

DECISION

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

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FILE: B-216082

DATE: August 29, 1984

MATTER OF: DuHadaway Tool and Die Shop, Inc.

DIGEST:

A bid submitted in response to a total small business set-aside, which failed to indicate the bidder would furnish supplies manufactured or produced by a small business concern, was properly rejected as nonresponsive.

DuHadaway Tool and Die Shop, Inc. protests the award of a contract to R & D Machine under invitation for bids (IFB) No. N00383-84-B-0283, issued by the Department of the Navy as a total small business set-aside. DuHadaway complains that the agency acted improperly in rejecting the firm's low bid as nonresponsive because DuHadaway did not represent and certify in its bid that it would furnish supplies manufactured or produced by a small business concern. We summarily deny the protest.

DuHadaway states that the Navy failed to provide the firm with a solicitation package in time to submit its bid on the regular forms applicable to advertised procurements. However, the Navy agreed to allow DuHadaway to submit its bid in letter format, and the firm asserts that the Navy instructed it only to provide pricing and delivery data in accordance with the terms of the solicitation (the firm having examined the Navy's bid room copy of the solicitation) and to represent in the letter bid that it was a small business concern. Although the firm's offer was low, the Navy determined the bid to be non-responsive because DuHadaway had not stated in its letter that it was offering items manufactured or produced by a small business concern. We feel that the agency's action was properly taken.

The solicitation to which DuHadaway was responding required that offerors represent and certify that they were small business concerns and that all supplies to be

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furnished would be manufactured or produced by a small business concern in the United States, its possessions, or Puerto Rico. See Federal Acquisition Regulation, § 52.219-1, 48 Fed. Reg. 42,102, 42,523 (1983) (to be codified at 48 C.F.R. § 52.219-1). Such language requires that the small business concern either manufacture or produce the offered supplies itself or furnish supplies that have been obtained from a small business concern that is a manufacturer or producer. See Cascade Pacific International, B-208149, Aug. 3, 1982, 82-2 CPD ¶ 106.

This Office has consistently held that if a bid on a total small business set-aside fails to establish the legal obligation of the bidder to furnish supplies manufactured or produced by small business concerns, the bid is nonresponsive and must be rejected, Mechanical Mirror Works, Inc., B-210750.2, Oct. 20, 1983, 83-2 CPD ¶ 467, because a small business contractor would be free to provide the supplies from either small or large business manufacturers as its private business interests might dictate, thus defeating the intent of the set-aside program. Parco, A Division of Blue Mountain Products, Inc., B-211016, March 28, 1983, 83-1 CPD ¶ 318.

We think that a similar lack of a binding legal obligation is apparent here. DuHadaway's letter bid stated that the firm was "a small, non-minority, non-woman owned business," but did not state that the firm was the manufacturer or producer of the supplies to be furnished (which DuHadaway now asserts in fact to be the case). Even though the firm's letterhead identified it as a tool and die shop, and the letter stated that the firm had reviewed drawings pertinent to the solicitation and also requested progress payments (all of which, arguably, might be some indication that DuHadaway would be the manufacturer or producer), it was a material condition of the IFB that the items be manufactured or produced by a small business concern, and DuHadaway did not unequivocally state that it would be bound by that condition. If the contracting officer had accepted the bid, DuHadaway would not have been legally obligated to furnish small business items if not in its economic interest or because of other considerations. Even if DuHadaway was inadvertently misled by agency personnel as to the necessary contents of its letter bid, the firm had access to a copy of the

solicitation and should have been aware of the representation and certification provisions contained in it. Therefore, since the firm's intent was not clearly ascertainable from the face of the bid, the contracting officer acted reasonably in rejecting the bid as nonresponsive. Mechanical Mirror Works, Inc., supra.

The protest is summarily denied.

for Milton J. Aroslan
Comptroller General
of the United States