

DECISION

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

26558

FILE: B-210750.2

DATE: October 20, 1983

MATTER OF: Mechanical Mirror Works, Inc.

DIGEST:

Bid, submitted in response to total small business set-aside solicitation, which failed to indicate whether bidder would furnish materials manufactured or produced by small business concerns was properly rejected as nonresponsive; failure may not be waived or cured.

Mechanical Mirror Works, Inc. (Mechanical), protests the rejection of its low bid on item No. 7 under General Services Administration (GSA) invitation for bids No. YNP-F4-1365-A-2-28-83, a total small business set-aside.

We deny the protest.

Each bidder was required to certify in paragraph 1, "Small Business," of invitation form 33 ("Representations, Certifications and Acknowledgments") that it:

" . . . [] 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 paragraph 3, "Regular Dealer - Manufacturer," of the same form a bidder was required to indicate if "He is a [] regular dealer in [] manufacturer of, the supplies offered." In invitation provision 514 ("Production and Inspection Point(s)"), at page 13 of the invitation, a bidder was to:

" . . . insert, in the appropriate spaces provided below, the names of the manufacturers of the items offered and the address, telephone number, and DUNS number of the facility(ies) at which the items will be manufactured or produced."

Mechanical made none of these required insertions.

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The contracting agency rejected the Mechanical bid as nonresponsive under section 1-1.703-1(c)(3) (1964 ed. amend. 206) of the Federal Procurement Regulations, which states that a bidder shall not be considered for an award as a small business concern unless he has represented in good faith that he was a small business concern at the time of bid opening. The contracting agency states that at the time the Mechanical bid was submitted, and at the time of bid opening, there was no indication that Mechanical was a small business concern. The GSA Office of General Counsel also notes that the Mechanical bid was nonresponsive because a bidder must establish in its bid--and Mechanical did not--that it will furnish only products manufactured or produced by small business concerns.

It is the contention of Mechanical that its bid is responsive inasmuch as minor informalities or irregularities in a bid--as are allegedly involved in the Mechanical bid--may be corrected. Mechanical cites our decision in B-161641, October 31, 1967, that the failure of a bidder to state in its bid whether or not it is a small business may be waived when the contracting officer is able to make an independent determination that the bidder is in effect a small business. Mechanical states that on March 29, 1983, the Small Business Administration (SBA) certified Mechanical as a small business to GSA on a procurement of the same item being procured here. Thus, the contracting agency should have known of the small business status of Mechanical. Further, as regards the requirement that a bidder certify whether or not it is a small business, Mechanical notes that in our decision in Jimmy's Appliance, B-205611, June 7, 1982, 82-1 CPD 542, we stated that the mistaken certification by a bidder that it was a large rather than a small business did not render the bid nonresponsive and the question of the bidder's status could be referred to the SBA. Mechanical also notes, citing our decision in B-168881, March 31, 1970, that we have held that a bidder's failure to indicate in its bid its status as a manufacturer of the items being procured or the source of these items may be waived since the omissions are only minor deficiencies. In view of these cases, Mechanical believes that the contracting officer should have allowed Mechanical to supply the necessary information after bid opening.


We disagree. In none of the cases cited by Mechanical did we hold that the failure of a bidder to certify that the items to be supplied would be manufactured or produced by a small business concern could be waived or corrected as a

minor informality/irregularity. Our rule in such a case has been consistently that where a bid on a total small business set-aside fails to establish the intention of the bidder to furnish products manufactured or produced by small business concerns, the bid is nonresponsive and may not be considered for award. Culligan, Inc., 58 Comp. Gen. 307 (1979), 79-1 CPD 149; Dayton Chemical Corporation, B-200122, May 13, 1981, 81-1 CPD 373; Parco, A Division of Blue Mountain Products, Inc., B-211016, March 28, 1983, 83-1 CPD 318.

Jimmy's Appliance, *supra*, involved a service contract, not a supply contract as here, and there was no requirement that bidders obligate themselves to supply items manufactured by a small business. A bidder must bind itself in its bid to meet this obligation or the bid will be rendered nonresponsive. Mechanical did not state in its bid that it was the manufacturer of the items or that the items would be manufactured by a small business. Moreover, while GSA may have known Mechanical was a small business from the prior certification, GSA had no way of knowing where Mechanical intended to obtain the supplies, absent the listing of the manufacturer.

While we have permitted the acceptance of a bid where the bidder had neglected to include this certification in its bid, there was information in the bid as submitted which made it possible to ascertain the bidder's intention to supply products manufactured or produced by small business concerns. B-156852, June 9, 1965. However, information outside of the bid itself may not be provided by the bidder after bid opening so as to cure the failure to make this certification in the bid. To permit a bidder to make its nonresponsive bid responsive after bid opening would be tantamount to permitting it to submit a new bid, and this may not be permitted. Jack Young Associates, Inc., B-195531, September 20, 1979, 79-2 CPD 207.

The protest is denied.


Acting Comptroller General
of the United States