



Comptroller General
of the United States
Washington, D.C. 20548

123817

Decision

Matter of: Certified Slings, Inc.
File: B-243085
Date: May 6, 1991

John Lloyd Rice, Esq., Miller & Chevalier, for the protester, Philip F. Eckert, Jr., Esq., Defense Logistics Agency, for the agency. Behn Miller and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Bidder's failure, under a partial small business set-aside, to certify that all end items to be furnished will be manufactured or produced by a small business located in the United States does not require rejection of its bid as nonresponsive where bidder is already obligated by Federal Acquisition Regulation provision incorporated in the solicitation to furnish only small business end items in its performance of the contract.

DECISION

Certified Slings, Inc. protests the award of the small business set-aside portion of invitation for bids (IFB) No. DLA400-91-B-1036, issued by the Defense Logistics Agency (DLA) for cargo aircraft tie-downs for use in C140 aircraft. Certified Slings contends that because the awardee--Kinedyne Corporation--failed to complete the small business end item certification clause in the solicitation, its bid is nonresponsive.

We deny the protest.

The IFB was issued on December 14, 1990, as a 50 percent small business set-aside; under the terms of the IFB, 99,215 tie-downs were designated for award to a small business concern. The IFB was issued to 125 small businesses; 3 small business bidders submitted bids by the January 15, 1991, bid opening date. At bid opening, Kinedyne Corporation was determined to be the low bidder; the protester was the second low bidder. On February 26, Certified Slings filed the instant protest with our Office; award has been postponed pending the outcome of the protest.

Under the set-aside portion of the IFB, all small business bidders were required to complete the following size and end item certification:

"(A) Representation. The offeror represents and certifies as part of its offer that it () is, () is not a small business concern and that () all, () not all end items to be furnished will be manufactured or produced by a small business concern in the United States, its territories or possessions, Puerto Rico, or the Trust Territory of the Pacific Islands."

Although Kinedyne certified its small business size, it failed to complete the end item certification; Certified Slings protests that this incomplete portion of the small business certification clause renders Kinedyne's bid nonresponsive.

A responsive bid is one that, if accepted by the government as submitted, will obligate the contractor to perform the exact thing called for in the solicitation; the certification concerning a bidder's obligation to furnish products manufactured or produced by a small business concern is a matter of bid responsiveness because it involves a performance commitment by the bidder. Propper Mfg. Co., Inc.; Columbia Diagnostics, Inc., B-233321; B-233321.2, Jan. 23, 1989, 89-1 CPD ¶ 58. As a general matter, where a bid on a small business set-aside fails to establish the bidder's legal obligation to furnish end items manufactured or produced by a small business concern, the bid is nonresponsive and must be rejected; otherwise, a small business contractor would be free to provide the end items from either small or large businesses as its own business interests might dictate, thus defeating the purpose of the small business set-aside program.^{1/} Propper Mfg. Co., Inc.; Columbia Diagnostics, Inc., B-233321; B-233321.2, supra.

However, a bidder's failure to complete this end item certification does not require rejection of its bid as nonresponsive where, despite its failure to complete the certification, the bidder would still be obligated to furnish

^{1/} The end item requirement reflects the view that the socio-economic aims of the small business set-aside program are served only if the supplies are manufactured by small business concerns and reflects the Small Business Administration's requirement that a small business set-aside contractor furnish the product of a small business concern. See 13 C.F.R. § 121.206(b) (1990); Morgan Lumber Sales, B-234997, Apr. 28, 1989, 89-1 CPD ¶ 410.

only small business end items. Concorde Battery Corp., 68 Comp. Gen. 523 (1989), 89-2 CPD ¶ 17. In this regard, an incomplete solicitation certification only renders a bid nonresponsive if the certification provision imposes requirements materially different from those to which the contractor is otherwise bound, either by its offer or by law. See Tennier Indus., Inc., B-239025, July 11, 1990, 90-2 CPD ¶ 25.

In this case, the IFB incorporated by reference Federal Acquisition Regulation (FAR) § 52.219-7, NOTICE OF PARTIAL SMALL BUSINESS SET-ASIDE, subsection c(3) of which provides:

"A manufacturer or regular dealer submitting an offer in its own name agrees to furnish, in performing the contract, only end items manufactured or produced by small business concerns inside the United States, its territories and possessions, the Commonwealth of Puerto Rico, the Trust Territory of the Pacific Islands, or the District of Columbia. However, this requirement does not apply in connection with construction or service contracts."

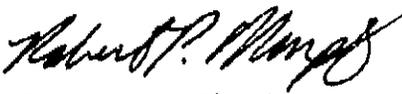
This provision appears on page 13 of the solicitation, one of 24 IFB pages which bidders were required to complete and submit as part of their bid package. Kinedyne's bid contained all 24 of the IFB pages; accordingly, even though it neglected to complete the end item certification clause, Kinedyne's bidding documents did in fact incorporate the firm's agreement to furnish only small business end items in its performance of the contract. Concorde Battery Corp., 68 Comp. Gen. 523, supra.

In its comments, relying on our decision in Aerial Machine & Tool Corp., B-234052, Jan. 13, 1989, 89-1 CPD ¶ 41, Certified Slings contends that an alternate solicitation provision may not be relied upon to correct or waive an incomplete end item certification. We disagree.

In Aerial, we held that a solicitation's Place of Performance clause--indicating the site of product manufacturing--cannot be used to establish a bidder's obligation to the end item requirement because the performance clause is informational only, expressing the bidder's present intent, and is used in connection with a determination of bidder responsibility. See also Delta Concepts, Inc., 67 Comp. Gen. 522 (1988), 88-2 CPD ¶ 43. Here, however, the clause at FAR § 52.219-7 and the end item certification clause involve the same commitment from the bidder--to furnish only end items manufactured by a small

business. Under these circumstances, where the incomplete end item clause imposes no legal obligation in addition to that imposed by the FAR § 52.219-7 clause, a bidder's failure to complete its end item certification may be waived. See also Phillips Cartner & Co., Inc., 69 Comp. Gen. 105 (1989), 89-2 CPD ¶ 492.

Only where a bidder provides information with its bid that reduces, limits, or modifies a material IFB requirement may the bid be rejected as nonresponsive. Gateway Press, Inc., B-240826, Dec. 21, 1990, 90-2 CPD ¶ 513. Since Kinedyne submitted a bid which did not take exception to any of the solicitation's terms, including those contained in FAR § 52.219-7, Kinedyne is obligated on the face of its bid to provide aircraft tie-downs manufactured or produced by small businesses located in the United States. Concorde Battery Corp., 68 Comp. Gen. 523, supra. Accordingly, we find that Kinedyne's incomplete end item certification clause does not render its bid nonresponsive.


for James F. Hinchman
General Counsel