

**DECISION**



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

31184

**FILE:** B-218709

**DATE:** May 14, 1985

**MATTER OF:** Rosco Manufacturing Company

**DIGEST:**

Bid under total small business set-aside which represents that not all supplies to be furnished will be manufactured or produced by a small business is nonresponsive. A bid on a small business set-aside must establish the legal obligation of the bidder to furnish supplies manufactured or produced by a small business.

Rosco Manufacturing Company protests the rejection of its bid as nonresponsive under solicitation No. DLA700-85-B-4570, a total small business set-aside for bituminous material distributors issued by the Defense Construction Supply Center.

We dismiss the protest pursuant to our Bid Protest Regulations which provide that when on its face a protest does not state a valid basis of protest, it will be dismissed without requiring the submission of an agency report. 4 C.F.R. § 21.3(f) (1985).

Rosco represented in clause K03 of its bid that it was a small business concern, but it also represented that not all supplies to be furnished would be manufactured or produced by a small business. Rosco further represented in clause K11 that it was not a manufacturer of the supplies offered, but indicated in clause K30 that it intended to perform 100 percent of the work at its facility in Madison, South Dakota.

A bid on a small business set-aside must establish the legal obligation of the bidder to furnish supplies manufactured or produced by a small business concern. Automatics Limited, B-214997, Nov. 15, 1984, 84-2 CPD ¶ 535. Rosco

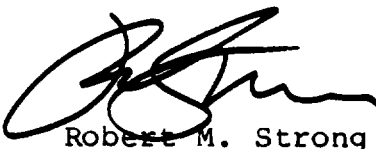
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indicated in its bid that the items to be supplied were not all produced or manufactured by a small business. The bid also contained contradictory representations as to whether Rosco manufactured the items. This constituted a failure on Rosco's part to express its intention to supply items produced or manufactured by a small business in its bid and to thereby submit a binding promise to meet the small business set-aside requirement. Its bid was thus nonresponsive. Surgical Instrument Company of America, B-215623, Nov. 23, 1984, 84-2 CPD ¶ 547. Further, this matter could not be waived after opening as a minor informality since the representations regarding the source of the items to be furnished concerned the responsiveness of Rosco's bid. Responsiveness must be established at time of opening and cannot be affected by a later offer to cure. Parker & Elmer, B-214040, Aug. 8, 1984, 84-2 CPD ¶ 158.

Further, Rosco argues that the agency should have known that it was the manufacturer of the items it proposed to furnish since it had contracted with the agency many times previously. Whatever Rosco's performance under previous contract has been, the fact remains that its failure to certify that it would supply items manufactured or produced by a small business under this contract leaves it free to supply an item from a source other than a small business if it chooses to do so. Automatics Limited, supra.

  
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