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DECISION

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

FILE: B-208012 DATE: September 20, 1982

MATTER OF: Vi Mil Inc.

DIGEST:

1. In order to be eligible for labor surplus area (LSA) evaluation preference, a bid must propose a locality which is identified as an LSA on the Department of Labor's published list of LSA's at bid opening.

2. A bidder which submits a bid that does not qualify for labor surplus area (LSA) preference at bid opening cannot substitute a current LSA for its proposed non-LSA and thus become eligible for the preference.

3. An agency is not required to notify a protester of its decision to proceed with an award, notwithstanding a protest prior to award.

4. Where a bid is properly evaluated as other than low and award is made to the low bidder, claim for bid preparation costs is denied.

Vi Mil Inc. (Vi Mil) protests the Defense Logistics Agency (DLA) determination that Vi Mil's bid did not qualify for a labor surplus area (LSA) evaluation preference under invitation for bids (IFB) No. DLA100-82-B-0471. Vi Mil also protests the award of a contract to South Jersey Clothing Co. (SJC).

We deny Vi Mil's protest and its related claim for bid preparation costs.

The IFB solicited bids for 42,000 Army Green - 344 polyester/wool tropical men's coats. Paragraph K17, entitled, "ELIGIBILITY FOR PREFERENCE AS A LABOR SURPLUS CONCERN," notified bidders that LSA concerns would receive a preference and requested information on LSA locations:

> "* * * 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."

Paragraph LD5, entitled, "NOTICE OF TOTAL SMALL BUSINESS AND LSA SMALL BUSINESS CONCERN SET-ASIDE WITH PRICE DIFFERENTIAL," informed the bidders that only small business concerns could participate in the procurement and that, for the purposes of evaluation, a factor of 5 percent would be added to the bids of small businesses which were not LSA concerns. Furthermore, this paragraph, at subparagraph (d), in addition to advising bidders to identify in section "K" the geographic areas where performance will take place, states:

> "* * * If the Department of Labor classification of any such area changes after the offeror has submitted its offer, the offeror may change the area in which it proposes to perform, provided that it so notifies the contracting officer before award of the LSA set-aside portion.* * *"

In its bid, Vi Mil indicated that 61 percent of the costs of manufacturing and production would be incurred in four LSA's, including 25 percent in Orange, Massachusetts, and 13 percent in Philadelphia, Pennsylvania. Vi Mil submitted its bid on June 4, 1982. On the same day, the Department of Labor (DOL) published its new list, "Labor Surplus Areas Eligible for Federal Procurement Preference from June 1, 1982, through May 31, 1983," in the Federal Register. See 47 Fed. Reg. 24476, June 4, 1982. Philadelphia, which was on the prior list, was deleted and Orange, which was not on the prior list, was added.

Bids were opened on June 14, 1982. DLA concluded that Vi Mil could not be considered an LSA concern for this procurement since Philadelphia had been deleted from the DOL list in effect at the time of bid opening, resulting in an LSA commitment of less than 50 percent (61 - 13 = 48). Consequently, DLA added the 5-percent evaluation factor to Vi Mil's bid, making it the fourth low rather than the low bid.

It is Vi Mil's position that it should have been allowed, citing paragraph LD5(d), to substitute an LSA location on the new DOL list for Philadelphia. Vi Mil submits that it "promised to incur over 50 percent of the cost of manufacturing and production in a labor surplus area." Vi Mil contends that it had no knowledge of DOL's list prior to submitting its bid. However, Vi Mil admits that it learned of the new list several days after the submission of its bid. With respect to why, without knowledge of the new list, it listed Orange, not previously on the list, the president of Vi Mil, by affidavit, stated:

> "On or about May 17, 1982, I was informed by a member of the Department of Labor's Congressional Liaison Office, * * * that Orange, Massachusetts, would be added to the Department of Labor's listing of labor surplus areas which was expected to be released on June 1, 1982."

Alternatively, Vi Mil alleges that it made a mistake in transcribing figures from the "Place of Performance" portion of the bid which states that 30 percent of the sewing costs will be incurred in Orange, not 25. Therefore, Philadelphia's new status notwithstanding, the percentage of the cost of manufacturing and production in an LSA would entitle Vi Mil to the evaluation preference (61 - 13 + 5 = 53). Vi Mil requests, based on the above and the fact that no preaward written notification of the award was given to Vi Mil, that SJC's contract be terminated. Vi Mil asserts that the resulting contract should be awarded to Vi Mil and that it is entitled to bid preparation costs.

Initially, we reject Vi Mil's allegation that it made an error when it was filling out its bid. Vi Mil's bid, specifically to show eligibility for LSA preference, indicated that the percentage of costs to be incurred at Orange would be 25 percent. Vi Mil has failed to rebut DLA's argument that the fact that only one of the necessary contract operations, 30 percent of the sewing, will be performed in Orange does not necessarily mean that the 25-percent figure is inaccurate for Orange referring to total contract costs.

As for Vi Mil's principal arguments, it is clear that Vi Mil was aware that DOL's list would be released on June 1, 1982, prior to the submission of its bid and the bid opening date. Accordingly, Vi Mil, by submitting its bid 10 days prior to bid opening and before it reviewed the DOL list, assumed the risk that Orange would not be included and/or its other specified LSA's would be deleted from the list. In addition, Vi Mil admits that it learned of the actual publication of the new list prior to bid opening. Therefore, Vi Mil had the opportunity to confirm if Orange was included on the list and that the other areas were not deleted from the list and amend its bid, if necessary, prior to bid opening. Vi Mil, for unknown reasons, did not amend its bid.

In Vi Mil Inc., B-207603, June 23, 1982, 82-1 CPD 621, aff'd, on reconsideration, B-207603.2, July 30, 1982, 82-2 CPD ____, we held that to be eligible for a preference under the same DLA clause used he and existing regulations, a bid must propc locality which is identified as an LSA on the DO. list that is current as of the bid opening date. A commitment in a bid to perform in an LSA while listing a non-LSA place of performance at the time of bid opening is not enough to make a bidder eligible for an LSA preference. S.G. Enterprises, Inc., B-205068, April 6, 1982, 82-1 CPD 317. Therefore, since Vi Mil's bid, at bid opening, did not propose the minimum requirement to qualify for LSA preference, DLA was correct in adding an evaluation factor of 5 percent to Vi Mil's bid. Moreover,

in this circumstance, DLA properly refused to permit Vi Mil to substitute a current LSA for Philadelphia after bid opening. We have held that bidders may change proposed performance areas only if a bidder at the time of bid opening has satisfied the requirements of paragraph K-17, i.e., the bidder is eligible for an LSA preference. See Uffner Textile Corporation, B-205050, December 4, 1981, 81-2 CPD 443.

Vi Mil's final argument, that award was improper since it did not receive preaward written notification, is also denied. DLA has advised our Office that there was an urgent need for the coats in question and, therefore, the contracting officer, in accordance with Defense Acquisition Regulation § 2-407.8(b)(3)(i), (ii) and (iii) (1976 ed.), made the determination to award notwithstanding the protest. Subsequently, the DLA Executive Director for Contracting approved this determination. Award was made on July 29, 1982, and notification was sent to Vi Mil on the same date. We have held that an agency is not required to notify a protester of its decision to proceed with award, notwithstanding the protest prior to award. See La Barge, Incorporated, B-190051, January 5, 1978, 78-1 CPD 7. Furthermore, since DLA determined that an award must be made promptly and the determination was approved at a higher level than the contracting officer, in accordance with applicable regulations, such is not subject to question by our Office. See The Entwistle Company, B-192990, February 15, 1979, 79-1 CPD 112.

In regard to Vi Mil's claim for bid preparation costs, since Vi Mil's bid was properly evaluated as other than the low bid, the claim must be denied. See Colorado Research and Production Laboratory, B-199755, March 5, 1981, 81-1 CPD 170.

The protest and claim are denied.

Harry R. Van Cleve

for Comptroller General
of the United States