DECISION

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

FILE: B-221510 **DATE:** May 2, 1986

MATTER OF: Randolph Engineering, Inc.

DIGEST:

1. Protest of agency's determination of low bidder's qualifications to perform contract, in part based on a cover letter submitted with bid asserting the existence of a licensing agreement with another company, which agreement became effective after bid opening, concerns a matter of responsibility which the General Accounting Office does not generally review.

2. Allegation that low bid is nonresponsive because the small business bidder has a limited licensing agreement with a large business and, therefore, will not furnish products manufactured by a small business, is without merit since solicitation is not restricted to small businesses.

3. Place of Performance certification in bid for non-labor-surplus area set aside (LSA) portion of a partial LSA set-aside procurement is a matter of responsibility, not responsiveness, and failure to complete certification as required for LSA set-aside does not require rejection of bid.

4. Allegation that low bidder does not qualify as a regular dealer under the Walsh-Healey Act is not for consideration by General Accounting Office since by law that is a matter for determination by the contracting agency subject to final review by the SBA, where bidder is a small business, and the Department of Labor.

Randolph Engineering, Inc. (Randolph), protests the award of a contract to the Bonneau Company (Bonneau), under invitation for bids (IFB) No. DLA100-85-B-1321 issued by the Defense Logistics Agency for 85,511 each sunglasses, HGU 4/P, with case. Randolph essentially contends that Bonneau is nonresponsible and that its bid is nonresponsive and should, therefore, be rejected. The protest is dismissed in part and denied in part.

The solicitation was issued as a partial labor surplus area (LSA) set-aside. One-half of the requirement was open to competition on an unrestricted basis and the other half was restricted to LSA concerns. Since an award has not yet been made on the unrestricted portion of the procurement, negotiations have not begun on the LSA set-aside portion. See Department of Defense Federal Acquisition Regulation Supplement (DFARS), 48 C.F.R. § 220.7003(b)(3)(1) (1985).

Randolph contends first that Bonneau is nonresponsible because Bonneau allegedly declared as a "basis for" its bid a licensing agreement with American Optical.1/ Randolph takes the position that the agreement between Bonneau and American Optical should be disregarded in considering Bonneau's qualifications to perform the contract since the agreement did not become effective until after the date of bid opening. Randolph also maintains that because Bonneau is utilizing American Optical--a large business--Bonneau is ineligible for award since it "does not meet the [solicitation] requirements . . . that ALL supplies to be furnished will be manufactured or produced by a SMALL BUSINESS CONCERN. . . ." (Emphasis in original). The protester further speculates that production may occur at the American Optical facility in Tijuana, Mexico, which also would violate Bonneau's representation that the supplies would be manufactured by a small business in the United States, its possessions, or Puerto Rico.

As the agency points out, Randolph's contention concerning the determination of Bonneau's qualifications based on its agreement with American Optical pertains to bidder responsibility, a matter which our Office generally does not consider. We will not review an affirmative determination of responsibility where, as here, there has been no allegation or showing of possible fraud or bad faith on the part of the procuring officials and no allegation

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1/ Although it was not required to do so, Bonneau submitted its bid under cover of a letter advising that the American Optical Corporation had licensed the manufacture of "the FG58 military sunglasses" to Bonneau effective January 1, 1986. Bonneau advised in its cover letter that the license agreement "provides for technical support and testing of all our products to ensure they meet and exceed military specifications."

that definite responsibility criteria in the solicitation have not been applied. Pan Am Aero, B-220486, Oct. 4, 1985, 85-2 C.P.D. ¶ 382.

Although the solicitation contains a small business concern representation clause, the solicitation is not restricted to small businesses. Therefore, Bonneau's small business size status and the small business place of production restrictions are not valid bases for protest in this case.

Randolph also argues that in clause K39, Place of Performance-Sealed Bidding (DFARS, 48 C.F.R. § 52.214-14), Bonneau indicates in its bid that it intends to use one or more plants or facilities other than that at its Dallas, Texas address referenced in the bid, but because the locations of the other facilities it intends to use are not specified, the bid should be rejected as nonresponsive for failure to provide this "mandatory information." Randolph bases this argument on clause K89, Place of Performance, in the solicitation which states:

> "1. The offeror must stipulate in the Place of Performance Clause included in this solicitation (52.214-14. . .) information pertinent to the place of performance. Failure to furnish this information with the bid may result in rejection of the offer/bid."

Since the solicitation is a partial LSA set-aside, it incorporates the applicable Place of Performance clauses, proper certifications of which are required to determine a bidder's eligibility for award under the LSA set-aside portion of the procurement, as well as to determine the order of priority for the conduct of negotiations for award. (See DFARS, 48 C.F.R. § 20.7003(b)). Although the set-aside portion of the solicitation is restricted to firms eligible to receive that portion, the non-set-aside portion is not restricted to bidders who are eligible for LSA evaluation preference. As for the non-set-aside portion of the solicitation, Bonneau is not required to comply with the LSA set-aside Place of Performance restrictions. See Kings Point Manufacturing Co., Inc., B-205712, Apr. 5, 1982, 82-1 C.P.D. ¶ 310; see also Kings Point Manufacturing Co., Inc., et al., B-210389.4, Dec. 14, 1983, 83-2 C.P.D. ¶ 683 at 7.

Thus, the Place of Performance certification is not, in this instance, a matter of responsiveness, but a matter of responsibility and, therefore, Bonneau's failure to certify in compliance with LSA set-aside requirements does not render its bid unacceptable. See Industrial Design Laboratories, Inc., B-216639, Nov. 13, 1984, 84-2 C.P.D. ¶ 523.

The protester expresses the view that Bonneau conditioned its bid on award of both the LSA set-aside and the non-set-aside portions of the procurement. Therefore, the protester argues, unless Bonneau's bid demonstrates that it is eligible for award of the set-aside portion, it is ineligible for award of the non-set-aside portion. The protester's argument is based on the following provision in the IFB:

"OFFERER'S MINIMUM/MAXIMUM QUANTITY LIMITATIONS

Offerer shall indicate limitations in the spaces provided below:

☐ 100% of all items or none.

☐ 100% of all items to be awarded or none.

☐ Not less than _____ units overall

☐ Not more than _____ units overall

☐ Other (including limitations applicable to separate items)."

In its bid, Bonneau checked the second box, i.e., "100% of all items to be awarded or none."

We do not agree that by checking the second box Bonneau conditioned its bid upon award of both the non-set-aside and set-aside portions of the procurement. It simply indicated with respect to any minimum/maximum quantity limitation that it would accept the total quantity which the agency proposed to actually award it and not some other predetermined minimum or maximum number. The protest is denied on this basis.

Randolph also speculates that the Bonneau bid may be "nonresponsive" "under the terms of the IFB as well as the 'Walsh-Healey Act'." It appears that in this allegation the

protester is suggesting that because Bonneau's bid seems to indicate that Bonneau's only function in performing the contract will be to ship the sunglasses from its Dallas facility, it cannot comply with the solicitation's inspection requirements.

We note, however, that sections (a) and (c) of clause E25 of Bonneau's bid show that inspection is to take place at Bonneau's Dallas, Texas plant. It thus appears that the protester's allegation concerning Bonneau's ability to comply with the inspection requirements of the solicitation is without merit. Camtec (Cambridge Technologies, Inc.), B-215381, Aug. 13, 1984, 84-2 C.P.D. ¶ 168. This aspect of the protest is denied.

Concerning Randolph's suggestion that Bonneau is only a shipper or wholesaler for purposes of this solicitation and, therefore, does not qualify as a regular dealer under the Walsh-Healey Act, 41 U.S.C. ¶ 35 (1982), our Office does not consider issues as to whether a bidder qualifies for an award under the Walsh-Healey Act. Such matters are by law for determination by the contracting agency, subject to final review by the Small Business Administration if the bidder is a small business, and by the Department of Labor. Churchill Corp., B-217377, Jan. 24, 1985, 85-1 C.P.D. ¶ 96. In this regard, we note that according to the agency's preaward survey report, Bonneau does qualify as a regular dealer under the Walsh-Healey Act. The protest is dismissed on this basis.

Finally, Randolph argues that if any of the products or first articles furnished under this solicitation "are deemed by the Contracting Officer and/or DCAS Survey Team to be of foreign origin," Bonneau's bid would require the application of a 50 percent price evaluation differential, in which instance it would no longer be the low bidder. The protester's contention here is speculative, based on an assumption that Bonneau will furnish goods of foreign origin, and there is nothing in Bonneau's bid to give credence to the protester's speculation. Whether the bidder complies with its obligation to furnish domestic end products is a matter of contract administration and is not for consideration by our Office. Bender Shipbuilding & Repair Co., Inc., B-219629.2, Oct. 25, 1985, 85-2 C.P.D. ¶ 462 at 2. The protest is dismissed on this basis.

for Seymour Efros
Harry R. Van Cleve
General Counsel