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

FILE: B-207068.2 DATE: September 27, 1982

MATTER OF: Martin Manufacturing Co., Inc.

DIGEST:

Where IFB states that bidders will be given an evaluation preference if they propose to perform work in a labor surplus area listed by the Department of Labor, a bidder proposing to perform in an area which would be included on the next published list, scheduled to be effective 2 days after bid opening is entitled to the perference since, under the particular circumstances presented, the bidder's proposed place of performance was tantamount to having been on the current list at the time of bid opening.

Martin Manufacturing Co., Inc. (Martin), protests that it was improperly denied status as a labor surplus area (LSA) concern under invitation for bids (IFB) No. DLA100-82-B-0445, issued by the Defense Logistics Agency (DLA), Defense Personnel Support Center, Philadelphia, Pennsylvania.

We sustain the protest.

The IFB solicited bids for 770,328 men's short sleeve shirts. Paragraph K17, entitled "ELIGIBILITY FOR PREFERENCE AS A LABOR SURPLUS CONCERN," notified bidders that LSA concerns would receive a preference under this procurement and requested information on the location or locations of the labor surplus area "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 bidders that only small business concerns could participate in the procurement and that, for purposes of evaluation, a factor of 5 percent would be added to the bids of small businesses which were not LSA concerns.

In its bid, Martin indicated that its place of performance would be Weakley County, Tennessee. As of the date the IFB was issued, Weakley County had not been included on the list of LSA's published by the Department of Labor. However, the area had experienced a substantial surge in unemployment and this situation was brought to the attention of the Secretary of Labor. The Secretary conducted an inquiry and concluded that, under the provisions of 20 C.F.R § 654.5(c) (1981), "exceptional circumstances" existed which justified inclusion of Weakley County on the LSA list.

In a March 12, 1982, letter to two members of Congress, the Secretary stated:

> "[W]e will include Weakley County in the next update to the annual listing of labor surplus areas. This update will be effective April 1."

By letter of March 27, 1982, Martin informed the contracting officer of this development and further stated that its bid could now be considered to comply with the solicitation's LSA provisions--paragraphs K-17 and LD5.

Bids were opened on March 30, 1982. On that same day, the notice of Weakley County's addition to the LSA list was published in the Federal Register. See 47 Fed. Reg. 13432, March 30, 1982. This notice stated that Weakley County and certain other specified locations "are classified" labor surplus areas and "are added to the annual list of labor surplus areas, effective April 1, 1982." The notice further indicated that it had been signed by the Assistant Secretary of Labor on March 18, 1982.

After examining the bids, DLA concluded that Martin could not be considered an LSA concern for purposes of this procurement because Weakley County had not been included on the LSA list actually in effect at the time of bid opening. Consequently, DLA added the 5-percent evaluation factor to Martin's bid and

this effectively removed Martin from the competition. The award was ultimately made to Gulf Apparel Corporation, an LSA concern.

Martin argues that it should have been considered an LSA concern. In Martin's opinion, the critical time with respect to LSA classification is the time of award, not bid opening. In this connection, Martin argues that, other than the certification in the bid that the requisite amount of manufacturing would be performed in a labor surplus area, other information on LSA eligibility is a matter of responsibility which can be furnished any time before award. Thus, in Martin's opinion, there was no need for Weakley County to be included on the LSA list at the time of bid opening so long as it was on the list by the time of award.

Alternatively, Martin claims that, for all practical purposes, Weakley County was on the LSA list at the time of bid opening. The announcement of Weakley County's addition to the list was published in the Federal Register on the very day bids were opened and, even though this notice stated that the effective date for changes to the list was April 1, 1982, the notice also indicated that the actual determination to add Weakley County and the other locations to the list had been made on March 18, 1982. In Martin's opinion, it is a matter of form over substance for DLA to refuse to recognize Martin's LSA status under the facts presented--Martin had committed itself to perform 100 percent of the work in a labor surplus area, and the proposed site for performance was, except for procedural technicalities, accepted by the Department of Labor as a labor surplus area.

In S. G. Enterprises, Inc., B-205068, April 6, 1982, 82-1 CPD 317, we held that a bidder is not eligible for an LSA evaluation preference if it makes a commitment in its bid to perform in a labor surplus area, but its proposed site of performance is a non-labor surplus area at the time of bid opening. Martin, however, argues that this case can be distinguished from its situation. According to Martin, our concern in S. G. Enterprises was that the protester

had created an ambiguity in its bid which meant that it was not legally bound to perform in a labor surplus area and, therefore, could manipulate its competitive position after bid opening by either electing to perform in the area listed, which later became a labor surplus area, or choosing not to. In Martin's opinion, it does not have this option, but is committed to performance in just one location--Weakley County--a location that was clearly designated a labor surplus area before bid opening, even if not technically on the LSA list at the time bids were opened.

While it might be argued that Martin's situation differs from the one presented in S. G. Enterprises, it is quite similar to the situation presented in Vi Mil, Inc., B-207603, June 23, 1982, 82-1 CPD 621. There, the protester argued, as Martin does here, that it should have been considered eligible for the LSA preference because it had learned in advance of bid opening that the Department of Labor planned to include its proposed location in the next publication of the LSA list. In finding Vi Mil ineligible for the LSA preference, we held that, to be eligible for preference under the DLA clause (the same one used in the present solicitation as well as in S. G. Enterprises) and existing regulations, a bid must propose a locality which is identified as an LSA on the published list that was current as of the bid opening date. See also Vil Mil, Inc.--Reconsideration, B-207603.2, July 30, 1982, 82-2 CPD ____, where we affirmed our original decision.

However, despite the apparent similarity between the Vi Mil decision and Martin's situation, the two cases can be distinguished on there facts. In Vi Mil, bid opening took place on May 17, 1982, but the place of performance Vi Mil specified in its bid as a labor surplus area was not added to the LSA list until June 1. Moreover, there is no indication that anyone other than Vi Mil was aware of the upcoming addition to the LSA list. Here, on the other hand, the Secretary of Labor announced the upcoming change in Weakley County's LSA status by his letter of March 12, 1982, and this information was conveyed to

DLA prior bid opening. But more importantly, a public notice of Weakley County's addition to the list was published in the Federal register on the day of bid opening. Also, here there was a lapse of less than 2 days between bid opening (March 30) and the effective date (April 1) of Weakley County's LSA status while in Vi Mil there was a lapse of 2 weeks.

In view of the various disputes that have arisen here, in S. G. Enterprises, and in Vi Mil, we believe that a specific cutoff point for actually being on the current LSA list must be established and logically this cutoff point is at the time of bid opening. Nevertheless, an overly technical application of this general would serve no useful purpose. As noted in S. G. Enterprises, a bidder's listing of a non-LSA area in the IFB's LSA eligibility clause can create an ambiguity in the bid and provide the bidder with an opportunity to manipulate its competitive position after bid opening by either electing to perform in the area listed, which later became a labor surplus area, or choosing not to. In the present case, however, there are significant differences which remove it from S. G. Enterprises and Vi Mil situations. The Secretary of Labor's March 12 letter, the publication in the Federal Register on the day of bid opening, and Weakley County's LSA status becoming effective less than 2 days after bid opening, when viewed together, was tantamount to Weakley County having been on the current LSA list at the time of bid opening.

Since under the particular circumstances of this case Martin was entitled to the LSA preference, we recommend that DLA reevaluate Martin's bid and determine what part, if any, of the total requirement Martin would have been entitled to if its bid had been evaluated in that manner originally. We further recommend that, after completing this reevaluation, DLA terminate the contract with Gulf Apparel Corporation to the extent necessary to award to Martin all, or as much as possible, of the amount it otherwise would have received had it been given the LSA preference at the outset.

Martin has also complained that DLA violated Defense Acquisition Regulation § 2-407.8(b)(3) (1976 ed.) when it failed to notify Martin of an earlier protest filed by the Gulf Apparel Corporation (later withdrawn when Gulf received the award). However, in view of our recommendation for corrective action, we believe that this basis for protest is now academic and need not be considered.

By separate letter of today, we are notifyng the Director, DLA, of our findings.

We sustain the protest.

Harry R. Van Cleve

for Comptroller General
of the United States