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R. Klemm
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DECISION

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

03945

FILE: B-189550

DATE: October 20, 1977

MATTER OF: Aluminum Alloys Corporation

DIGEST:

Bid under formally advertised small business set-aside which included representation that contract end item would not be manufactured or produced by small business concern was properly rejected as nonresponsive. Therefore, award of such bidder would constitute withdrawal of small business set-aside. Where small business set-aside is withdrawn, proper procedure is to resolicit so that all eligible bidders, including large businesses, have opportunity to compete.

On May 17, 1977, the Department of the Navy (Navy) issued invitation for bids (IFB) N00383-77-B-0389 for the procurement of metallic tubes. The procurement was a 100-percent small business set-aside. Bids were opened on June 17, 1977, with the following results for 210 metallic tubes:

<u>Bidder</u>	<u>Unit Price</u>	<u>Total Price</u>
Aluminum Alloys Corporation	\$124.00	\$26,040
L&S Machine Co., Inc.	145.95	30,649
F&H Manufacturing Co.	187.50	39,375
Wess-Dell Machine & Engineering Co.	212.50	44,625

Aluminum Alloys Corporation (AAC), the low bidder and protester, indicated in its bid that the metallic tubing would not be manufactured or produced by a small business concern. Consequently, the Navy determined that AAC's bid was nonresponsive.

On June 24, 1977, the contract was awarded to L&S Machine Co., Inc. (L&S), the second low bidder. L&S represented in its bid that the specified metallic tubing would be produced by a small business concern and that it was a small business manufacturer of the supplies offered.

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AAC protests the rejection of its bid and contends that no bidder could accurately state that it would manufacture the metallic tubing, because only two aluminum mills in the country, both of which are large businesses, manufacture the tubes. AAC contends further that the only processing that any of the bidders would be capable of doing would be to package the tubes as required by the solicitation. Hence, AAC states that as low bidder it should have been awarded the contract.

An investigation by the contracting officer revealed that AAC's allegations concerning the manufacturing and packaging of the tubing were essentially correct. The contracting officer was also aware of our decision in 49 Comp. Gen. 41 (1969) where we held in part that:

"The statutes (10 U.S.C. 2301 and 15 id. 644) declare that in certain conditions awards of the prime contracts should be made to small business, but are silent with respect to subcontracts. Therefore, our Office may do no more than insist that the contracting agency conduct its small business procurement in a manner which is not inconsistent with existing law, regulation and proper contract provisions. See, also, B-148155, May 17, 1962. * * * it is significant to note that the term 'end item' as used in paragraph 1-706.5 of the Armed Services Procurement Regulation, from which the contract 'Notice of Total Small Business Set-Aside' clause was taken, is not defined. Consequently, it has been the position of our Office that, so long as the small business firm, which has subcontracted a major portion of the work to large business, makes some significant contribution to the manufacture or production of the contract end item, the contractual requirement that the 'end item' be manufactured or produced by small business concerns has been met. See 39 Comp. Gen. 435 (1959); B-148155, supra; B-154207, November 20, 1964."

Under the circumstances, the contracting officer concluded that L&S was not the manufacturer of the tubing; it was doubtful whether L&S would make a significant contribution to the production of

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the end item; and, consequently, it was questionable whether L&S could perform the contract in accordance with the small business set-aside provisions.

After discussing the matter with L&S, the contracting officer offered and L&S accepted a no-cost cancellation of the contract. The contracting officer states that it was in the best interests of everyone concerned to cancel the contract and resolicit on an unrestricted basis, i.e., issue a solicitation which does not contain a small business set-aside requirement.

AAC protests the contracting officer's decision to resolicit for metallic tubing. More specifically, AAC states that the contracting officer should have awarded it the contract after the contract with L&S was canceled.

With regard to the determination that AAC's bid was non-responsive, we have consistently held that where, as here, a bid on a total small business set-aside procurement fails to indicate the intention of the bidder to furnish products manufactured or produced by small business concerns, the bid is properly rejected as nonresponsive. American Amplifier and Television Corporation, 53 Comp. Gen. 463, 465 (1974), 74-1 CPD 10.

In connection with AAC's contention that as low bidder it should have been awarded the contract, the Navy states that AAC, in effect, requests that the small business set-aside provision be ignored because no bidder was eligible for award. The Navy calls attention to Lawrence W. Rosine Co., 55 Comp. Gen. 1351 (1976), 76-2 CPD 159, where Rosine, the only bidder, was awarded a contract conditioned upon its being determined to be a small business by the Small Business Administration (SBA). SBA subsequently determined that Rosine was a large business. The Navy asked whether the award could be reinstated since Rosine was the only bidder. We advised the Navy that the award to Rosine could not be reinstated since the solicitation required that award be made to a small business concern, and an award to Rosine would be tantamount to a withdrawal of the small business set-aside. We went on to state that where a small business set-aside is withdrawn, the proper procedure is to resolicit so that all eligible bidders may have an opportunity to compete.

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Since AAC indicated in its bid that the metallic tubes would not be manufactured or produced by a small business concern, the award of the contract to AAC would constitute a withdrawal of the small business set-aside and, as we held in Lawrence W. Rosine Co., supra, the procuring activity should resolicit after withdrawing a small business set-aside so that all eligible bidders, including large businesses, have a chance to compete.

Based on the foregoing, we conclude that the Navy could not have properly awarded the contract to AAC. Accordingly, AAC's protest is denied.

Milton J. Arosler
for Comptroller General
of the United States