

# DECISION



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

**FILE:** B-213298

**DATE:** April 2, 1984

**MATTER OF:** AMCO Corporation

## DIGEST:

1. Bidder who certified in its bid that it was a dealer may qualify either as a manufacturer or dealer prior to award since the bidder made a binding offer to furnish products manufactured by a small business which the bidder can do either as a manufacturer or regular dealer.
2. GAO's role in a protest concerning manufacturer or regular dealer status is limited to considering whether contracting officer complied with procedural requirements.
3. Where protest was filed prior to award, contracting officer should have complied with requirements of DAR § 12-604(b)(2) (1976 ed.), which requires contracting officer to notify protester of intent to make award and to hold award in abeyance pending appeal of bidder's status as manufacturer or dealer to Department of Labor (DOL), or DAR § 21-604(c), which provides for forwarding case to DOL after award.

AMCO Corporation (AMCO) protests the award of a contract to Peerless Hotel Supplies (Peerless) under solicitation No. DABT31-83-B-0063, issued by the Procurement Division, DIO, Fort Leonard Wood, Missouri. The solicitation, a 100-percent small business set-aside, was for wire shelving, casters and posts.

The protest is denied in part and sustained in part.

Bids were opened on July 11, 1983. Peerless, the low bidder, represented that it was a small business concern and a regular dealer. Also, Peerless represented that the supplies that it would furnish would be manufactured or produced by a small business concern.

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AMCO, by letter of July 19, 1983, protested to the procuring activity on the basis that the two lowest bidders were ineligible for award because the product they were furnishing was being manufactured by William Hodge, a Division of Falcon Products, a large business concern.

Although the size protest was untimely since it was not filed with the contracting officer within 5 working days after bid opening, the contracting officer forwarded AMCO's protest to the Small Business Administration (SBA) pursuant to section 1-703(b)(1)b of the Defense Acquisition Regulation (DAR) (1976 ed.). By letter of August 26, 1983, the Kansas City SBA Regional Office advised the contracting officer that Falcon was not a small business.

Peerless was advised of SBA's ruling and was given an opportunity to locate a small business manufacturer or producer who would furnish the items called for under the solicitation at the same price. However, instead of locating a small business manufacturer or producer, Peerless decided to qualify as a manufacturer under the Walsh-Healey Act, 41 U.S.C. §§ 35-45 (1976), in lieu of being a regular dealer. This meant that under SBA's guidelines, Peerless had to perform a significant portion, between 20 percent and 30 percent, of the manufacturing. Peerless persuaded the contracting officer that it could perform between 20 percent and 30 percent of the contract work and would be in compliance with Code of Federal Regulations section 50-206.51, volume 41 (1982), which sets out criteria to be complied with in order to be considered a manufacturer under the Walsh-Healey Act. Award was made to Peerless on September 22, 1983. The contract has been performed and the contractor has been paid.

AMCO contends that Peerless is not a manufacturer under the Walsh-Healey Act since it is not performing 30 percent of the contract work. AMCO also argues that the bid price submitted by Peerless was based on Peerless being a dealer furnishing a product supplied by a firm that turned out to be a large business. AMCO argues that Peerless cannot circumvent the SBA requirement (that the product being furnished be manufactured by a small business) by claiming that it is a manufacturer when its bid was submitted as a dealer.

Regarding AMCO's contention that Peerless cannot perform the contract as a manufacturer since in its bid it certified itself as a regular dealer, information as to whether a bidder is a manufacturer or dealer may be

submitted any time prior to award. See Deterline Corporation, B-208896, April 21, 1983, 83-1 CPD 427. Also, see Leasco Information Products, Inc.; Computer Microfilm International Corp.; Educational Facilities Center; Xerox Corporation; Bell & Howell, B-180460, June 10, 1974, 74-1 CPD 314. All representations by Peerless took place prior to award and a bidder may qualify as either a regular dealer or manufacturer prior to award, regardless of what it certified to in its bid.

Concerning AMCO's contention that Peerless is not a manufacturer under the Walsh-Healey Act, we do not consider the legal status (manufacturer or regular dealer) of firms under the act, since this is delegated by law to the contracting officer subject to review by the Secretary of Labor. Our role in protests concerning the status of a bidder as a manufacturer or regular dealer under the Walsh-Healey Act is limited to considering whether the contracting officer has complied with procedural requirements. Kendall G. Peterson, B-208757.2, June 8, 1983, 83-1 CPD 624. In the present case, the record indicates that AMCO was not notified of the award until after award had been made. We believe, as does the Judge Advocate General representative who reviewed the procurement actions taken in this case, that the contracting officer should have, pursuant to DAR § 12-604(b)(2) (Defense Acquisition Circular No. 76-22, February 22, 1980), notified AMCO of its intention to award the contract to Peerless on the basis that it was a manufacturer/assembler rather than a dealer. This would have given AMCO an opportunity to protest Peerless' status and the award would have been held in abeyance until the protester had an opportunity to appeal to the Department of Labor (DOL), if it so desired. For that matter, even after award, the contracting officer could have, and should have, handled the matter pursuant to DAR § 12-604(c) and forwarded the case to DOL. However, since the contract has been performed, we are unable to recommend any corrective action. We are requesting the Department of the Army to take necessary measures to insure compliance with the above regulations in future procurements.

Accordingly, the protest is denied in part and sustained in part.

*Hilton J. Fowler*  
for Comptroller General  
of the United States