



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

B-179707

December 28, 1973
40315

Maxwell Manufacturing Company
Acorn Industrial Park
Downingtown, Pennsylvania 19335

Attention: Mr. Lloyd R. Maxwell
President

Gentlemen:

We refer to your letter dated November 27, 1973, and prior correspondence, protesting the award of a contract to Uni-Systems, Inc. (Uni Systems), under solicitation No. F41608-73-R-BD09, issued at Kelly Air Force Base, Texas, which was a 100-percent set-aside for small business.

The crux of your protest appears to be your belief that Uni-Systems, if awarded the above-mentioned contract, would not be in compliance with the small business set-aside requirements of the solicitation. You specifically draw attention to paragraph C-42 of the solicitation which provides as follows:

"NOTICE OF TOTAL SMALL BUSINESS SET-ASIDE (1972 JUL):

"(a) Restriction. Offers under this procurement are solicited from small business concerns only and this procurement is to be awarded only to one or more small business concerns. This action is based on a determination by the Contracting Officer, alone or in conjunction with a representative of the Small Business Administration, that it is in the interest of maintaining or mobilizing the Nation's full productive capacity, in the interest of war or national defense programs, or in the interest of assuring that a fair proportion of Government procurement is placed with small business concerns. Offers received from firms which are not small business concerns shall be considered nonresponsive and shall be rejected.

[Protest of Air Force Small Business Award]

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"(b) Definition. A 'small business concern' is a concern, including its affiliates, which is independently owned and operated, is not dominant in the field of operation in which it is offering on Government contracts, and can further qualify under the criteria set forth in regulations of the Small Business Administration (Code of Federal Regulations, Title 13, Section 121.3-8). In addition to meeting these criteria, a manufacturer or a regular dealer submitting offers in his own name must agree to furnish in the performance of the contract end items manufactured or produced by small business concerns: Provided, That this additional requirement does not apply in connection with construction or service contracts."

It is your contention that Uni-Systems intends to supply, in the construction of a chassis dynamometer, an absorption unit manufactured by a big business manufacturer, which you believe would be a clear violation of the 100-percent small business set-aside solicitation. It is your position that the Air Force, by allowing Uni-Systems to put related hardware around an absorption unit designed and built by a big business company, would be sanctioning a circumvention of the small business set-aside provisions.

In response to your protest, Uni-Systems has indicated its good faith intentions to comply with the spirit and intent of the small business set-aside provisions of the solicitation. There is no question that Uni-Systems, itself, is a small business. Further, Uni-Systems has advised the contracting officer that it is developing its own water brake unit which it plans to use in the subject contract. Uni-Systems only proposes to use the big business brake unit component as a back-up alternate to insure its availability in case of delivery or other potential problems. It is the use of this alternate brake to which you protest.

In our decision 49 Comp. Gen. 41 (1969), we had occasion to discuss the subcontracting limitations for small business concerns awarded total small business set-aside contracts. We stated 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. * * *

Our decision then focused on the end item being furnished and stated:

"* * * 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."

Factually, there could be no dispute that the manufacturing of some portion of the related hardware and the total assembling of the component parts into the final unit would constitute a significant contribution to the production of the "end item" involved here. Since such work would be performed by Uni-Systems, it may be concluded that the "end item" would be, in significant part, produced by small business. Therefore, we would find no legal basis to object should Uni-Systems provide the alternate chassis dynamometer built by a large business under the subject contract.

You have contended that there is no legal justification for permitting any big business participation in the use of funds designated by Congress for 100-percent small business set-asides, unless such big business participation is specifically spelled out in the written language of the solicitation. There is nothing in the statutes governing small business awards that earmarks funds for small business procurements. The statutes provide for a fair proportion of Government contracts being placed with small business concerns, but there is nothing in the acts which affirmatively states or implies a limitation on the amount of work which small business contractors could subcontract to big business. 49 Comp. Gen., supra. Further, although it would not have been improper to indicate in the solicitation that there could be big business

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participation on a subcontracting level, the failure specifically so to provide does not preclude the award of a contract to a firm which contemplated subcontracting, but was making a significant contribution to the production of the contract end item. In that regard, our Office has upheld an award to a bidder who proposed to subcontract when the solicitation was silent on subcontracting. 34 Comp. Gen. 595 (1955). That decision did not imply that reasonable administrative qualifications upon subcontracting could not be imposed and stated in the solicitation. See 37 Comp. Gen. 196 (1957). The power to take such action is not within the jurisdiction of our Office. 49 Comp. Gen., supra.

For the reasons stated above, the protest is denied.

Sincerely yours,

R.F.KELLER

Deputy Comptroller General
of the United States