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DECISION

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

FILE: B-205068 DATE: April 6, 1982

MATTER OF: S. G. Enterprises, Inc.

DIGEST:

A bidder is not eligible for an LSA evaluation preference if it makes a commitment in its bid to perform in an LSA but its proposed site of performance is a non-LSA at the time of bid opening.

S. G. Enterprises, Inc. (SG) protests the proposed award of a contract for flyers' helmet bags to S & S Garment Manufacturing Co. (S&S) under invitation for bids DLA100-81-B-1276 issued by the Defense Personnel Support Center, Defense Logistics Agency. SG contends that the contracting officer improperly determined that it was not eligible for a labor surplus area (LSA) evaluation preference on the ground that SG was not an LSA concern at the time of bid opening. We deny the protest because we agree with the contracting officer that SG was not an LSA concern for the purpose of this procurement.

This solicitation was issued as a total small business and LSA/small business set-aside which provided that non-LSA small businesses were subject to a five percent evaluation factor. Paragraph K17 of the IFB, entitled "ELIGIBILITY FOR PREFERENCE AS A LABOR SURPLUS CONCERN," instructed bidders desiring to be considered for award as an LSA concern to indicate the address(es) where costs incurred on account of manufacturing or production will amount to more than 50 percent of the contract price. Paragraph LD5 of

the IFB, entitled "NOTICE OF TOTAL SMALL BUSINESS AND LSA SMALL BUSINESS CONCERN SET-ASIDE WITH PRICE DIFFERENTIAL," defined an LSA as "a geographic area which at the time of award is classified as such by the Secretary of Labor in the Department of Labor 'Listing of Eligible Labor Surplus Areas Under Defense Manpower Policy 4A and Executive Order 10582,'" and it defined an LSA concern as a "concern that agrees to perform or cause to be performed a substantial proportion of a contract in labor surplus areas."

SG's bid of $8.96 per unit was the lowest of the twelve bids received. S&S was the second low bidder at $9.08 per unit. S&S was an LSA concern and thus was not subject to the five percent price increase assessed against non-LSA firms. SG desired to be considered as an LSA concern and its bid listed Miami, Florida as the site where all of its manufacturing and production costs for the contract would be incurred. However, at the time of bid opening, September 9, 1981, Miami was not included by the Secretary of Labor in the Department of Labor's (DOL) listing of LSAs. Miami was subsequently added to the DOL listing, effective October 1. The contracting officer determined that SG was not eligible for the LSA evaluation preference because Miami was not an LSA at the time of bid opening and, in evaluating SG's bid, increased its price by five percent. Consequently, SG was displaced as the low bidder by S&S. The award has been postponed pending the outcome of this protest.

SG contends that since Miami became an LSA after bid opening and would be an LSA at the time of award SG was an LSA firm under the terms of the solicitation and not subject to the five percent penalty. SG does not argue that Miami was an LSA at the time of bid opening, but maintains that the IFB defines an LSA as an area classified by the Secretary of Labor as an LSA at the time of award and does not mention the time of bid opening as controlling.

DLA responds that in order to be eligible for the LSA evaluation preference the geographic area in which the bidder proposes to perform must be classified as an LSA

at the time of bid opening, as well as at the time of award. DLA contends that SG created an ambiguity in its bid by indicating that it was an LSA concern, while stating that performance would occur in a non-LSA area. It maintains that whether or not a bidder intends to qualify as an LSA concern is a matter of "[non]responsiveness to that portion of the solicitation pertaining to LSA eligibility preference" which must be determined at bid opening.

While the information to be provided in paragraph K17 is not to assess the overall responsiveness of a bid but to determine the bidder's eligibility for the LSA evaluation preference, South Jersey Clothing Co.; Catania Clothing Corp., B-204531, B-204531.2, February 4, 1982, 82-1 CPD ____, we agree with the agency that such eligibility must be determined at bid opening.

A bidder establishes its eligibility as an LSA concern when it submits a bid indicating that at least 50 percent of the contract costs will be incurred in an LSA, thereby obligating itself to incur that proportion of the contract costs in an LSA. Chem-Tech Rubber, Inc., B-203374, September 21, 1981, 60 Comp. Gen. ____, 81-2 CPD 232. Further, we have held that a bidder's failure to complete the LSA certification clause is, in effect, a failure to enter a commitment to perform the requisite proportion of the contract in an LSA and that such failure is a material omission which cannot be waived as a minor informality. Chem-Tech Rubber, Inc., supra.

Here, SG did not fail to insert the location where the requisite proportion of the contract was to be performed, but instead inserted a non-LSA location in the space reserved for the designated LSA location. This, of course, created an ambiguity in SG's bid, in that the bid indicated that SG was eligible for the LSA evaluation preference but also indicated that the firm did not qualify for such a preference as its designated performance location was a non-LSA area.

We think that when all the IFB provisions concerning the LSA evaluation preference are read together it is clear that in order for a bidder to be eligible for an LSA preference the performance location for the requisite percentage must be an LSA at the time of bid opening as well as at the time of award. See Uffner Textile Corporation, B-205050, December 4, 1981, 81-2 CPD 443. In this regard, we note

that bidders were warned in the IFB that the failure to list an LSA location and the requisite percentage in their bids "will preclude consideration of the offeror as an LSA concern" and that the information required must be submitted with the offer if LSA eligibility is being claimed.

In our view, SG's listing of a non-LSA area in the LSA eligibility clause of the IFB had the same effect as would its failure to list a performance location at all--it did not promise to perform the contract in an LSA. Since SG did not promise at bid opening to perform in an LSA it was not bound to perform in such an area, thus allowing it to manipulate its competitive position after bid opening by either electing to perform in the area listed which later became an LSA or choosing not to. Therefore, the contracting agency was precluded from determining whether SG made a commitment to perform in an LSA and it properly determined that SG was not entitled to the LSA evaluation preference.

The protest is denied.

for Milton J. Socolar
Comptroller General
of the United States