San Antonio Air Logistics Center, Kelly Air Force Base, for air conditioners.

Keco contends that the bids of EAS, Tiernay Manufacturing Company (Tiernay) and MGR Manufacturing Company (MGR), the first, second and third low bidders, respectively, are nonresponsive.

We deny the protest.

The IFB provided for first article approval and for an alternative bid. Bid "A" includes first article requirements while bid "B" is based on waiver of first article requirements. Further, the IFB provides that first article requirements may be waived for offerors

"(1) * * * who have previously furnished production quantities of the same article to the prime contractor for delivery to the Air Force; or (2) * * * currently in production of the same article on an Air Force contract who have received first article approval * * *; or (3) * * * who have previously furnished production quantities of the same article to the Air Force * * *"

if, in the opinion of the Air Force, the articles have performed satisfactorily in service. Also, the IFB provides

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that offerors are "requested to indicate, in the space provided below," which of the conditions, (1), (2) or (3), applies and the contract under which the article was furnished.

EAS submitted bid "B" only and cited condition (3) under contract No. F41608-82-C-0150, dated November 5, 1981, in support of waiver of the first article requirements. In further explanation, EAS stated in its bid that the contract cited was originally awarded to the Defense Systems Division of the American Air Filter Company, formerly a division of Allis Chalmers Corporation (Allis Chalmers). EAS purchased the assets and facilities of the Allis Chalmers' division and retains the personnel involved in supplying the solicited air conditioners and is currently producing the same air conditioners under the cited contract.

Keco alleges that EAS does not qualify for waiver of first article requirements on the contract cited because any performance under that contract is too recent to permit performance evaluation. Furthermore, Keco alleges that even if EAS can qualify on the basis of performance under the cited contract, qualification is lost because EAS has announced the intention to move the location of production. Keco also contends that the Air Force based the waiver on condition (2) and three contracts not referenced by the bidder and, in fact, awarded to companies other than EAS.

In response, the Air Force states that EAS is currently producing the solicited item under the contract cited by EAS, but that waiver was based on production quantities supplied by EAS to the Air Force on three other contracts: F41608-79-C-0055, February 23, 1979; F33657-72-C-0805, April 12, 1972; and DLA400-78-C-0947, December 30, 1977. The Air Force also states that the same grounds of protest were raised by Keco and denied by our Office in Keco Industries, Inc., B-207114, August 23, 1982, 82-2 CPD 165.

In the cited case, Keco questioned, inter alia, whether EAS could qualify for a waiver of first article requirements on the basis of performance by the predecessor of EAS. We held that the contract history of a predecessor company does qualify a successor company for waiver of first article testing when the facilities and assets of the two companies are similar or identical and, therefore, the Air Force did

not abuse its discretion in granting a waiver of first article requirements. That decision also involved a procurement of the same commodity that is the subject of the procurement now protested by Keco.

In rebuttal, Keco contends that the IFB "requires" the bidder to enter which of the three conditions the bidder meets and relies upon and to identify the contract under which that condition was met. EAS selected condition (3) and identified only the one contract. Keco maintains that the reliance by the Air Force on condition (2) and three contracts not referenced by the bidder and allegedly awarded to "companies other than" EAS, is, in effect, a change of the bid of EAS after bid opening. Keco also alleges that, employing the arithmetic of EAS, less than 50 percent of the production of the contract bid upon is to be performed at the original location where first article approval was secured by the predecessor of EAS. Finally, Keco attempts to distinguish our decision in Keco Industries, Inc., supra, on the grounds that our decision did not involve "a newly acquired, second manufacturing site." Keco argues that our holding that the contract history of a predecessor company qualifies the successor for first article waiver "when the facilities and assets of the two companies are similar or identical" is bad law since facilities and assets are but parts of a corporate whole and, in many respects, including first article integrity, not the most important parts and Keco asserts that the facilities and assets of EAS are not identical or even similar to those of Allis Chalmers.

We have consistently held that waiver of first article testing is a matter of administrative discretion which we will not question absent a clear showing that the decision was arbitrary or capricious. Keco Industries, Inc., supra; Astrocom Electronics, Incorporated, B-190384, February 13, 1978, 78-1 CPD 122. In Keco Industries, Inc., supra, we held, in effect, that the Air Force did not abuse its discretion by waiving first article requirements for EAS to manufacture and furnish the same commodity as here solicited on the basis of the contract experience of its predecessor. No basis appears for a different finding at this time.

Contrary to the contention of Keco, the IFB states that offerors "are requested" to furnish evidence in support of first article waiver rather than "required" to do so. We have also held, however, that an agency may base its decision to waive first article requirements on information

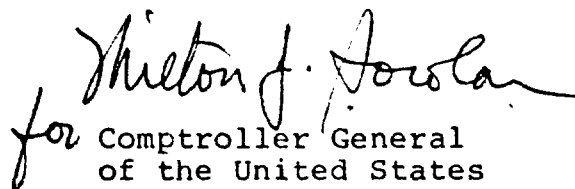
provided after bid opening, TM Systems, Inc., B-203156, December 14, 1981, 81-2 CPD 464, or on information otherwise in the possession of the agency, Line Fast Corporation, B-205483, April 26, 1982, 82-1 CPD 382.

Also, while Keco alleges that the facilities and assets are not "even similar" to those of Allis Chalmers, we found in our prior decision that "all rights, properties, and assets of the Defense Systems Division [of Allis Chalmers] that would have been employed to perform the contract were transferred" by purchase to EAS. Keco has not shown in what particulars the facilities and assets acquired by EAS are "not even similar" or in what respects the differences, if any, are more important to the issue of first article waiver.

Keco also contends that EAS does not qualify as a small business for priority under the labor surplus area set-aside in the IFB.

On October 14, 1982, Region VII of the Small Business Administration (SBA) concluded that EAS was other than a small business for the purpose of Government procurements. This conclusion apparently was based on the failure of EAS to certify by signature that the information provided was factual and accurate or to submit information that EAS was a separate corporate entity from Allis Chalmers. On application by EAS for recertification, the SBA found on October 26, 1982, that EAS is eligible as a small business concern when bidding on Government procurements with a size standard of 750 employees or less. The SBA has conclusive authority to determine the size status of a business concern. Check-Mate Industries, Inc., B-207705, June 11, 1982, 82-1 CPD 569. The size standard in the IFB is "not over 750 employees." Consequently, EAS is a small business for purposes of priority under the labor surplus area set-aside of the present IFB.

Since we deny the protest of Keco concerning EAS, which is the low bidder, it is not necessary for us to consider the academic question of whether Tiernay and MGR are eligible for award. Illinois Chemical Corporation, B-205119, February 9, 1982, 82-1 CPD 119.


for Comptroller General
of the United States