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DECISION

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

FILE: B-205050 DATE: December 4, 1981

MATTER OF: Uffner Textile Corporation

DIGEST:

1. When a firm withdraws its protest against a proposed contract award and in the withdrawal letter expresses continued interest in the matter--still under protest by another firm--and in an eventual award, the firm has shown sufficient interest in an award to extend the acceptance period of its bid until the resolution of the protest even though it did not expressly extend the bid.

2. A bidder is eligible for a Labor Surplus Area (LSA) evaluation preference not withstanding that the firm restricts from public disclosure information about the LSA where it will incur the requisite proportion of the contract cost, where the firm obviously has committed itself publicly in the bid to performance terms which otherwise establish its eligibility for the evaluation preference.

The United States District Court for the District of Columbia has requested our decision in a matter which Uffner Textile Corporation and Putnam Mills Corporation raised with both the court and this Office. The protesters/plaintiffs complained that the Defense Personnel Support Center, Defense Logistics Agency (DLA) improperly had determined Prestex, Inc. to be eligible for a Labor Surplus Area (LSA) bid evaluation preference under invitation for bids (IFB) No. DLA100-81-B-1268 for 2,821,000 yards of fabric. We find that DLA's determination was proper.

The IFB required bidders to state in their bids the percentage of the contract that would be performed in LSAs and to list the names and locations of the companies that would perform the contract so that DLA

could determine if the bidders were eligible for the preference. Prestex did not provide that information in the space provided; instead it stated that a letter with privileged information would follow. It attached to the bid, however, a letter containing the appropriate information, which it labeled "privileged." Uffner Textile and Putnam Mills, each in line for partial awards if Prestex is ineligible for the preference, then protested award to Prestex. (Prestex bid on an all-or-none basis and was the low aggregate bidder.) Putnam Mills has since withdrawn from the protest and the lawsuit.

Prestex argues that we should not consider the Uffner Textile protest because it is moot. According to Prestex, Putnam Mills permitted its bid to lapse when it withdrew its protest and therefore is ineligible for an award. Prestex observes that Putnam Mills' ineligibility for award would leave only Uffner and Prestex in the competition. Prestex reasons that the agency cannot make a partial award to both Prestex and Uffner Textile because of the all-or-none restriction in Prestex's bid; therefore, Prestex argues, only an aggregate award to Prestex, regardless of its eligibility for the LSA preference, will meet the agency's needs. This, Prestex suggests, renders the protest moot.

The record does not support Prestex's contention that Putnam Mills allowed its bid to expire. DLA reports that Putnam Mills orally extended its bid acceptance period from the initial expiration date of October 17, 1981, to October 28 and later extended its bid in writing to November 17 and then to November 30. In addition, Putnam Mills' letter withdrawing its protest, received October 15, stated that Putnam Mills agreed to "accept whatever decision the contracting officer deems appropriate in making awards." We believe the withdrawal letter reflects a continued interest in an award and thus had the effect of extending Putnam Mills' bid until Uffner Textile's protest was resolved. Putnam Mills' subsequent express extensions of the acceptance period in response to an agency request confirm its intention to remain in contention for award. Thus, we find no merit to Prestex's position on this point.

We will now discuss the merits.

The IFB provided a five-percent evaluation advantage to bidders who agreed to perform a substantial proportion of the contract in geographic areas which are classified

as LSAs by the Secretary of Labor.[1] A contractor is deemed to perform a substantial proportion of a contract in LSAs if the contractor or its first tier subcontractors incur more than 50 percent of the contract price in LSAs. The advantage was to be provided to LSA firms through the addition of five percent of a non-LSA bidder's evaluated bid price to the bid. A clause entitled "NOTICE OF TOTAL LABOR AREA SURPLUS CONCERN SET-ASIDE WITH PRICE DIFFERENTIAL" instructed bidders as follows:

> "Each offeror desiring to be considered for award as a LSA concern on this acquisition shall identify * * * the geographical areas in which it proposes to perform, or cause to be performed, a substantial portion of the contract. * * * Such offerors are instructed to insert in the clause entitled 'Eligibility for Preference as a Labor Surplus Area Concern' in Section K of the solicitation, the address(es) where costs incurred on account of manufacturing or production (by offeror or first tier subcontractor) will amount to more than fifty percent (50%) of the contract price."

The clause concluded with a warning to bidders:

> "CAUTION: Failure to list the location of manufacture or production and the percentage of cost to be incurred in each location in the space provided in the clause entitled 'Eligibility for Preference as a Labor Surplus Concern' * * * will preclude consideration of the offeror as a LSA concern."

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[1] Historically, a provision known as the Maybank Amendment was included in the annual Department of Defense (DOD) appropriation acts to prohibit the use of appropriated funds to pay price differentials on contracts for the purpose of relieving economic dislocation. In section 724 of the 1981 DOD Appropriation Act, Pub. L. No. 96-527, 94 Stat. 3085, the Maybank Amendment was modified to permit DLA, on a test basis, to pay up to a 5 percent price differential on these contracts. This solicitation was issued pursuant to that authorization.

The "ELIGIBILITY FOR PREFERENCE AS A LABOR SURPLUS CONCERN" clause repeated the requirement that bidders include the addresses in LSAs where more than 50 percent of the manufacturing or production costs will be incurred, and reiterated the warning, in upper-case letters, that failure to include the addresses will render a bidder ineligible for the LSA preference.

In the spaces where the bidder desiring the evaluation preference was to list the LSA concerns and their names and addresses, Prestex stated "LETTER OF PRIVILEGED INFORMATION TO FOLLOW." The contracting officer construed this statement to mean that the bidder promised to submit confidentially the addresses of firms in LSAs where the requisite proportion of costs would be incurred. The privileged information was submitted in a letter with the bid. The letter listed a specific subcontractor in an LSA and stated that more than 51 percent of the contract costs would be incurred there. The contracting officer concluded that Prestex had committed itself in the unrestricted portion of the bid to meet the IFB's LSA requirements, and that the firm therefore was eligible for the five-percent LSA preference. We agree.

The relevant procurement statute, 10 U.S.C. § 2305(c) (1976), requires that "Bids shall be publicly opened." We have consistently interpreted the public-opening mandate as requiring that the material terms of the contract be established at bid opening to protect the public interest and bidders against any form of fraud, favoritism or complicity and to leave no room for any suspicion of irregularity. Computer Network Corporation, 55 Comp. Gen. 445, 451 (1975), 75-2 CPD 297; Garrett Enterprises, Inc.--Reconsideration, B-196659.2, February 6, 1981, 81-1 CPD 70.

The material terms that must be disclosed publicly at bid opening are those elements of the bid which relate to price, quantity, quality or delivery. Garrett Enterprises, Inc., -- Reconsideration, supra. Information required for evaluation of the bid with respect to any of the material terms, therefore, generally must be publicly disclosed and available for examination. See Warner Laboratories, Inc., B-189502, October 21, 1977, 77-2 CPD 314.

Thus, the commitment to incur 51 percent of the contract costs in LSAs constitutes a material element of the bids under this invitation because by establishing eligibility for the LSA preference in bid evaluation it affects the relative standing of the bidders. See Chem-Tech Rubber, Inc., B-203374, September 21, 1981, 81-2 CPD 232. Also, it sets a firm's obligation if awarded the contract to incur those costs in LSAs so that if the firm does not do so during performance it will be in breach of contract.

The record shows that Prestex essentially was trying to conceal the identity of its subcontractor from public disclosure in what apparently is a very competitive atmosphere. We have recognized the propriety of bidding in that fashion with respect to LSA matters. For example, we have held that after bid opening a bidder may change the place or area where the requisite proportion of costs will be incurred to qualify the bidder for the LSA preference.[2] See Chem-Tech Rubber, Inc., supra; B-153267, June 8, 1964. We have also held that the bidder's representation of the amount of costs to be incurred in LSAs is immaterial except to the extent that it must represent at least the amount required in the IFB; therefore, a bidder who represents that 100 percent of the contract costs will be incurred in LSAs may reduce that amount after bid opening provided the actual amount still exceeds that actually required. Clark Division of Euclid Design and Development Company, B-185632, April 21, 1976, 76-1 CPD 270.

The underlying rationale for these decisions is that, except for the promise to incur the requisite proportion of costs in LSAs, the information pertaining to LSAs required by the IFB does not comprise a material term which must be established at bid opening. Rather, the information concerns the bidder's responsibility--its ability to meet the material terms of the contract. Generally, data dealing solely with the bidder's responsibility may be submitted after bid opening and prior to award, Paul N. Howard Company, B-199145, November 28, 1980, 80-2 CPD

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[2] This assumes that the bidder agrees at bid opening to perform in an area (or areas) designated as an LSA(s) by the Secretary of Labor at the time of bid opening, as well as the time of award as required by the IFB. See B-162881, April 10, 1968.

399, and may be submitted in confidence. Ace-Federal Reporters, Inc., 54 Comp. Gen. 340, 342 (1974), 74-2 CPD 239.

Thus, a bidder expressly may promise to perform as an LSA concern in its bid, and separately submit the address where the requisite proportion of costs will be incurred. In this respect, the fact that DLA's invitation appeared to mandate the submission of all of this information at bid opening is not dispositive, since an agency generally may not convert matters of responsibility into matters of responsiveness simply by the terms of the solicitation. See Paul N. Howard Company, supra; Paul N. Howard Company--Reconsideration, B-199145.2, July 17, 1981, 81-2 CPD 42.

We believe that Prestex's statement in the section of the IFB that dealt with LSA eligibility that "LETTER OF PRIVILEGED INFORMATION TO FOLLOW" under the circumstances adequately expressed a public legal commitment by Prestex to perform the contract in a manner that rendered the firm eligible for the five percent bid evaluation preference. The statement was inserted in the space in the IFB where a bidder claiming the preference was to list the name of the LSA concern that it would use. We think it unreasonable to assume that Prestex would have made that entry in that place in the bid unless it was committing itself to perform in a manner that would make it eligible for the preference.

Moreover, if Prestex simply had inserted the firm's name, under the terms of the IFB clause the public commitment would have been adequate. However, as stated above the contractor does not even have to use the firm listed in the bid; rather, it can list one concern and use another in performance as long as both are LSA concerns. Thus, a bidder essentially can disguise in the bid the name of the LSA firm it will use. On that basis, we think it illogical not to allow a bidder to restrict the name of the firm from public disclosure in the first instance.

Further, the "privileged" information in fact was furnished with the bid. It was in the form of a copy of the relevant IFB page with the name of an LSA concern listed and the indication that over 50 percent of the contract costs would be incurred in an LSA. We view the fact of this submission with the bid as a confirmation of Prestex's public commitment.

Finally, we note that, according to the record, the history of this type of procurement is such that firms often restrict LSA-related information, and their bids continually are accepted.

Accordingly, we believe that the contracting officer properly found that Prestex publicly committed itself to the performance condition that established the firm's eligibility for the five-percent evaluation preference. The protest is denied.

for Milton J. Socolar
Comptroller General
of the United States