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DECISION

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

FILE: B-208170 **DATE:** December 29, 1982

MATTER OF: East Wind Industries, Inc.

DIGEST:

1. Where bidder indicates that more than 50 percent of the cost of manufacture or production in small business/labor surplus area (LSA) small business set aside would be incurred in an area which is a non-LSA area at the time of bid opening, the bidder is not entitled to the LSA evaluation preference.

2. Where conflict exists between the protester and the agency on a disputed question of fact and the only evidence before GAO consists of contradictory assertions, protester has not carried its burden of affirmatively proving its allegation.

East Wind Industries, Inc. protests the award of a contract for 504,000 waterproof clothing bags to any other bidder under invitation for bids (IFB) No. DLA100-82-B-0820, issued on May 27, 1982 by the Defense Personnel Support Center, Defense Logistics Agency (DLA). East Wind contends that DLA improperly refused to consider it eligible for a labor surplus area (LSA) evaluation preference.

The solicitation, which contained an opening date of June 21, was set aside for small business/LSA small business and provided that non-LSA small businesses would be subject to a 5 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 LSA concerns to indicate the address(es) where costs incurred on account of manufacturing or production would amount to more than 50 percent of the contract price. It also cautioned bidders that failure to list the location of manufacture or production and the percentage, if required, of cost to be incurred at each location would preclude consideration of the offeror as an LSA concern.

Paragraph LD5 of the solicitation 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 10562,'" 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."

East Wind--the second low bidder--submitted a bid of $1,885,539.60, and listed its plant at Clayton, Kent County, Delaware as the site where more than 50 percent of its costs of manufacturing production would be incurred. The low bidder, Fancy Industries, Inc., bid $1,881,079.20, and although it claimed an LSA preference it specified Brooklyn, New York, a non-LSA area, as the place where all of its costs would be incurred. Thus, if the 5 percent evaluation factor were applied to Fancy's bid, East Wind would be the low bidder.

At bid opening, the contracting officer discovered that Kent County, Delaware was no longer listed as a labor surplus area. Since none of the other bidders qualified for the LSA preference, the contracting officer did not apply the 5 percent evaluation factor to any of the bids. After bid opening, by letter dated June 22, East Wind sought to "clarify" the LSA notation in its bid. It stated that the cloth for the bags would be produced by a subcontractor in Milford, Massachusetts--an LSA area--and that the cost of the cloth would amount to more than 50 percent of its bid price. DLA, however, refused to permit "clarification" of East Wind's bid.

East Wind states that the contracting officer "directed" it not to include its subcontractor in its certification for LSA eligibility and assured that firm that it would be permitted to alter its listed place of performance if that location was not on the current LSA list. Consequently, East Wind maintains that the agency was bound by the actions of its authorized representative to consider its "clarification" letter. Further, East Wind argues that, in any event, its bid was responsive as it included a legal commitment to perform in an LSA area and its failure to list its supplier was a minor informality, which as a matter of responsibility could be corrected after bid opening.

Under the LSA provisions in the solicitation, a bidder is required to list its proposed areas of performance, and the legal commitment to perform in an LSA arises if the areas listed are LSAs. Vi Mil Inc.--Reconsideration, B-207603.2, July 30, 1982, 82-2 CPD 96. For evaluation purposes, the relevant issue is simply whether at the time of bid opening the bidder is eligible to be considered for the LSA evaluation preference because of that legal commitment in the bid. Since a geographic area only achieves the status of an LSA as a result of the Secretary of Labor's published listing, and because the material terms of a contract must be established at bid opening, Uffner Textile Corporation, B-205050, December 4, 1981, 81-2 CPD 443, it is essential that a bidder legally obligate itself to perform in an LSA by committing itself to perform in an LSA at the time of bid opening. See S.G. Enterprises, Inc., B-205068, April 6, 1982, 82-1 CPD 317. Thus, the bidder's designation of a geographic area that is not included on the Secretary of Labor's published list of LSAs at the time of bid opening does not create the essential legal obligation to perform the contract in an LSA, even if, as here, that area previously was on the LSA list but had been removed prior to bid opening. See S.G. Enterprises, Inc., supra.

The fact that the bidder actually intended to have more than 50 percent of the costs incurred by an unlisted supplier located in an LSA is irrelevant, as is the fact that the bidder actually may not have known that its designated location had been removed from the LSA list. Here, Kent County, Delaware was not on the LSA list published in the Federal Register on June 4, 17 days before bid opening. (47 Fed. Reg. 24474.)

Further, we do not find that the record supports East Wind's position that its failure to designate an LSA area in its bid was the result of improper advice from the contracting officer.

First, the contracting officer specifically denies that he assured East Wind that it could change its designated location, and thereby remain eligible for the LSA preference, if that location was not on the Secretary's LSA list at bid opening. The contracting officer also refutes East Wind's contention that it was "directed" to exclude subcontractors or suppliers in its LSA certification. The contracting officer explains that in response to East Wind's representative's question whether suppliers must be listed in the LSA certification clause, the contracting officer asked whether East Wind was located in an LSA and whether East Wind's previous bids listing its main plant had been accepted. The contracting officer states that when East Wind's representative answered that East Wind was located in an LSA and its prior bids had been accepted, the conversation ended. The contracting officer also states that neither party discussed the specific breakdown of manufacturing or production costs for this procurement. We do not find that the contracting officer's version of the conversation constitutes a "direction" that suppliers be omitted from the LSA certification. The protester has the burden to prove its case, and when the only evidence on the issue is conflicting statement by the protester and contracting officials, that burden is not met. International Automated Systems, Inc., B-205728, February 8, 1982, 82-1 CPD 110. In this regard, we find it difficult to understand why East Wind would list its plant as the site where over 50 percent of its costs would be incurred when in fact it admits this statement was not true, but that over 50 percent of its costs would actually be incurred by its supplier at a different location.

The protest is denied.

for Milton J. Socolar
Comptroller General
of the United States