



Comptroller General  
of the United States

Washington, D.C. 20548

322229

## Decision

**Matter of:** Adrian Supply Co.  
**File:** B-257261  
**Date:** September 15, 1994

Bob Stormberg for the protester.  
Karen S. Davis, Esq., and George L. Thompson, Esq., Federal Aviation Administration, for the agency.  
David R. Kohler, Esq., and Susan L. Sundberg, Esq., Small Business Administration, for the agency.  
Adam Vodraska, Esq., and Guy R. Pietrovito, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

### DIGEST

The elimination of the requirement in a total small business set-aside that the small business offer only end items manufactured by small business concerns, based upon a waiver by the Small Business Administration, was improper where the procuring agency conducted an incomplete investigation that failed to correctly identify a manufacturer as a small business.

### DECISION

Adrian Supply Co. protests the terms of invitation for bids (IFB) No. DTFAll-94-B-01013, issued as a total small business set-aside, by the Federal Aviation Administration (FAA), Department of Transportation, for an automatic closed transition transfer switch and automatic closed transition transfer bypass/isolation switches to be installed in new radar sites in the states of Colorado and Washington. The protester complains that the requirement that small business concerns offer the products of small business concerns was improperly deleted from the IFB.

We sustain the protest.

The IFB, as issued on February 14, 1994, incorporated by reference Federal Acquisition Regulation (FAR) § 52.219-6, "Notice of Total Small Business Set-Aside," which requires a small business manufacturer or regular dealer submitting an offer in its own name to furnish only end items manufactured or produced by domestic small business concerns. In this regard, the FAR provides that a contracting officer should

only set a procurement aside for exclusive small business participation where there is a reasonable expectation that "offers will be obtained from at least two responsible small business concerns offering the products of different small business concerns," FAR § 19.502-2(a). As applied to regular dealers, such as Adrian, the requirement that small business concerns offer only products of other small business concerns is known as the "nonmanufacturer rule." See FAR §§ 19.001, 19.102(f)(5)(iii). The IFB also contained a portion of the standard "Small Business Concern Representation," which requires a bidder to represent and certify whether it is a small business concern and will provide an end item manufactured by a small business concern. See FAR §§ 19.304(a), 52.219-1(a). However, the end item certification portion of the "Small Business Concern Representation" clause was not included in the IFB.

Adrian protested to the agency that the IFB improperly did not require bidders to certify their intent to furnish only end items manufactured by small business concerns; Adrian argued that without the required representation and certification a bidder could furnish supplies from a large business manufacturer and thus defeat the purpose of the set-aside. The contracting officer responded that the omission of the end item certification was "a clerical error" and on March 11 amended the solicitation to include the end item certification.

After amending the IFB to provide for the certification of small business end items, FAA informally contacted the Small Business Administration's (SBA) Denver regional office to ascertain whether that office was aware of any small business manufacturers of the switches. SBA's regional office informed FAA that it could not locate any small business manufacturers for the switches in its search of the Procurement Automated Source System (PASS).<sup>1</sup> Based upon this informal inquiry to the SBA regional office and FAA's own search in the Thomas Register<sup>2</sup> for manufacturers of the

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<sup>1</sup>PASS is a SBA data base with descriptions of firms permitting the user to conduct market searches for firms possessing desired characteristics.

<sup>2</sup>The Thomas Register is a multivolume set that identifies suppliers of products and services, provides company profiles, and for some companies provides product catalogs. The information provided for listed companies includes an "estimate of the [company's] approximate minimum total tangible assets." The Thomas Register does not specifically identify whether listed companies are small or large business concerns.

switches, the contracting officer decided that there were no small business manufacturers for the switches.<sup>3</sup>

On March 18, the agency again amended the IFB and replaced the standard "Notice of Total Small Business Set-Aside" clause with the clause set forth at FAR § 52.219-6, Alternate I. This clause allows a regular dealer submitting an offer in its own name to furnish any end items manufactured or produced domestically, not just those manufactured by a small business concern. A procuring agency is authorized to use the clause set forth at FAR § 52.219-6, Alternate I: (1) when the acquisition is for a product in a class for which the SBA has determined that there are no small business manufacturers in the federal market, or (2) where, for a specific acquisition, the contracting officer determines that there are no known domestic small business manufacturers that can reasonably be expected to offer a product meeting the requirements of the solicitation, and the SBA in response to the contracting officer's request waives the requirement. See FAR §§ 19.102(f)(5), 19.502-2(b), 19.508(c).

Adrian filed a second agency-level protest, challenging the elimination of the small business end item certification requirement. Adrian stated that there were small business manufacturers that make the solicited switches and argued that the clause set forth at FAR § 52.219-6, Alternate I, could only be used where the SBA granted a waiver.<sup>4</sup>

In response to Adrian's second agency-level protest, FAA suspended bid opening until the protest could be resolved and requested that SBA waive the small business manufacturer requirement on an individual basis for this solicitation because "we have been unable to locate any small business manufacturers of this particular item."<sup>5</sup> The waiver request recounted the results of the agency's earlier Thomas Register and PASS searches and of the agency's prior

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<sup>3</sup>FAA identified Zenith Controls, Inc. as a manufacturer of the switches, but erroneously assumed that the firm was not a small business concern and made no further investigation of Zenith Controls's size status.

<sup>4</sup>Adrian did not identify the manufacturers it claimed to be small business concerns in its agency-level protest, nor did FAA request this information.

<sup>5</sup>The contracting officer reports that he did not realize until the agency-level protest was filed that FAR § 19.102(f)(5)(iv) required that requests to waive the nonmanufacturer rule be sent to SBA headquarters.

acquisitions of the switches.<sup>6</sup> FAA did not ask Adrian to identify the small business concerns that Adrian asserted manufactured the switch or inform Adrian that FAA was requesting a waiver of the nonmanufacturer rule from SBA.

SBA has issued proposed regulations to govern the processing of agency requests for individual waivers of the nonmanufacturer rule.<sup>7</sup> See 58 Fed. Reg. 48,981 et seq. (Sept. 21, 1993). In pertinent part, these rules, which are to be codified at 13 C.F.R. § 121.2204, provide:

"(c) The SBA will examine the contracting officer's determination and any other information it deems necessary to make an informed decision on the waiver request. Potential sources of information may include, but are not limited to, SBA's Procurement Automated Source System (PASS), the Thomas Register and information from industry associations and organizations and procuring activities and agencies. If SBA's research verifies that no small business manufacturers or processors exist for the item, an individual, one-time waiver will be granted.

"(e) If a small business manufacturer or processor is found for the product in question, the waiver request will be denied.

"(h) The determination to grant or deny a waiver by the Associate Administrator for Procurement Assistance is the final administrative ruling by SBA."

58 Fed. Reg. 48,981-48,983.

SBA states that, pending issuance of its final regulations governing requests for waiver of the nonmanufacturer rule for a specific acquisition, it is following its proposed regulation.

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<sup>6</sup>The FAA's earlier acquisitions of the switches were all unrestricted procurements.

<sup>7</sup>The SBA has published final procedural regulations for processing nonmanufacturer rule waivers for classes of products at 13 C.F.R. § 121.2101 et seq.

In accordance with its proposed regulations, the SBA reviewed FAA's search for small business manufacturers of the switches and concluded that FAA's search was reasonably complete. SBA did not further investigate or search for small business manufacturers of the switches and granted FAA's request for a waiver based only upon FAA's investigation. SBA has informed us that it would not have granted a waiver from the nonmanufacturer rule had it been informed that there was any small business manufacturer for the switches and that it would withdraw a waiver if it were advised that the waiver had been based upon erroneous information. We have no basis on this record to conclude that SBA acted inappropriately.

Based on the waiver granted by the SBA, the contracting officer denied Adrian's agency-level protest, whereupon Adrian filed this pre-bid opening protest with this Office, arguing that the contracting officer had unreasonably determined that no small business manufacturers existed for the solicited switches. Adrian identified Zenith Controls as the small business manufacturer whose switches Adrian intended to offer. FAA now concedes that Zenith Controls is a small business manufacturer of the switches.

At bid opening FAA received 10 bids. The apparent low and second-low responsive bids of \$50,228 and \$50,886 offered end items manufactured by large businesses. Adrian's third-low responsive bid of \$51,374 offered switches manufactured by Zenith Controls. Two other bidders also offered switches manufactured by Zenith Controls. Award of a contract has not been made pending our determination in this matter.

As noted above, the FAR requires a contracting officer to determine that there are "no known domestic small business manufacturers or processors [that] can reasonably be expected to offer a product meeting the requirements of the solicitation" before seeking a waiver of the nonmanufacturer rule. [Emphasis added.] See FAR § 19.102(f)(5)(iii). Here, we find that the contracting officer improperly determined, based upon an inadequate investigation, that there was no expectation of receiving a bid offering an end item manufactured by a small business concern.

Specifically, FAA searched the Thomas Register and had the SBA Denver regional office conduct a search of the PASS for small business manufacturers for the switches. Regarding the SBA's PASS search, the record shows that SBA's computerized search was conducted using incorrect search terms, which the protester asserts without rebuttal that FAA provided; that is, SBA searched for small business manufacturers of the switches under the terms "isolation and switch" and "automatic and isolation and switch." The protester states that when the correct search terms

"automatic and transfer and switch" and "transfer and switch" were used by SBA's Dallas regional office in that office's PASS search, 22 firms, including Zenith Controls, were identified. FAA does not dispute this.

The Thomas Register lists more than 50 firms under the category "SWITCHES; TRANSFER," the category which the agency apparently searched. Of this number, the agency, in its waiver request, identified six firms that it contacted as small businesses, all of which either indicated that they could not make the switches or did not respond to FAA's inquiry. The agency also listed seven firms as large manufacturers, although it is not clear from the record how many of these were actually contacted (Zenith Controls is listed here erroneously by FAA as a large manufacturer). Dozens of firms were listed under "SWITCHES; TRANSFER," as having assets of more or less than \$1 million or as being not rated. FAA offers no explanation, except as to Zenith Controls, as to why no effort was made to determine whether any of these firms were small business manufacturers for the required switches.

The record shows that FAA failed to identify Zenith Controls as a small business manufacturer for the switch because the agency erroneously assumed that Zenith Controls was the large business manufacturer of electronic equipment of similar name.<sup>8</sup> A review of the Thomas Register would have clarified for the agency that Zenith Controls has no relationship with the large business, given that the two companies have different addresses and the large business has estimated tangible assets in excess of \$250 million while the value of Zenith Controls's tangible assets was listed as not rated.<sup>9</sup> We conclude that FAA's incomplete Thomas Register search was an inadequate basis for its determination that there were no small business manufacturers for the switches, as the agency represented to the SBA.

The protest is sustained.

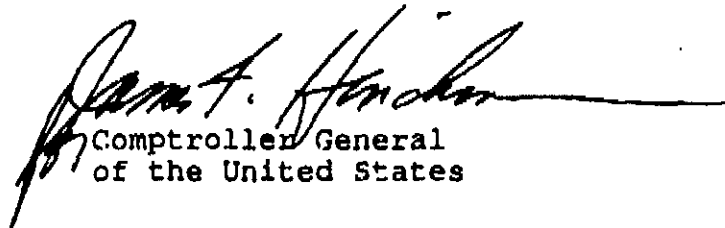
We recommend that the FAA request that the SBA reconsider its waiver of the nonmanufacturer rule for this procurement. If the SBA declines to waive the nonmanufacturer rule and

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<sup>8</sup>The large business electronics manufacturer is Zenith Electronics Corp.

<sup>9</sup>We note that the Thomas Register lists more than 20 companies with the name "Zenith." Affiliates are indicated in the Thomas Register, and Zenith Controls is not identified by the Thomas Register as being affiliated with Zenith Electronics.

the agency is authorized to proceed with a small business set-aside under FAR § 19.502-2(a) (i.e., if there is more than one small business manufacturer of the end product), then the agency should amend the IFB to again include the nonmanufacturer rule and resolicit bids on that basis. We find that Adrian is entitled to its costs of filing and pursuing the protest, including reasonable attorneys' fees. 4 C.F.R. § 21.6(d)(1) (1994). Adrian shall file its certified claim for its costs with the procuring agency within 60 working days of receipt of the decision. 4 C.F.R. § 21.6(f)(1).

  
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