

DOCUMENT RESUME

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[Bidder's Status as Manufacturer or Regular Dealer and Capacity to Perform Contract]. B-189018. June 8, 1977. 3 pp.

Decision re: Acme Plastics, Inc.; by Paul G. Dembling, General Counsel.

Issue Area: Federal Procurement of Goods and Services (1900).

Contact: Office of the General Counsel: Procurement Law I.

Budget Function: General Government: General Property and Records Management (804); General Government: Other General Government (806).

Organization Concerned: E + M Ecology Sign Co.; General Services Administration.

Authority: Walsh-Healey Act (41 U.S.C. 35-45). 54 Comp. Gen. 66. B-186296 (1976). B-185422 (1976). B-182070 (1974). B-186573 (1976).

Acme Plastics' question of whether E + M Ecology Sign Co. (E + M) is a manufacturer or regular dealer under the Walsh-Healey Act was for determination by the contracting agency, not by GAO. The allegation concerning E + M's capacity to perform the prospective contract was, likewise, not GAO's review responsibility in this case. (QM)

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J. Carter
Proct



DECISION

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

FILE: B-189018

DATE: June 8, 1977

MATTER OF: Acme Plastics, Inc.

DIGEST:

1. Question of whether a bidder is manufacturer or regular dealer under Walsh-Healey Act is for determination by contracting agency, subject to review by Secretary of Labor, and will not be considered by GAO.
2. Allegation concerning bidder's capacity to perform prospective contract involves question of responsibility and not responsiveness. GAO no longer reviews affirmative determinations of responsibility absent allegations of fraud by procuring officials or where solicitation contains definitive criteria for responsibility, neither of which applies here.

Acme Plastics, Inc. (Acme), protests the proposed award of a contract to purchase certain items from E + M Ecology Sign Co. (E+M) under solicitation 7PR-W-51601/3Z/7AV issued by the General Services Administration, Business Center, 7AV, Fort Worth, Texas.

Acme contends that award to E + M would be improper because information submitted by E + M in response to the solicitation " * * * is false and fraudulent and therefore is nonresponsive to the intent of the procurement regulation for the purpose of establishing bidder responsiveness and responsibility." Acme cites the following specific instances of erroneous information:

- "1. The apparent low bidder (E + M Ecology Sign Co.) is not a manufacturer of signs but two Medical Doctors engaged in a business venture with no past sign experience or capability in the manufacture of the supplies called for under Items 3-13 of the Solicitation. Their certification under paragraph 2 on page 2 of SF 33 that they are a manufacturer of the supplies, is a false statement of fact.

- "2. Their certification on page 11 of the Solicitation that the production point of the supplier is 5501 N.W. 12th Ave., Fort Lauderdale, Florida is a false statement of fact confirmed by an official at that location and verified by the G.S.A. Facilities Survey. Manufacture of the supplies at that location was never intended due to the lack of injecting molding equipment in their facility and unavailability of equipment to manufacture the molds required for production.
- "3. The equipment located at 5501 N.W. 12th Ave., Fort Lauderdale, Florida that could be used to manufacture the molds mentioned in paragraph 2 above is not owned by the apparent low bidder or the alleged production facility cited as the point of manufacture. This has been verified by statements from the owners of the equipment, that permission has not been requested or granted for its use under the proposed contract. The certification of 5501 N.W. 12th Ave., Fort Lauderdale, Florida as a point of manufacture, either of the molds or the supplies, in the face of these facts can only be considered as false and misleading."

The question of whether a bidder is a manufacturer or regular dealer is for consideration under the Walsh-Healey Act, 41 U.S.C. § § 35-45 (1970). The responsibility for such determination rests in the first instance with the contracting agency and is subject to review by the Secretary of Labor and not this Office. Starlight Components, Inc., B-185296, April 20, 1976, 76-1 CPD 269; Case, Inc.; Bethune Quilting Company, B-185422, January 29, 1976, 76-1 CPD 63.

The other two examples cited by Acme of deficiencies in E + M's bid pertain to questions asked to assist GSA in determining the bidder's overall qualifications and capacity to perform the prospective contract. The question of a bidder's ability to perform a proposed contract, as opposed to its compliance with the material terms and conditions of the IFB, is a question of bidder responsibility rather than of bid responsiveness. D & D Aero Spraying, Inc., B-182070, November 26, 1974, 74-2 CPD 295. This Office does not review protests against affirmative responsibility determinations unless either fraud is alleged on the part of procuring officials or the solicitation contains definitive responsibility criteria which allegedly have not been applied. See Central Metal Products, Incorporated, 54 Comp. Gen. 66 (1974), 74-2 CPD 64; Bryan L. and F.B. Standley, B-136573, July 20, 1976, 76-2 CPD 60. No allegation of fraud is made and the solicitation contains no definitive criteria of responsibility.

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For the foregoing reasons, we decline to consider this matter on the merits and are closing our file without further action.

Paul C. Dembling
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General Counsel