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

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B-175633 May 31, 1973

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The Honorable Howard H. Callaway
The Secretary of the Army

Dear Mr. Secretary:

We refer to letter AMCGC-P dated March 16, 1973, and prior correspondence, from The Deputy General Counsel, Headquarters United States Army Materiel Command, reporting on protests of Transvac, Inc., Cincinnati Electronics Corporation, Sentinel Electronics, Inc., and Bristol Electronics, Inc., under invitation for bids (IFB) No. DAAB05-72-B-0012.

The IFB covered the procurement of a quantity of radio sets and receiver-transmitters on a 3-year multiyear basis with 50 percent set aside for award to labor surplus area concerns. On the non-set-aside portion of the IFB, the four lowest bidders in ascending order were as follows: Transvac (small business but not a labor surplus area concern), Cincinnati (small business and a labor surplus area concern), Sentinel (small business and a labor surplus area concern), and the Avco Corporation (Avco) (large business and a labor surplus area concern). Bristol submitted the sixth low bid on the non-set-aside portion of the IFB In accordance with the IFB provision setting forth the standard notice of labor surplus area set-aside prescribed by paragraph 1-804.2(b) of the Armed Services Procurement Regulation (ASPR), Cincinnati as a certified-eligible concern is entitled to priority negotiation opportunity under the set-aside portion of the IFB. However, the contracting officer rejected the bids of Transvac and Cincinnati as nonresponsive. Pending a favorable responsibility determination, the contracting officer proposes to award the non-set-aside portion to Sentinel and extend to Sentinel, a certified-eligible concern and low responsive bidder on the non-set-aside portion, first priority for negotiation of the set-aside portion.

For the reasons set forth in detail below, we concur with the contracting officer's rejection of the Transvac bid as nonresponsive, but do not agree that the Cincinnati bid is nonresponsive. However, we do not believe that Cincinnati should be afforded an opportunity to participate in the set-aside negotiations as a small business concern. Moreover, we find no merit to the Bristol protest against any award to Sentinel.

PUBLISHED DECISION
52 Comp. Gen._____

[Protests of Bid Rejections as Nonresponsive]

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TRANSVAC BID

The rejection of the bid as nonresponsive concerned that firm's failure to quote a price for first article testing and test report or to indicate that there would be no charge for item 0008 of IFB amendment No. 0009. According to the contracting officer, first article testing may not be waived in the case of Transvac which has no previous experience in producing the required equipment. Amendment 0009 significantly increased the first-year quantity of the sets, provided a revised delivery schedule reflecting the increased quantity, and provided for a superseding of the previous eight IFB amendments by incorporating all prior changes. The amendment reads in pertinent part as follows:

> * * * BIDDERS MUST INSERT BID PRICES IN THIS AMENDMENT NO. 0009 * * *
>
> * * * * *
>
> For the purpose of evaluating bids, Item Nos. 0001, 0002, 0005 thru 0014 [including item No. 0008], 0017 and 0018 will be considered as a single group and awarded as a unit; however, the Government reserves the right to waive the requirement for First Article Test and Report, Item 0008 for any particular bidder/offeror.
>
> * * * * *
>
> Enter prices where space is provided above in the Unit Price or Amount Column for all items. If an item is offered at no charge, enter N/C. DO NOT LEAVE BLANK. Failure to follow this instruction will render the offer non-responsive.

The first page of the bid submitted by Transvac obligates it to furnish "* * * any or all items upon which prices are offered, at the price set opposite each item * * *."

Counsel for Transvac argues that a price for item 0008 in amendment 0009 was not inserted because no space was provided. Citing the above-quoted language of the amendment requiring the entry of prices or a no charge notation where space is provided, counsel points out that no space was provided in the "Unit Price" and "Amount" columns of item 0008. In further support of his argument, counsel notes that Transvac quoted a price of $2,000 for the identical first article testing and test report requirement where such space was provided in the original IFB and amendment 0003 under a different item number. It is asserted that this established beyond a reasonable doubt an intention to bid on the first article requirement.

It is clear that all items were to be priced by bidders where a space, more specifically, "$_____" is provided. In the case of item 0008, such space was not provided. But, we have held that such circumstance will not excuse a bidder from omitting essential information in a bid where IFB language similar to that quoted above is present. See B-144112, January 13, 1961, wherein we stated:

> We cannot agree with the contention that Molded should be excused for its failure to specify brand name or equal because the Government failed to include blank spaces after the item descriptions in the form prescribed by ASPR 1-1206 (c)(2)(i). It is noted that adequate space was available after the item descriptions to permit compliance with the requirements of the "brand name or equal" clause. This is borne out by the fact that two of the bidders (Bendix and General Instrument Corporation) found ample room to indicate their intentions in that regard. The requirements of the "brand name or equal" clause are clear and unambiguous. The clause specifically warned bidders in bold type that bids would be rejected for failure to comply with its requirements. Consequently, we believe that Molded's failure to comply with the invitation requirements was primarily due to its own negligence rather than the Government's failure to include blank spaces after the item descriptions in the specific form prescribed by the Armed Services Procurement Regulation. For the same reason we cannot conclude that the invitation was defective because of ambiguity.

All of the bidders, but Transvac, inserted prices for item 0008. Furthermore, we note that adequate space adjacent to the item in question was available for the insertion of a price or no charge notation. And, it is pertinent to note that 4 "Xs" were used throughout the bidding schedule to indicate that no insertions were required of bidders. This blocking symbol of 4 "Xs" is not present in item 0008. These facts, plus the cautionary language of the IFB quoted above, in our view, lead us to the conclusion that Transvac failed to comply with the pricing terms of the IFB, as amended, and it may not be said that it (Transvac) was justified or was misled into failing to insert a price for item 0008. The fact that Transvac did insert a price for an identical first article requirement in the basic IFB and amendment 0003 is irrelevant since the only first article requirement in the IFB now is included in amendment 0009.

In the alternative, counsel for Transvac argues that, even if we should conclude that a price was required to be inserted in amendment 0009, the failure to do so was a minor informality or irregularity under ASPR 2-405 or an obvious clerical error under ASPR 2-406.2 and 2-406.3

which can be waived or corrected. Counsel points out that Transvac is obligated by the terms of its bid to perform the first article requirement even though no price was inserted in item 0008. As to this latter point, counsel also refers to a post-bid opening telegram to the contracting officer which verified and confirmed the first article obligation; stated an intention to charge $2,000 therefor; and suggested that the probable legal effect of the noninclusion of a price for item 0008 bound it to perform such work at no cost to the Government.

ASPR 2-405 permits a contracting officer to waive or permit a bidder to correct bid deficiencies resulting from a minor informality or irregularity where the relative standing of bidders would not be affected. In part, a minor informality or irregularity is defined as one which is merely a matter of form or some immaterial variation from the exact requirements of an IFB, having no effect or merely a trivial or negligible effect on price and no effect on quality, quantity or delivery of supplies being procured. Counsel contends that the omission of a $2,000 item on a $14,000,000 contract would patently have merely a trivial or negligible effect on price. Also, he notes that the relative standing of bidders would not be affected by correction or waiver of the price omission since the Transvac bid is more than $1,000,000 lower than that of the second low bidder taking into account both the non-set-aside and set-aside portions of the IFB.

However, the foregoing ignores the fact that ASPR 2-405 does not define waivable or correctible deficiencies only in terms of their impact on price and relative standing. Rather, that section further requires that the deficiency have no or merely a negligible effect on quality, quantity or delivery. There is nothing of record which contradicts the critical necessity for the first article testing requirement in the case of Transvac. We believe, therefore, that the failure to submit a price for first article testing is neither a waivable nor correctible deficiency.

Counsel further contends that Transvac is required to perform first article testing and furnish a test report under the terms of its bid. In support of this contention, counsel refers to its insertion of bid prices for items 0001 and 0002 of amendment 0009. Those items call for radio sets and receiver-transmitters to be furnished by Transvac in accordance with "Specification MIL-R-55499A(EL) with Amendment No. 1." Counsel points out that the specification imposes an obligation on Transvac to perform first article testing and submit a test report irrespective of item 0008. Counsel then refers to the post-bid-opening telegram as reinforcement for this obligation. Counsel further supports his position by bringing our attention to a prior contract awarded requiring the furnishing of similar equipment where no separate line item was set forth in the IFB for first article testing.

The telegram submitted by Transvac after bid opening is extraneous to the bid and may not be considered in determining the responsiveness of the bid. See 51 Comp. Gen. 352, 355 (1971). However, counsel for Sentinel correctly states that the cited military specification, by its terms, requires the furnishing of preproduction samples (first articles) for approval if required in the IFB and contract. It is noted that item 0008 prescribes the first article requirement to be in accordance with a supplemental technical instruction in the IFB. That instruction incorporates by reference the first article quality assurance provisions of the specification, the pertinent ASPR first article testing clause, and the paragraph in the specifications calling for first article performance if required in the IFB and contract. Counsel for Sentinel states that the specification provisions were not viable with respect to the first article requirement without the submission of a price for item 0008.

To sustain the argument of Transvac's counsel, we must be able to conclude that the bid of Transvac unambiguously imposed an obligation to comply with the first article requirement. We cannot so conclude. At the best, the bid is ambiguous. The IFB, as amended, specifically called for performance in accordance with the military specification prescribing first article requirements. But, on the other hand, item 0008 clearly called for a price to provide first article testing and a test report. And, as quoted above, a bidder is only obligated to furnish items upon which prices were offered at the price set opposite each item. Thus the acceptability of a bid must be based on the bid documents themselves and not on what a prior solicitation may or may not have required.

Counsel for Transvac's argument concerning the "obvious clerical error" nature of the omission likewise must fail. We have already concluded that the Transvac bid was nonresponsive. It is well settled that a nonresponsive or otherwise defective bid cannot be made responsive through the "mistake" procedure. See 51 Comp. Gen. 255, 261 (1971). An allegation of error and correction of a price omission in a bid is proper for consideration only where a bid is responsive and otherwise proper for acceptance. See 52 Comp. Gen. ____ (B-177368, March 23, 1973). In that case, however, we restated a very limited exception to this rule. Even though a bidder fails to submit a price for an item in bid, that omission can be corrected if the bid, as submitted, indicates not only the probability of error but also the exact nature of the error and the amount intended. To ascertain the existence of an error and the bid intended, we have looked to the consistency of a bidding pattern in particular cases. In this regard, counsel for Transvac draws attention

to our decision B-173129, December 6, 1971 (published at 51 Comp. Gen. 352 supra), and a decision cited with approval therein, B-157429, August 19, 1965.

However, we cannot find that a legally enforceable obligation is imposed upon Transvac by its bid to furnish the first article testing. Clearly, there is nothing in the bid to establish, as was the case in the above-cited decisions, what amount Transvac would have utilized to correct the alleged obvious clerical error. Its prior pricings of $2,000 for the first article related to superseded bid schedules of the IFB. And there is nothing in the bid as reflected on the schedule in amendment 0009 which would afford a reasonable basis to say that the $2,000 superseded pricing or for that matter any specific amount for the requirement was carried forward into any other parts of the bid where prices were to be inserted. Moreover, an examination of the entire bid does not allow any interpretation with respect to the existence of a consistent bidding pattern which might serve to cure the deficiency in Transvac's bid.

For these reasons, we conclude that the contracting officer properly rejected the Transvac bid as nonresponsive for failure to quote a price or insert a no cost notation adjacent to item 0008 of amendment 0009. See B-176071, December 27, 1972; and B-176254, September 1, 1972.

CINCINNATI BID

This bidder is now the apparent low bidder on the non-set-aside portion of the IFB. Its bid, signed by A. J. Murray, Secretary, totaled $7,247,109.92 for the non-set-aside portion of the IFB. The $7,837,487.60 non-set-aside bid, now third low, submitted by Avco was signed by A. J. Murray as Director of Business Development-Planning and Services. Both bids listed as the office address and place of manufacture, the offices and manufacturing facilities of Avco located in Cincinnati, Ohio. At this point, certain background information should be related. It is reported that Cincinnati was incorporated on September 13, 1972, about 5 weeks before bid opening, as an electronics firm which would utilize the resources of Avco (Evendale Operation). At the time of incorporation, Avco's Evendale Operation had over 100 Government contracts amounting to more than $30,000,000. In a letter to the contracting officer dated 9 days after bid opening, the individual who signed both bids explained the reason for the submission of the two bids:

> Several key Avco Electronics Division executives have made a proposal to purchase the Evendale Operation from Avco Corporation, and discussions to this end are presently under way.

The offer to purchase the Evendale Operation was made on 23 August 1972 and Mr. James R. Kerr, President of Avco, agreed in principal on 18 September 1972 to accept the offer. Mr. Kerr's acceptance was subject to the new organization providing assurance that adequate financing to complete the proposed purchase had been arranged and that novation arrangements could be worked out with the customers.

The financing necessary to consummate the purchase has been completed, and the matter of novation of outstanding contracts is now being worked on with the cognizant Government personnel.

Both Avco and Cincinnati Electronics are targeting to complete the transaction on 30 November 1972, which is the end of the Avco fiscal year.

During this interim period there are five (5) Avco Evendale Operation employees who are also officers and/or shareholders in Cincinnati Electronics Corporation. * * *

* * * * *

Avco Electronics has bid on a prior procurement of the AN/PRC-77 and has indicated its interest in the current procurement by letters to your agency on 10 July and 15 August 1972. The position of Avco Electronics is one of "business as usual" during the time required to complete the sales transaction. In the event that the sale is not consummated, Avco will continue to operate the Evendale Operation and does not want to lose any new business opportunities while the sale/purchase arrangements are being completed. Therefore, Avco submitted a bid on the AN/PRC-77 on 18 October 1972.

On the other hand, if the sale is consummated, Avco will have no interest in obtaining the AN/PRC-77 award, but Cincinnati Electronics, the successor company, is very desirous of obtaining the award and will then possess all of the assets formerly owned by Avco that will be required to perform the contract. Therefore, in order to use the competitive advantage which Cincinnati Electronics has, a separate bid was submitted by Cincinnati Electronics on the AN/PRC-77. The lower price offered by Cincinnati Electronics was principally due to the elimination of Corporate Assessments and the fact that a lower profit margin is made possible by an improved cash flow position resulting from the improved progress payment position as a small business.

A letter of understanding of September 18, 1972, from Avco to Cincinnati, stated in part:

> Of course, you will understand that neither your group nor Avco will be legally bound until a definitive agreement shall have been negotiated, approved by Avco's Board of Directors and your group and executed by both parties. Before commencing to negotiate and prepare such a definitive agreement, however, we would like to be assured that your group has arranged in principle for adequate financing to complete the proposed purchase and to carry on the business and that appropriate novation arrangements satisfactory to Avco can be worked out with the principal customers of the Evendale operation. Please let us know when you have arranged for adequate financing and we would then be able to support your efforts to work out satisfactory novation arrangements with Evendale's customers.

Prior to the submission of the Cincinnati bid, that firm requested and received from the Chicago Regional Office of the Small Business Administration (SBA) a determination that it qualified as a small business concern. The SBA office made that determination based on a full disclosure by Cincinnati of the contemplated purchase of the Evendale Operation from Avco. Sentinel protested Cincinnatti's eligibility as a small business 5 days after bid opening. The Size Appeals Board on November 29, 1972, reversed the decision of the regional office and determined that Cincinnati was not an eligible small business concern for the purposes of the instant procurement. One month later, the Board issued its findings and decision, in pertinent part, as follows:

> Negotiations between the officials of Cincinnati Electronics Corporation and AVCO Corporation have been in progress for a considerable period of time. There is of record a copy of a resolution of the Board of Directors of AVCO Corporation dated November 6, 1972 [over 3 weeks after bid opening], acknowledging that an agreement in principle had been reached by the partners, and providing further that:
>
> > "Resolved that the officers of this Corporation be and they hereby are authorized to negotiate a formal agreement with Mr. Mealey(President and majority stockholder of Cincinnati Electronics Corporation) and his associates providing for the sale to them (or a satisfactory corporate designee) of the business and assets of the Evendale Operation on the general basis outlined in the foregoing correspondence, it being understood that neither

> party will be legally bound until the specific terms of such agreement have first been approved by this Corporation's Board of Directors or Executive Committee and the agreement has been executed by both parties." (Emphasis added.)

The formal agreement of purchase and sale covering the assets of the Evendale Operation was said by Counsel for purchaser on November 16, 1972, to be in the final stages of negotiation and both parties anticipated signing the agreement on November 30, 1972.

* * * * *

Inasmuch as the purchase-sale agreement has not been formalized, and since it is the intent of the parties that neither party shall be legally bound until this act occurs, the Evendale Operation of the AVCO Electronics Division remains a part of the AVCO Corporation and was so on October 18, 1972, the date of bid opening.

On that date, Cincinnati Electronics Corporation was merely a shell corporation with three to five employees and no facilities or equipment to perform a Government contract. Its officials were at the time officers and employees of AVCO Corporation and actively engaged in pursuing the business interests of their employer.

Cincinnati Electronics Corporation has no place of business except within the AVCO organization. All attempts to reach its principals other than through AVCO were unsuccessful.

Under these circumstances, the Board must conclude that although Cincinnati Electronics Corporation was itself within the size limitation for small business concerns on the date of bid opening, it did not meet the "independently owned and operated" test required for a small business by Section 3 of the Small Business Act.

Since the officials of Cincinnati Electronics Corporation and the officials of the Electronics Division of the AVCO Corporation are the same, the Board finds that the Cincinnati Electronics Corporation is affiliated with the AVCO Corporation through common management within the meaning of Section 121.3-2(a) of the SBA Size Standards Regulations previously quoted.

It is a well settled rule of Government contract law that a bidder on a set-aside procurement must be a small business both on the date of the bid opening and the date of award. (See 40 Comp. Gen. 550 and B-161216, May 22, 1967.)

> On the record before the Board, no clear line of fracture had been effected between the Electronics Division of the AVCO Corporation and the prospective purchaser by the date of bid opening. One was merely the alter ego of the other.
>
> To accord a bidder small business size status under these circumstances would be to sanction form over substance and permit an ineligible bidder to avail itself of small business preferential treatment with the intent of taking affirmative steps to remove its disability prior to award. This would not be within the spirit and intent of the Small Business Act, and would be manifestly unfair to other qualified small business concerns.
>
> For the foregoing reasons, the SBA Size Appeals Board finds that the Cincinnati Electronics Corporation was not a small business concern for the purpose of receiving priority in negotiation for the set-aside portion of the contract either on the date of bid opening or at the present time.

On February 27, 1973, the Board denied on procedural grounds the Cincinnati request for reconsideration. On March 9, 1973, the assets of the Evendale Operation were purchased by Cincinnati, the appropriate novation agreement was executed and the Cincinnati officials severed all ties with Avco. Despite this fact, and a recertification of Cincinnati as a small business for future procurements by the regional office, the Size Appeals Board refused to grant a Cincinnati request for recertification for purposes of the instant procurement.

Returning to the events which transpired after bid opening, on November 17, 1972, the contracting officer advised Cincinnati that:

> 1. Your company is not considered to be a "going concern" as you are not in a position to commence operations unless and until a sale of "all the assets owned by AVCO that will be required to perform the contract" are actually transferred to Cincinnati prior to award.
>
> 2. The management of the Evendale Operation has submitted two bids in response to solicitation DAAB05-72-B-0012. Since the timing of the sale of the Evendale Operation is a matter solely within the control of AVCO's management, you are in a position to alter Cincinnati's position in relation to the other bidders. Since Cincinnati's eligibility for award can be controlled by AVCO's management, the Contracting Officer has no alternative but to consider your bid non-responsive.

Whether a bidder is eligible as a manufacturer or regular dealer ("going concern") for purposes of award under the Walsh-Healey Public Contracts Act (41 U.S.C. 35-45) is for determination initially by the contracting officer subject to review by the Department of Labor. See ASPR 12-601, et seq. To date, the contracting officer has made no determination as to Cincinnati's eligibility or ineligibility under

ASPR 12-604. We expect that determination will be made as to the current status of Cincinnati at the contemplated date of award. In this regard, insofar as Cincinnati is concerned, a firm, to qualify as a manufacturer, must be able to show before the award, inter alia, that if it is newly entering into such manufacturing activity, it has made all necessary prior arrangements for space, equipment, and personnel to perform the contract. See ASPR 12-603.1 which provides that "A new firm which, prior to the award of the contract, has made such definite commitments in order to enter a manufacturing business which will later qualify it, shall not be barred from receiving the award because it has not yet done any manufacturing."

Before discussing the contracting officer's second basis for disqualifying Cincinnati from consideration for award, one preliminary matter should be mentioned. Counsel for Sentinel points out that the Cincinnati bid should be rejected as nonresponsive since it bid higher prices for the option, as opposed to the basic, quantities. Counsel argues that the IFB provisions clearly indicate an intent that option quantities will be considered in determining the price most advantageous to the Government. In answer to this, we note that special provision J.1 specifically states that "Evaluation of bids or offers for award will be made on the basis of the quantities to be awarded exclusive of the option quantities." In the absence of a provision calling for such evaluation, it is not proper to evaluate option prices in determining the low bid. See B-176346, March 29, 1973, and cases cited therein. Furthermore, the IFB, as amended, contains no prohibitions against the quoting of a higher price for option quantities. See 51 Comp. Gen. 528 (1972).

Counsel for Sentinel also alleges that the higher option prices in the Cincinnati bid contain contingencies forbidden in the price escalation clause of the IFB and includes a contingency to recoup startup and other nonrecurring costs in violation of ASPR 7-104.47(b). Under the price escalation clause of the IFB, the contractor warrants that the prices set forth (including option prices) do not include allowance for any contingency to cover anticipated increased costs of performance to the extent that such increases are covered by the clause. The increases referred to in the clause involve possible upward price revisions as computed from an economic indicator concerned with wages to be paid employees. According to the clause prescribed by ASPR 7-104.47(b), referenced in the IFB, the contractor agrees not to include in the price for option quantities any costs of a startup or nonrecurring nature fully provided in the unit prices of the basic quantities of the various multiyear program years. Counsel, citing Cincinnati's 26-percent higher option price over the base price concludes that, since the escalation clause covers certain cost increases and expenses, it must be concluded that Cincinnati has added excludable items.

As stated above, there was no prohibition against submitting higher option than base prices. Furthermore, the clause at ASPR 7-104.47(b) contemplates that prices offered for option quantities may reflect recurring costs and a reasonable profit necessary to furnish additional option quantities. We have no information other than counsel's allegation that Cincinnati's option prices contain excludable items. Since the contracting officer has not responded to this argument, we would expect that the contracting officer would monitor any contract awarded to Cincinnati to assure compliance with the above-mentioned clauses.

The SBA Size Appeals Board decision, quoted above, concluded that Cincinnati and Avco were affiliated through common management and, therefore, Cincinnati could not be classified as a small business as of the date of bid opening. Counsel for Cincinnati vigorously opposes this conclusion and repeats the arguments previously advanced before the Board. In B-173301, June 28, 1972, wherein a protester challenged a Size Appeals Board decision, we noted that, under 15 U.S.C. 637(b)(6), a decision of SBA regarding the size status of a particular concern is "conclusive" upon the procurement agency involved. We went on to state that our Office may not ignore a determination by SBA of the size status of a particular concern. With respect to that protester's request for review, we noted that there is no basis for our Office to question a Board decision where no evidence or argument is presented to GAO which had not been presented to and considered by the Board. With this in mind, we will consider Cincinnati to have been an affiliate of Avco at bid opening.

Counsel for Cincinnati also alleges that the Board should not have considered Sentinel's protest without a decision thereon by the cognizant SBA regional office, thus depriving Cincinnati of the right to appeal as prescribed by pertinent SBA regulations. While SBA regulations at 13 CFR 121.3-5 and 121.3-6 set forth a protest procedure, the latter section appears also to permit, as occurred here, an appeal directly to the Board from an adverse decision by a regional director. See 13 CFR 121.3-6(b)(1)(ii). In any event, counsel for Cincinnati did not raise this issue with our Office until March 1, 1973, over 4 months after the Sentinel appeal. Although counsel for Cincinnati was afforded and availed himself of the opportunity to participate in the Sentinel appeal before the Board, the alleged violation of regulations was never brought before the Board at least through the denial of the request for reconsideration on February 27, 1973. In these circumstances, the Cincinnati protest in this regard is untimely and will not be considered. See 4 CFR 20.2(a).

As quoted above, the contracting officer rejected Cincinnati's bid as nonresponsive because of the submission of its bid along with that of Ayco, both of which were signed by the same individual, with a resultant option of control over the bidder's respective competitive position due to the impending sale of Avco's Evendale Operation. Our Office has considered the effect of multiple bidding by affilates under advertised

procurements. Briefly restating our position, the bids of two affiliated concerns submitted in response to the same IFB are not required to be rejected merely because of that affiliation so long as the multiple bidding was not prejudicial to the United States or to other bidders. We have also recognized that it is not unusual for an individual or individuals to submit multiple bids on behalf of more than one commonly owned and/or controlled company where legitimate business reasons for such multiple bidding exist. See 51 Comp. Gen. 403, 404, 405 (1972); and 39 id. 892, 894 (1960).

Both Cincinnati and Avco submitted bids taking no exceptions to the terms of the IFB, while stipulating the same location as the place of peformance. It is clear from the record that the sale of the Evendale Operation by Avco to Cincinnati was not irrevocable prior to or at bid opening and that, even after bid opening, the sale might or might not have taken place. But, the record does not disclose any indication that pertinent SBA statutory or regulatory requirements were violated. In our view, legitimate business reasons dictated the submission of the two bids because of the uncertainty surrounding the sale. Finally, there is evidence to indicate that the sale negotiations were entered into and eventually concluded with every intention to effectuate its consummation. In this regard, counsel for Cincinnati explains the submission of the two bids as follows:

> In view of the necessity for developing business adequate to support Cincinnati Electronics Corporation's entry into the industry and the virtual certainty that purchase of the Evendale Operation will be completed well in advance of the ultimate award date for the subject procurement, Cincinnati Electronics Corporation submitted a bid in response to the solicitation. However, to protect against the possibility of some unforeseen event preventing completion of the sale, and to continue a business level of contracts substantial enough to assure efficient use of the Evendale Operation if the sale is not completed, AVCO prudently submitted its own bid. Since only one company would remain in control, it is clear that the bids were not in conflict, but constituted an either/or situation. Parenthetically, it should be noted that Cincinnati Electronics was able to offer the Government a significantly lower price than AVCO because of the elimination of corporate assessments, a lower profit margin and the increased progress payments to which it would be entitled as a small business.

Our Office has not objected to the submission of multiple bids by affiliated or otherwise related bidders where, as here, post-opening option may exist as to prospective responsibility or nonresponsibility. In these decisions, the distinct possibility that common manufacturing

facilities of related bidders might preclude one or the other from performing, similar to the instant situation, has not been considered to be disqualifying.

In B-151459, July 8, 1963, a parent company submitted the third low bid while its controlled subsidiary, proposing in its bid to perform the contract by utilizing the parent's facilities to be transferred to it, submitted the low bid. The record showed that the purpose of the multiple bid submission was the possibility of an unfavorable preaward survey. Also, the subsidiary was able to bid lower due to less overhead and indirect costs than the parent. We took no exception to the award of a contract to either bidder so long as it was responsible. We concluded then that the consideration of the multiple bids submitted for legitimate business reasons by a parent and subsidiary company, knowingly bidding against one another and intending to use the same facilities and employees if awarded the contract, would not prejudice the Government or other bidders.

In B-161410, August 25, 1967, we responded to the suggestion that affiliated concerns could submit bids, select the highest low bid and collapse the other corporations. Related to that suggestion was a question as to what would be the result if the successful low bidder had not made an effort to qualify and the affiliated concern was next in line for consideration. In response thereto, we found no evidence that the affiliated concerns had not submitted bids in good faith. We recognized the possibility that a low bidder, whether affiliated or not, might not attempt to qualify as a responsible contractor. But, we did not believe that such possibility would necessarily preclude the consideration of multiple bids. Similarly, in 39 Comp. Gen., supra, the two low bidders were affiliated and contemplated using the facilities and personnel of both organizations if an award was made to either one or both concerns. We found legitimate business reasons for the submission of the two bids and remarked that it would be prejudicial to the Government to reject the lowest offers received. See also B-153687, July 7, 1964; B-154275, July 1, 1964; B-162187, January 9, 1969; B-169165, April 17, 1970; and 51 Comp. Gen. 403, supra.

Counsel for Sentinel cites 51 Comp. Gen. 145 (1971), wherein we held that it was not proper to permit a successor-in-interest to take over the bid of a firm that had ceased operations after opening and thereby become eligible for awards. We stated, at page 148, as follows:

> * * * To permit a party to enter into the competition after bids have been opened by virtue of taking over the bid of one whose situation makes its responsibility questionable would seem to provide an unwarranted option to the prejudice of other bidders.

Counsel further notes that counsel for Cincinnati explained the submission by that firm of a bid because of our holding in that decision.

We view the circumstances here to be substantially different from those in 51 Comp. Gen. 145, supra. In the cited case, a new party who failed to submit a bid enters the competition after the exposure of prices. Here, we have a bidder, Cincinnati, submitting an unqualified bid with every intention of performing based on the expected acquisition of facilities and personnel for purposes of attaining the status of a responsible prospective contractor. Whatever responsibility option is available to Cincinnati, by itself or in concert with Avco, is not, in our opinion, fatally defective to the consideration of the bid. In the circumstances here, we believe that the Government's interest will be adequately protected by the conduct of effective preaward surveys.

We now turn to the eligibility of Cincinnati for participation in the set-aside negotiations. As stated above, we will defer to the Size Appeals Board's determination that Cincinnati's affiliation with Avco at the time of bid opening caused it to be other than a small business concern. The sale transaction between Avco and Cincinnati, completed after bid opening, disaffiliated its officers from Avco. However, the Board refused to recertify Cincinnati as a small business for purposes of the instant procurement and, in support thereof, cites decisions of our Office to the effect that a bidder on a set-aside procurement must be a small business both on the date of bid opening and the date of award.

In general, a self-certified bidder's status for the purposes of a particular procurement is for determination at the time of award rather than at the time of bid opening. See 49 Comp. Gen. 1, 3 (1969). That decision went on to cite specific dispositions by our Office where, as here, a bidder's size status has changed after bid opening but before award:

> * * * Accordingly, a self-certified small business bidder whose status changes from small to large between the opening of bids on a procurement set aside for small business and the time for award will be ineligible for award. 46 Comp. Gen. 898 (1967). Similarly, a bidder on a small business restricted procurement who certifies himself in good faith as a small business concern when he properly should have been classed as large business but who became small business between bid opening and the time for award because of a change in size standards will be qualified to receive an award. 42 Comp. Gen. 219 (1962). However, where a bidder's change in status before award from large business to small business

> after a good faith self-certification is brought about by the bidder's affirmative acts, we have held that such a bidder may not be considered as a small business concern for purposes of a set-aside award because to do so would give the bidder an option after bids are opened of determining whether it would be in his best interest to take action, or not to take action, to become eligible for award. See 41 Comp. Gen. 47 (1961). (Emphasis supplied)

To the same effect, ASPR 1-703(b) reads, in pertinent part, as follows:

> * * * The controlling point in time for a determination concerning the size status of a questioned bidder or offeror shall be the date of award, except that no bidder or offeror shall be eligible for award as a small business concern unless he has, or unless he could have (in those cases where a representation as to size of business has not been made), in good faith represented himself as small business prior to the opening of bids or closing date for submission of offers (see 2-405(ii) with respect to minor informalities and irregularities in bids). A representation by a bidder or offeror that it is a small business concern will not be accepted by the contracting officer if it is known that (i) such concern has previously been finally determined by SBA to be ineligible as a small business for the item or service being procured, and (ii) such concern has not subsequently been certified by SBA as being a small business. If SBA has determined that a concern is ineligible as a small business for the purpose of a particular procurement, it cannot thereafter become eligible for the purpose of such procurement by taking affirmative action to constitute itself as small business.

See, also, 13 CFR 121.3-8.

Here, there is no doubt that Cincinnati's certification as a small business concern was a good-faith utilization of the self-certification procedure. The record discloses that, by letter dated just 5 days before bid opening, the cognizant SBA regional office determined that it qualified as a small business concern. Such being the case, the question remains whether Cincinnati's disaffiliation with Avco entitles it to be considered as a small business concern for the set-aside portion of the procurement. It should be kept in mind that even if we conclude that Cincinnati cannot be considered a small business for the set-aside as a certified-eligible small business labor surplus concern (priority group 1), Cincinnati still would be entitled to negotiation opportunity as a bidder in priority group 2. But, the disaffiliation with Avco, if

allowed to now qualify Cincinnati as a small buisiness concern for purposes of the set-aside, would clearly displace Sentinel, Bristol, and at least one other certified-eligible small business concern in the order of priority for negotiations.

In 49 Comp. Gen., supra, we did not permit a bidder to preserve the efficacy of a good faith, but erroneous, small business self-certification by the post-bid-opening termination of a management agreement. In that decision, we applied the following rationale as to the type of affirmative acts sufficient to cause disqualification:

> While the bidder's good faith is the criterion for determining the acceptability of his self-certification as to small business status, the determining factor in deciding whether a bidder's actions after the opening of bids affecting his self-certification are permissible is whether those actions give him an undue advantage over other bidders by giving him an option to remain ineligible or to take steps which would preserve his small business status for award purposes. The rule against allowing a bidder such an option, therefore, is not dependent on the bidder's good faith or lack thereof in self-certifying his small business status, but rather the controlling factor is the deleterious effect the exercise of such options would have upon the integrity of the competitive bidding system. 41. Comp. Gen. 47, 55.

On reconsideration of 49 Comp. Gen., supra, reported at B-165795, August 21, 1969, it was maintained that the import of our decision was that any affirmative acts by self-certified bidders acting in good faith between bid opening and award--without regard to motivation--the effect of which is a change from large to small business status will cause disqualification from negotiation opportunity for the set-aside. After setting forth the above-quoted rationale from the decision, we stated:

> It is our position, therefore, that if the bidder's affirmative acts after the opening of bids have the effect of giving him the type of option, discussed above, such actions cannot serve to qualify the bidder for award. We do not view this position as an extension of the rule enunciated in [41 Comp. Gen., supra]. While that case stated that the sole purpose of the affirmative acts therein involved was to effect a change in status, the decision was not bottomed on the criterion of a "sole" purpose. Rather, we view the decision as applying the established rule that a bidder should not be allowed the option of deciding after bid opening whether

to remain eligible for award by taking steps to insure such eligibility or by foregoing such steps to deny his eligibility for award. (Emphasis supplied.)

Applying these principles, we conclude that the post-bid-opening sale of the Avco Evendale Operation to Cincinnati and the attendant disaffiliation of the two firms resulting in the current small business status of Cincinnati does not qualify it as a small business concern for the set-aside. We are not unmindful of the fact that the disaffiliation resulted from a bona fide transaction commencing before bid opening but unfortuitously not taking place until some months thereafter. We also note that the sale was not solely for the purpose of permitting Cincinnati to perform the advertised contract but involved a novation agreement covering over $30,000,000 in other Government business.

But, there is no question from the record that the sale and disaffiliation was by no means irrevocable during the time period following bid opening. Thus, there existed a post-bidding option, forbidden under the above principles, which permitted Cincinnati to remain eligible as a small business or to forego the consummation of the sale to preclude set-aside priority. To this same effect, see the quoted findings and decision of the Size Appeals Board. This option directly affects Cincinnati's priority category for purposes of set-aside negotiation to the detriment of Sentinel and other bidders. See B-157921, November 29, 1965; B-152297, November 7, 1963; and ASPR 1-703(b), quoted above. But see B-156882, July 28, 1965.

SENTINEL BID

We turn now to the Bristol protest against any award to Sentinel. Bristol contends that the self-certified small-business status of Sentinel is in error because of Sentinel's plans to perform the contract, either by way of joint venture or subcontract with a foreign firm which is a "large business." The record shows that the contracting officer requested a size evaluation of Sentinel from the cognizant SBA regional office in response to the Bristol protest. Prior to responding to the contracting officer, SBA requested and received information from Sentinel concerning its relationship with the foreign firm. Thereafter, SBA determined that Sentinel was a small business concern for purposes of the procurement. SBA "* * * found no evidence of improper affiliation through commonownership, personnel, management, or contractual relationships as are precluded by SBA 121-Small Business Size Standards." In view of this, we find no basis for not considering Sentinel to be a small business concern for purposes of this procurement.

Bristol also contends that the end item will not be manufactured by a small business as required by the provisions of the IFB. Our Office

has consistently held 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 B-175337, January 3, 1973. It is reported that the preaward survey on Sentinel found its subcontractor arrangements with the large foreign firm to be a normal contractor-vendor relationship. Apparently, the foreign firm will be acting as purchasing agent for Sentinel and will arrange for the delivery of all product material, foreign and domestic, required to perform the contract. Furthermore, the contracting officer states that the preaward survey establishes that a substantial portion of the work required under the contract will be performed by Sentinel in its domestic facility. That being the case, we find no merit in Bristol's contention.

Bristol also argues that the purchasing function to be carried out by the foreign firm is a manufacturing function and, as such, contrary to the Buy American Act (41 U.S.C. 10a-d) and implementing regulatory requirements, requiring that a domestic end product be manufactured in the United States. In this regard, ASPR 6-101 defines a domestic source end product as an end product manufactured in the United States if the cost of its components mined, produced or manufactured in the United States exceeds 50 percent of the cost of all its components. We note that, based on a review of Sentinel's bills of material for evaluation, the preaward survey team concluded that well over 50 percent of the components to be used by Sentinel will be of domestic manufacture. Therefore, Bristol's argument that Sentinel is offering a foreign end product and that a 50-percent evaluation factor should be added to the Sentinel bid cannot be sustained. See ASPR 6-104.4(b) and 6-104.5.

Neither the Buy American Act nor the applicable regulations define or provide criteria in the case of the purchase of foreign products as to what constitutes manufacture. But, in 39 Comp. Gen. 435, 437, 438 (1959), we stated:

> * * * In early times the word "manufacture" was generally related to the production of an article directly from raw materials, but it has now been held that even the mere assembly of parts previously manufactured may be regarded as a manufacture of the completed article. * * *

In light thereof, and the fact that purchasing alone by the foreign firm would not seem to constitute a manufacturing function, we conclude that Sentinel will be manufacturing the required equipment in the United States. Of particular significance, the Sentinel bid contains the certification that the end product to be supplied is a domestic source

end product. We have recently held that compliance with the provisions of the Buy American Act is one of contract administration and properly the responsibility of the contracting agency. See B-177365, May 4, 1973. We expect that the cognizant administration contracting officer will take steps to insure that the provisions of the Buy American Act and implementing regulations are followed. This would encompass, of course, compliance with the military specifications cited by Bristol. Finally, whatever extra costs will be incurred by the Government by possible inspections at a foreign location, if any, cannot properly be added to Sentinel's bid since the IFB contained no such factor for evaluation.

Sincerely yours,

PAUL G. DEMBLING
Acting Comptroller General
of the United States