

DECISION

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

FILE: B-185632

DATE: April 21, 1976

60784
99037MATTER OF: Clark Division of Euclid Design and Development
Company

DIGEST:

Where, under labor surplus area (LSA) provision of solicitation, bidder's stated percentage of costs (100 percent) to be incurred in LSA is changed after bid opening to 30 percent such change does not affect its eligibility for award since bidder agreed prior to award to perform at least the minimum required percentage (25 percent).

Invitation for bids (IFB) No. DSA700-75-B-2625 was issued by the Defense Supply Agency (DSA) on August 29, 1975. The solicitation was restricted to small business concerns under a combined small business-labor surplus area (LSA) set-aside. The Clark Division of Euclid Design and Development Company (Clark) protests against the making of an award to any other bidder on the LSA set-aside.

Bids were opened on December 16, 1975, with Man Barrier Corporation (Man) being the lowest bidder. The second low bidder was Hardill Associates, Ltd. (Hardill) and Clark was third lowest. The original quantity of goods under the small business set-aside portion has been awarded to Man under contract No. DSA700-76-C-2094, dated January 26, 1976. Award for the LSA set-aside portion is still to be made.

Man, Hardill and Clark under paragraph (c) of clause B17, entitled Eligibility for Preference as a Labor Surplus concern, represented themselves in their respective bids as certified-eligible concerns with a first preference. In paragraph (b) of clause B17, Man represented costs on account of manufacturing or production would be incurred in an amount of 100 percent of the contract price at its plant in Ansonia, Connecticut. Hardill, likewise, indicated it would incur such costs equal to 100 percent of the contract price at its plant in Paramount, California. Clark stated it would incur 50 percent of the contract price at Cleveland, Ohio.

Clark alleges that it is impossible for manufacturing and production costs, constituting 100 percent of the contract price, to be performed in the plants listed by Man and Hardill. In this regard, the record before us reflects that Man, reduced its 100-percent estimate to 40 percent for direct labor and overhead, and 30 percent for purchase material after receiving clarification from DSA on the basis of computing the percentage. Clark contends, therefore, that the bids of both Man and Hardill should be rejected as nonresponsive for failure to properly execute the LSA eligibility certificate. Further, Clark argues Man should not be allowed to correct its mistaken interpretation of the eligibility requirements after bid opening as the failure renders the bid nonresponsive.

Clause B17, at issue here, reads:

"(a) Each offeror desiring to be considered for award as a labor surplus area (LSA) concern on the set-aside portion of this procurement, specified elsewhere in the schedule, shall indicate below the address(es) where costs will be incurred and complete the 'Representation of Eligibility as a Certified Eligible Concern' as appropriate.

"(b) Insert below the address(es) where costs incurred on account of manufacturing or production (by offeror or first tier subcontractor) will amount to more than twenty-five percent (25%) of the contract price, if offering as a certified-eligible concern, or will amount to more than fifty percent (50%) of the contract price if offering as a persistent or substantial LSA concern.

Name of Company Street Address City/County State Percentage

(If more than one location is to be used, list each location and the costs to be incurred at each, stated as a percentage of the contract price.)

"(c) When eligibility for preference in award is based on the status of the offeror or offeror's subcontractors as a 'certified-eligible concern,' the offeror in addition to identifying the areas of performance, shall complete the following representation.

REPRESENTATION OF ELIGIBILITY AS A
CERTIFIED ELIGIBLE CONCERN

Offeror represents that as of the date of submitting this offer he or his subcontractors are, in accordance with the partial labor surplus area or partial small business set-aside clauses included elsewhere in the solicitation,

- () a certified-eligible concern with a first preference.
- () a certified-eligible concern with a second preference.

CAUTION: Failure to list the location of manufacture or production and the percentage of cost to be incurred at each location in the space provided in (b) above will preclude consideration of the offeror as a LSA concern. In addition, if eligibility is based on status as a certified-eligible concern, failure to complete the representation of eligibility above will preclude consideration of the offeror as a certified-eligible concern."

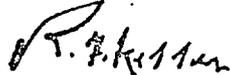
Clark concedes that no representation can precisely state the exact percentage of manufacturing and production costs which will be incurred because of possible changing circumstances occurring after award. However, Clark suggests that both Man and Hardill not only failed to properly complete the clause but also by inserting 100 percent did not transmit any of the required information rendering it as uncommunicative as if it had been left blank. For the reasons stated below, we cannot agree with Clark's position.

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We interpret clause B17 to require a commitment in the bid to perform not less than the designated percentage of the work at the stated locations in order to qualify for the preference category sought. Any indication of a commitment to perform more than the minimum called for cannot affect the bidder's eligibility for the preference. Therefore, if a bidder indicates at least the minimum percentage called for to qualify for the preference category and the contracting officer is satisfied that he can and will meet that commitment in performance, he should not be disqualified because his bid showed a percentage exceeding the minimum which he cannot in fact meet.

Since, on the basis of the above, all three concerns (Man, Hardill and Clark) are entitled to the same priority for award on the set-aside portion, award should be first offered to Man as the lowest responsive bidder on the non-set-aside portion with the price not to exceed the highest price under the non-set-aside portion.

Protest denied.


Deputy Comptroller General
of the United States