

DECISION

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

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FILE: B-211938

DATE: January 11, 1984

MATTER OF: American KAL Enterprises, Inc.

DIGEST:

1. A protest that the agency lacked authority to amend an invitation for bids to restrict a procurement to bids offering domestic products is untimely where the protest was not filed until after bid opening. GAO's Bid Protest Procedures require that protests based on solicitation improprieties apparent prior to bid opening must be filed prior to bid opening to be timely.
2. Under the significant issues exception to our timeliness rules, GAO will consider an otherwise untimely raised issue only if the issue is both significant to procurement practice or procedure because of its widespread interest to the procurement community and is one that we have not previously considered.
3. A contention that a contract should not be awarded to a bidder because it is unable to comply with a domestic products requirement is a challenge to the bidder's responsibility rather than to the responsiveness of its bid.
4. It is the responsibility of a small business concern found nonresponsible to file for a certificate of competency (COC) with the Small Business Administration (SBA). GAO will not review the responsibility determination where the firm fails to file for a COC.
5. Contracting officials may not request a bidder to extend its bid where they determine that the bid is unacceptable because the bidder is nonresponsible.

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6. Defects in the required notice to unsuccessful bidders are generally considered minor procedural deviations on the part of the agency of the type that do not affect the legality of the agency action absent a showing of prejudice.
7. The legality of a contract award is not affected even if a contracting officer erroneously decided to make the award during the pendency of a protest.

American KAL Enterprises, Inc., protests the General Services Administration's rejection of its bid for a requirements contract for the supply of slip joint pliers under item No. 6 of invitation for bids No. YEN-EI-A3109-A-2-10-83. GSA determined that American KAL was nonresponsive because it was unable to supply domestically produced or manufactured pliers as required by statute and the IFB. We dismiss the protest in part and deny the remainder.

Section 723 of the Act of December 21, 1982, Pub. L. 97-377, 96 Stat. 1830, 1854, which includes the Department of Defense's (DOD) continuing appropriation for fiscal year 1983, mandated that none of the appropriations contained in the act, with certain limited exceptions, could be available for the procurement of "hand or measuring tools, not grown, reprocessed, reused, or produced in the United States or its possessions. . . ." GSA, subsequent to enactment of that Act, amended the previously issued IFB to delete references to the Buy American Act, 41 U.S.C. § 10a-10d (1976), and instead to provide that award would be made only to bidders offering tools manufactured or produced wholly in the United States or its possessions. The amendment defined a foreign product as one either manufactured outside the United States or its possessions or which contained any component, regardless of cost, not manufactured or produced in the United States or its possessions. Components were defined as "articles, materials and supplies which are directly incorporated" into the tools. The IFB provided that, "Any bidder offering a foreign product . . . will be considered nonresponsive and therefore rejected."

American KAL submitted the apparent low bid on item No. 6 and certified in its bid that the product it proposed to furnish was manufactured, mined, or grown in the United States. However, a preaward survey revealed that American KAL intended to manufacture the pliers from unfinished forgings imported from Japan and finished in the United States. Accordingly, GSA determined that American KAL's bid was nonresponsive and informed American KAL that the period for acceptance of its bid would be allowed to expire for this reason. American KAL thereupon filed this protest with our Office.

Upon reconsideration, GSA subsequently determined that the issue was not one of responsiveness, since it was not apparent on the face of the bid that American KAL was not offering a domestic product, but rather a question of American KAL's eligibility to participate in a domestic set-aside, i.e., its responsibility. American KAL was given an opportunity to secure a domestic source for the unfinished forgings. When, however, American KAL admitted that it was unable to secure a commitment from a domestic supplier, GSA in effect found American KAL nonresponsive because of an inability to supply the domestic product required by the specifications and, since American KAL was a small business, referred the issue to the Small Business Administration (SBA).

What happened when SBA subsequently contacted American KAL in regard to this matter is subject to dispute. GSA claims in the administrative report submitted to our Office on this protest that SBA notified it that SBA was closing its file on the case because American KAL was not pursuing the matter. American KAL admits to receiving a letter from SBA indicating that SBA was closing its file because American KAL had expressed an unwillingness to apply for a COC. However, American KAL claims that SBA informed it that "SBA could not issue a determination because it was not up to SBA to resolve the question as to what the IFB required." Further, GSA informally advised our Office during the development of this protest that SBA had refused to act in this matter because SBA did not view the issue as

a question of responsibility. In any case, American KAL did not apply for a COC and SBA closed its file on the case. GSA then made award on item No. 6 to another bidder.

American KAL maintains that GSA has no authority to restrict GSA procurements of hand tools on the basis of Public Law 97-377 since the limitations of that act allegedly apply only to procurements by DOD. In response, GSA alleges that American KAL's protest is untimely.

Our Bid Protest Procedures, 4 C.F.R. § 21.2(b)(1) (1983), require that protests based on solicitation improprieties apparent prior to bid opening must be filed prior to bid opening to be timely. See Gas Turbine Corporation, B-210411, May 25, 1983, 83-1 CPD 566. GSA informed bidders in the amendment that the restrictions therein on foreign products were added pursuant to Public Law 97-377, explaining that DOD was the predominant user of the items being procured and that it was infeasible for GSA to maintain dual supply systems for civilian and military agencies. Since GSA's reliance upon Public Law 97-377 as a justification for restricting the procurement was apparent on the face of the IFB but American KAL's protest was not received until after bid opening, the protest is untimely to the extent that it challenges GSA's authority to restrict the procurement based upon Public Law 97-377.

American KAL argues that if we find its protest against GSA's authority to restrict the procurement untimely, then we should nevertheless consider the issue pursuant to section 21.2 (c) of our Bid Protest Procedures, which permits consideration of untimely protests raising significant procurement issues. However, before we will invoke the significant issues exception, the protest must present an issue that is not only significant to procurement practice or procedure because of its widespread interest to the procurement community, but also is one which we have not previously considered. See Ensign Aircraft Company, B-207898.3, April 1, 1983, 83-1 CPD 340. We have previously indicated that where a bid offered to supply goods manufactured in China under a GSA solicitation for a requirements contract for hand or measuring tools of which DOD would be the predominant user, then the bidder's protest against GSA's finding of nonresponsibility would be

academic because Public Law 97-377 would prohibit DOD from placing orders against any requirements contract awarded to the protester. See Lutz-Superdyne, B-210394, June 17, 1983, 83-1 CPD 662. But see Idealspaten, GmbH, B-205323, April 27, 1982, 82-1 CPD 389. Accordingly, we will not consider this issue here under the significant issue exception.

Apart from raising the issue of GSA's authority to apply the restrictions imposed by Public Law 97-377, American KAL also challenges GSA's actual determination that American KAL was nonresponsible pursuant to Public Law 97-377 on the grounds that the question was one of responsiveness rather than responsibility and that, in any case, American KAL was indeed offering a domestic product since the unfinished Japanese forgings were only raw materials which would be transformed into domestic goods by finishing in the United States.

However, a concern that a bidder is unable to comply with a domestic products requirement with which it certified it would comply involves the bidder's responsibility rather than whether the bid is responsive, *i.e.*, contains an unequivocal offer to provide conforming goods. See Mutual Industries Inc., B-210968, June 10, 1983, 83-1 CPD 643; Gulf and Western Manufacturing Co., B-195804, September 6, 1979, 79-2 CPD 181; Nicolet Technology Corp., B-192895, September 28, 1978, 78-2 CPD 244. SBA has statutory authority to make final disposition as to all elements of the responsibility of small business concerns. 15 U.S.C. § 637 (b)(7) (1982). Since American KAL was a small business concern and GSA in effect found it nonresponsible, GSA was therefore required to refer the question of American KAL's nonresponsibility to SBA.

When such a referral is made, it is the responsibility of the small business firm determined to be nonresponsible to file a complete and acceptable application for a COC with SBA in order to avail itself of the possible protection provided by statute and regulation against unreasonable determinations by contracting officers as to its responsibility. 13 C.F.R. § 125.5. Where the bidder fails to file a timely application for a COC with the SBA, our Office will not question the contracting officer's

negative responsibility determination. See Parmatic Filter Corporation, B-210138, February 24, 1983, 83-1 CPD 187; Syndex Recovery Systems, Inc., B-210455, February 14, 1983, 83-1 CPD 155. In any case, even if American KAL's failure to file for a COC, and therefore SBA's failure to issue a COC, resulted from SBA's finding that GSA had rejected American KAL's bid for reason of nonresponsiveness rather than nonresponsibility, thus rendering review by SBA inappropriate, we believe that American KAL's contention that it was offering a domestic product lacks merit. As indicated above, the amended IFB defined a foreign product as one containing any component, i.e., any materials directly incorporated into the tools, regardless of cost, not manufactured in the United States or its possessions. American KAL admits that it is unable to offer pliers made from domestic forgings. Since the forgings are a component of the finished pliers, American KAL is unable to offer a domestic product.

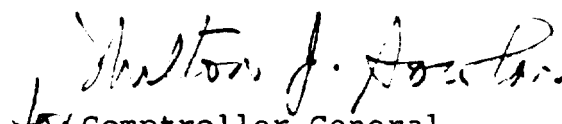
American KAL also protests "GSA's failure, without proper notice, to request an extension of American KAL's bid" However, given our findings above, we must accept that GSA correctly determined that American KAL's bid was unacceptable due to American KAL's inability to offer a domestic product. Accordingly, GSA contracting officials were prohibited by 41 C.F.R. § 5-2.407-53(a)(2) (1983) from requesting American KAL to extend its bid. Further, we are unaware of any requirement that a bidder be given notice before an agency decides not to request extension of a bid.

American KAL alleges that GSA failed to properly notify it initially that its bid was considered nonresponsive and later that American KAL was considered nonresponsive. However, the record explicitly or implicitly indicates that American KAL was informed that its bid was considered nonresponsive because American KAL intended to utilize Japanese forgings, that American KAL subsequently was notified of GSA's concern about its eligibility for the procurement when it was given the opportunity to find a domestic supplier of unfinished forgings, and that American KAL was told of GSA's referral of the issue of its eligibility to SBA. In short, American KAL appears to have been explicitly informed that its bid was considered nonresponsive and apparently later should have known that GSA in effect considered American KAL nonresponsive. In any case,

defects in the required notification to unsuccessful bidders, Federal Procurement Regulations (RFP) § 1-2.408 (amend. 68, January 1970), are generally considered minor procedural deviations on the part of the agency of the type that do not affect the legality of the agency actions absent a showing, not made here, of prejudice. See Northpoint Investors, B-209816, May 17, 1983, 83-1 CPD 523.

American KAL contends that GSA improperly awarded a contract for item No. 6 during the pendency of this protest. However, the contracting officer and her superiors determined that the slip joint pliers were mission essential items for which a prompt award was required in order to ensure GSA's continued ability to fill customer orders from inventory. FPR § 1-2.407-8(b) (amend. 68, January 1970). In any case, the legality of a contract award is not affected even if a contracting officer erroneously decided to make the award during the pendency of a protest. See Accent General, Inc., B-209263, June 7, 1983, 83-1 CPD 616.

The protest is dismissed in part and denied in part.


for Comptroller General
of the United States