



Comptroller General
of the United States

Washington, D.C. 20548

146308

Decision

Matter of: Kaysam Worldwide, Inc.

File: B-247743

Date: June 8, 1992

Diane Kraut for the protester,
Charles J. McManus, Esq., Douglas P. Larsen, Jr., Esq., and
Russell Spindler, Esq., Department of the Navy, for the
agency.
Daniel I. Gordon, Esq., and Paul I. Lieberman, Esq., Office
of the General Counsel, GAO, participated in the preparation
of the decision.

DIGEST

Protest that agency improperly issued small business-small purchase set-aside order to source offering foreign-made product is sustained because such set-asides are limited by regulation to sources supplying domestically-produced products.

DECISION

Kaysam Worldwide, Inc. protests the issuance of a purchase order to Scientific Sales, Inc. for latex balloons under request for quotations (RFQ) No. N60530-92-Q-A072, a small business-small purchase set-aside issued by the Department of the Navy.¹ Kaysam contends that the agency could not properly purchase Scientific's balloons in this procurement because, as Scientific certified in its quotation, those balloons are not domestically manufactured.

We sustain the protest.

¹The agency argued that the protest should be dismissed as untimely because, according to the agency, Kaysam learned the information which formed the basis for the protest more than 10 days prior to the filing of the protest. See 4 C.F.R. § 21.2(a)(2) (1992). Kaysam disputes the agency's position in this regard, and neither party has produced conclusive evidence supporting its position. Because it is our practice to resolve doubts over the timeliness of a protest in the protester's favor, we decline to dismiss the protest as untimely. See Honeywell, Inc., B-244555, Oct. 29, 1991, 91-2 CPD ¶ 390.

Because the value of the procurement was expected to be less than \$25,000, the agency used the small purchase procedures set forth in part 13 of the Federal Acquisition Regulation (FAR), and issued the RFQ as a small business-small purchase set-aside. The RFQ was sent to three potential sources, including Kaysam and Scientific. Kaysam, which asserts that it is the sole United States manufacturer of the kind of balloons being procured, submitted a quotation of \$20,810. Scientific submitted a quotation of \$8,575 and certified that the balloons it would supply are not manufactured in the United States.² A purchase order was issued to Scientific on the basis of its low price.

The RFQ contains "Note 29," which states: "Unless specifically authorized, furnishing articles of foreign origin is not within the terms and conditions of this order, and shall be cause for rejection." The RFQ does not contain any other language which proscribes offering foreign products.

Kaysam contends that Scientific is ineligible for award because it offered to supply balloons which are foreign made. In its report, the agency asserts that Note 29 was included in the RFQ through inadvertence. According to the agency, Note 29, which by its terms refers to orders, is not intended for inclusion in an RFQ. The agency also states that it is aware of no law or regulation which would permit it to restrict procurement of latex balloons to domestic sources of supply.

The regulations require, however, that only domestic products be furnished under all small business set-aside contracts awarded to a non-manufacturer. See FAR § 19.102(f)(1). Furthermore, 13 C.F.R. § 121.906(d) (1991) and FAR § 19.501(f)(2) specifically require that small nonmanufacturers responding to a small business-small purchase set-aside furnish only domestically produced products. Consequently, a contracting activity may not properly purchase a foreign-made product from a domestic small business supplier under such a procurement vehicle.³ Intertractor Am. Corp., B-218358, July 8, 1985, 85-2 CPD ¶ 30.

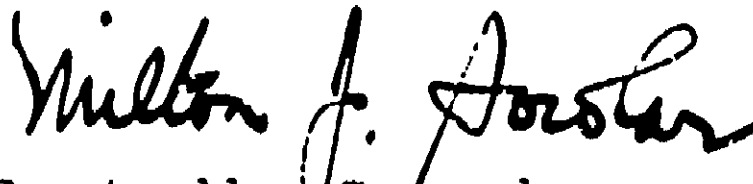
²A third company quoted a price of approximately \$8,780, also for foreign balloons.

³If the only acceptable quote from a responsible vendor under a small business-small purchase set-aside is unreasonable as to price, the set-aside may be canceled and the procurement completed on an unrestricted basis. FAR § 13.105(d).

We note that a small business-small purchase set-aside solicitation should contain FAR § 52.219-4, which states that only products manufactured or produced in the United States will be considered. The RFQ here used an obsolete version of that provision which did not contain specific language about product origin. Nonetheless, despite the absence of the foreign product prohibition language of FAR § 52.219-4 in the RFQ, the agency could not properly issue an order for a foreign product under the solicitation. Moreover, while the agency asserts that Note 29 was included inadvertently, in our view its inclusion should have put recipients of the RFQ on notice that only offerors providing domestically produced products could be considered for award. Since the agency acted in violation of the applicable regulation when it contracted to purchase balloons from Scientific which that company's quotation indicated were foreign made, we sustain the protest. See Bullock Int'l, Inc.--Recon., B-237369.2, Apr. 10, 1990, 90-1 CPD ¶ 377.

Because performance has already been completed, we are unable to recommend corrective action. We find that Kaysam is entitled to the reasonable costs of preparation of its quotation as well as the reasonable costs of filing and pursuing the protest, including attorneys' fees. 4 C.F.R. § 21.6(d). Kaysam should submit its claim for such costs directly to the agency.

The protest is sustained.

for 
Comptroller General
of the United States