



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Century Marine, Corp.

File: B-233574

Date: March 3, 1989

DIGEST

Bidder's failure to certify that only end items that are manufactured or produced by small business concerns will be furnished does not affect the responsiveness of the bid where such small business certification is not required for the type of contract to be awarded.

DECISION

Century Marine Corp. protests the rejection of its bid as nonresponsive and the award of a contract to Houston Ship Repair under invitation for bids (IFB) No. DTMA-93-88-B-80705, a total small business set-aside, issued by the Maritime Administration for the towing and repair of the vessel, "Pioneer Crusader." The agency rejected Century's bid because the firm failed to certify in its bid that all end items to be furnished under the contract would be manufactured or produced by small business concerns.

We sustain the protest.

The agency received three bids on August 29, 1988, the bid opening date. The contracting officer determined that Century's low bid was nonresponsive because Century had not entered into a Master Agreement with the Maritime Administration before bid opening, and it did not otherwise provide representations and certifications in its bid, including a certification that all end items would be manufactured by small business concerns.

The Master Agreement is used by the agency to standardize vessel repair contracts and contains generally applicable standard form clauses and contractor representations and

044757/138071

certifications, including small business certifications. The Master Agreement is entered into by a potential bidder and the agency independent of any procurement and is incorporated by reference into solicitations as issued by the agency. While Century submitted a Master Agreement for the agency's approval on July 15, 1988, it was found to be incomplete, and Century apparently did not submit a properly completed Master Agreement until October 1988, approximately 6 weeks after bid opening. Upon submission of the completed Master Agreement, Century represented that it was a small business concern but that not all end items would be manufactured by small business concerns.^{1/} Award was made to Houston Ship Repair, the second low bidder, at a price of \$1,335,493, which was approximately \$96,000 more than Century's low bid. This protest followed.

In a recent decision, Century Marine Corp., B-232630, Dec. 16, 1988, 88-2 CPD ¶ 598, involving this same protester and agency, and the same solicitation terms, we stated that a bidder's failure to sign the Master Agreement before bid opening does not require rejection of the bid. Specifically, we stated that by signing its bid, the protester agreed to be bound by all the terms of the Master Agreement except the representations and certifications. We noted that Section J of that IFB, as here, stated that "[a]ll terms, conditions, articles, and referenced documents and clauses of the Maritime Administration Master Lump Sum Repair Agreement . . . shall be considered as part of this contract." Further, we also noted that Section H, as here, provided that non-holders of a Master Agreement may bid if they agree "in writing" that "all terms and conditions of the Agreement apply to its bid." We therefore found that Century's signature on the bid constituted its written agreement to abide by the terms and conditions of the solicitation which specifically included all of the terms and conditions of the Master Agreement. We find that Century is equally bound here.

However, Century, both here and in the prior case, did not submit representations and certifications required of non-holders. They generally consist of standard certifications which commonly appear in solicitations, such as those

^{1/} Century states that it honestly could not certify that all "end items" would be manufactured by small business concerns because ship repair involves "thousands of parts and pieces of equipment," such as steel, that are manufactured by large business.

relating to previous contracts and compliance reports, independent price determination, contingent fees, affirmative action and type of business organization. Concerning these matters, we stated in our prior decision that such certifications and representations that have no bearing on whether the bid constitutes an unequivocal offer to provide the product or service does not affect the bid's responsiveness. See R&R Roofing and Sheet Metal, Inc., B-220424, Nov. 21, 1985, 85-2 CPD ¶ 587. We also noted in our prior decision, as relevant here, that the only material certification, whether the bidder will supply end items manufactured or produced by small business concerns, was immaterial since that procurement was not a small business set-aside. Accordingly, we concluded in our prior decision that Century's bid was improperly rejected.

Here, the agency argues that this solicitation was a small business set-aside and that Century's failure to certify that it will furnish end items from small business concerns renders the bid nonresponsive. We disagree.

The Master Agreement, referenced in the IFB, incorporates Federal Acquisition Regulation (FAR) clause 52.219-1 (FAC 84-28), the small business concern representation. The clause in part requires that the contractor provide only end items that are manufactured or produced by small business concerns inside the United States, its territories and possessions. However, the Master Agreement also incorporates another applicable small business clause (Notice to Total Small Business Set-Aside--FAR clause 52.219-6), which specifically states that the end item requirement does not apply in connection with construction or service contracts. Here, our review of the solicitation clearly shows that the procurement is for towing and ship repair services and does not contemplate a supply contract. Accordingly, since the certification is not required for service contracts, Century's failure to certify does not affect the responsiveness of the firm's bid. See BCI Contractors, Inc., B-232453, Nov. 7, 1988, 88-2 CPD ¶ 451. We therefore sustain the protest.

Since significant performance under the awarded contract has again occurred, as in the prior case, we do not recommend that the award be disturbed. However, in view of our conclusion that Century's bid was responsive and improperly rejected, we think that Century is entitled to bid preparation costs and to the costs of filing and pursuing the

protest, including reasonable attorneys' fees. Bid Protest Regulations, 4 C.F.R. § 21.6(d) (1988). Century should submit its claim for such costs directly to the agency.

The protest is sustained.

for Milton J. Towser
Comptroller General
of the United States