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

FILE: B-221031; B-220409 **DATE:** February 18, 1986

MATTER OF: Lite Industries, Inc.; Magline, Inc.

DIGEST:

1. Where statutory test program permitting the Defense Logistics Agency to apply a price differential of up to 2.2 percent in favor of bids submitted by labor surplus area concerns expired at the end of fiscal year 1985 and was not extended by the House Joint Resolution making continuing appropriations for fiscal year 1986, agency properly declined to apply price differential where bids were solicited and opened during fiscal year 1985 but where contract was not "made"--awarded--until after fiscal year 1985's expiration when continuing resolution was in effect.

2. Agency's refusal to apply a percentage differential in evaluating price offered by labor surplus area concern was proper where statutory authority to do so had expired as of time of award, and was consistent with the provisions of the solicitation relating to evaluation of bids, which specifically warned bidders that "if no legislation is in effect at time of award which authorizes the payment of a price differential, no evaluation factor will be added to the offers submitted."

Lite Industries, Inc., and Magline, Inc., have filed similar protests, predicated on the same issue of statutory interpretation, concerning two separate Defense Logistics Agency (DLA) solicitations. We have combined the protests in one decision to facilitate comprehensive treatment of the issue raised.

THE LITE INDUSTRIES PROTEST

Lite Industries, Inc., protests the award to Hialeah Industries, Inc., of a firm fixed price contract for wet

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weather poncho liners under invitation for bids (IFB) No. DLA100-85-B-1078 issued by the DLA's Defense Personnel Support Center. The solicitation was a total small business set-aside with price differential for Labor Surplus Area (LSA) concerns. The solicitation was issued on August 8, 1985; bids were opened on September 10, 1985; and the contract was awarded to Hialeah on October 29, 1985. Lite argues that the agency erred in failing to apply the 2.2 percent price differential for LSA concerns in the evaluation of bids under the solicitation, as a result of the agency's allegedly erroneous determination that the legislation authorizing the payment of a price differential for the purpose of relieving economic dislocations had expired. We deny this protest.

Lite protested to the agency upon being advised of the award to Hialeah. Lite maintained that Hialeah ($13.45 per unit) did not qualify as an LSA concern, but that Lite ($13.48 per unit), did.1/ Since its bid was within 2.2 percent of Hialeah's, Lite argued, the application of the differential in favor of LSA concerns should have resulted in award to it. The agency advised Lite that the 2.2 percent price differential permitted under section 1254 of the Department of Defense (DOD) Authorization Act, 1985, expired at the end of fiscal year 1985 on September 30, 1985, and that the preference for LSA firms was not applicable to the contract made for this DLA procurement on October 29, 1985. Lite then protested to this Office that the continuing resolution2/ passed by Congress on September 30, 1985, extended the preference for LSA firms because the purpose of the continuing resolution was to continue government spending in the same manner and at the previous level existing at the end of the fiscal year on September 30, 1985. Therefore, according to the protester, the agency was obligated to spend money on a continuing

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1/ Hialeah, which in its bid claimed eligibility as an LSA concern, contends that it, also, was a fully qualifying LSA concern entitled to the 2.2 percent differential. DLA did not address this contention in its administrative report. In view of our finding that the 2.2 percent differential was not applicable to this procurement, however, we need not address Hialeah's LSA status.

2/ The term "continuing resolution" refers to legislation enacted by Congress to provide budget authority for federal agencies and specific activities to continue in operation until the regular appropriations are enacted. See generally 58 Comp. Gen. 530, 532 (1979).

basis for programs under the same terms and conditions as existed under the DOD Authorization Act, 1985, until the continuing resolution expired on November 14, 1985. Moreover, in Lite's view, if Congress had wanted to end the LSA preference or limit spending for the test program it would have specifically said so in the continuing resolution.

The DLA rejects the protester's statutory interpretation, concluding instead that the test program authority found in the DOD Authorization Act, 1985, which permitted payment of price differentials to relieve economic dislocations, expired at the end of the 1985 fiscal year. DLA further contends that since the DOD Authorization Act, 1986, was enacted on November 8, 1985, without providing in any way for the test program, it evidences Congress' intent to end the test program in accordance with the statutory term of September 30, 1985, provided in the DOD Authorization Act, 1985. In DLA's view, to the extent that the continuing resolution continued programs under their current terms and conditions, the current terms and conditions for the LSA preference test program required its expiration on September 30, 1985, the end of the 1985 fiscal year. Thus DLA concludes that to require it to apply the LSA preference price differential as an evaluation factor under the protested solicitation would result in the application of public funds under a program that has not been authorized by law.

Under section 1109 of Pub. L. No. 97-252, 96 Stat. 746 (September 8, 1982), as amended by section 1205 of Pub. L. No. 98-94, 97 Stat. 683 (September 24, 1983), the Secretary of Defense was authorized to conduct a test program during fiscal years 1983 and 1984 and pay up to a 2.2 percent price differential under contracts awarded to a qualifying Labor Surplus Area concern. Section 1254 of Pub. L. No. 98-525, 98 Stat. 2611 (October 19, 1984), popularly known as the DOD Authorization Act, 1985, specifically extended the test program for one additional year through the end of fiscal year 1985. House Joint Resolution 388 (Pub. L. No. 99-103, 99 Stat. 471 (September 30, 1985))[3] making continuing

[3] Continuing resolutions are enacted as joint resolutions making continuing appropriations for a certain fiscal year. Although enacted in this form rather than as an act, once passed by both Houses of the Congress and approved by the President, a continuing resolution is a public law and has the same force and effect as any other law.

appropriations for fiscal year 1986, was the funding authority in effect and applicable to this procurement on the date of the award of this contract on October 29, 1985. On November 8, 1985, Congress passed the DOD Authorization Act, 1986 (Pub. L. No. 99-145, 99 Stat. 583 (November 8, 1985)), without authorizing, funding, or otherwise addressing the LSA preference test program.

Although we recognize that a continuing resolution is a temporary appropriations act to keep existing programs functioning after the expiration of previous budget authority, the issue in this case involves the expiration of the program authorization itself as well as the expiration of funding. In similar circumstances, we have held that the specific inclusion of a program in a continuing resolution will provide both authorization and funding to continue the program despite the expiration of the appropriation authorization legislation. Similarly, if it is clear from the legislative history that Congress intends certain programs to continue under the resolution despite the lack or expiration of authorizing legislation, the resolution will act both as authorization and appropriation. For example, in 55 Comp. Gen. 289 (1975) we found that the continuing resolution specifically stated that the program under consideration was to be continued under the resolution. This clear intent on the part of the Congress supported our determination that the program could be continued although authorization legislation for the program expired prior to or during the period the resolution was in effect. Id., at 292.

In the present case, however, the test program was not specifically included in the continuing resolution, and we find no evidence to support the protester's contention that Congress intended the test program to be extended by the continuing resolution beyond the end of the 1985 fiscal year. We are unconvinced by protester's general contention that Congress intended the very specific end of fiscal year 1985 expiration for the test program--which appears under the equally specific statutory rubric "ONE-YEAR EXTENSION OF TEST PROGRAM TO AUTHORIZE PRICE DIFFERENTIALS TO RELIEVE ECONOMIC DISLOCATIONS" in the DOD Authorization Act, 1985--to be submerged in and extended by the very general provision of the continuing resolution in this case. Nor do we find any indication or direction in committee reports, floor debates and hearings, or statements in budget projections or justifications that would support protester's contention that the agency was bound to continue operation of the test program during the period of the continuing

resolution until enactment of the DOD Authorization Act, 1986.

Lite's protest was filed with this Office on November 8, 1985, at a time when the protester believed that Congress would act to further extend the test program in the DOD Authorization Act, 1986. However, Congress did not specifically extend, provide funds, or address the test program in any way. In the absence of any indication that Congress intended to extend the test program beyond its September 30, 1985 expiration date, we will not object to the DLA's determination that applying the test program evaluation factor and paying a 2.2 percent price differential under this solicitation would violate 10 U.S.C. § 2392 (1982), which prohibits the use of Department of Defense funds to pay a price differential for the purpose of relieving economic dislocations.

Lite's protest is therefore denied.

THE MAGLINE PROTEST

Magline, Inc., protests the award to Doninger Metal Products Corporation of a firm fixed price contract for expandable aluminum tent frames under DLA's Defense Personnel Support Center invitation for bids (IFB) No. DLA100-85-B-1118, another total small business set-aside with price differential for LSA concerns. As in the case of Lite Industries, the solicitation was issued and bids were opened in fiscal year 1985; award was made in fiscal year 1986. Magline, too, protests DLA's failure to apply the 2.2 percent price differential for LSA concerns in the evaluation of bids, arguing that the agency erroneously determined that the legislation authorizing the payment of a price differential for the purpose of relieving economic dislocations had expired.

For the reasons stated above in conjunction with the protest of Lite Industries, Magline's protest on this basis is denied.

Magline further contends that since section 1254 of the DOD Authorization Act, 1985, was in effect at the date of bid opening on September 25, 1985--prior to the Act's expiration on September 30, 1985--the solicitation was "funded" before the test program expired, and the 2.2 percent differential should apply to the evaluation of bids in this case. We disagree.

The legislation set out at 10 U.S.C. § 2392 Note, as amended, states that the Secretary of Defense may exempt from the restrictive provisions of that statute:

> "any contract (other than a contract for the purchase of fuel) made by the Defense Logistics Agency during fiscal years 1983, 1984, and 1985 if the contract is to be awarded to an individual or firm located in a Labor Surplus Area . . . ."

The legislation specifically refers to contracts "made" by DLA by the end of the 1985 fiscal year. Since the contract here was formed, or "made," within the meaning of the statute when the contract was awarded to Doninger on October 24, 1985, it follows that the contract was made after the DOD Authorization Act, 1985, and the test program had expired with the end of the 1985 fiscal year on September 30, 1985.

Magline further contends that, even if the test program authorization and funding had expired on September 30, 1985, it should still receive the benefit of the test program's price differential because the solicitation specifies that bids would be evaluated on the basis of price differentials for LSA concerns. Noting that the purpose of a solicitation is to apprise bidders, prior to bid opening, of the specific factors on which bids will be evaluated, and to ensure that bidders compete on the same basis, Magline contends that because the IFB contained standard LSA price differential clauses, bids must be evaluated on the basis of this differential. Here again, we disagree.

Paragraph (e) of the clause entitled, "NOTICE OF TOTAL SMALL BUSINESS SET-ASIDE WITH PRICE DIFFERENTIAL FOR LABOR SURPLUS AREA CONCERNS (APR. 1985)" which is incorporated by reference in the solicitation in accordance with Defense Logistics Acquisition Regulation § 52.220-9000 (July 1985), states as follows:

> "(e) The evaluation factor described in subparagraph (a) above is authorized by legislation in effect at the time of solicitation issuance. If the authorized percentage factor is changed by legislation which takes effect before award, offers will be evaluated using the percentage factor so authorized. <u>If no legislation is in effect at the time of award which authorizes the payment of a price differential, no evaluation factor will be added to the offers submitted.</u>

> Offerors are cautioned that this solicitation will not be amended solely to advise of a change in the applicable percentage to be used as an evaluation factor." (Emphasis added.)

This provision adequately notifies bidders that legislative changes, such as the expiration of the test program in this case, may preclude the use of the price differential as an evaluation factor. The award to Doninger, therefore, was not inconsistent with the solicitation.

Magline also asserts that the solicitation clause quoted above is prejudicial to LSA concerns because a qualifying bidder must speculate as to whether legislation in effect at bid opening will still be in effect at the time the contract is awarded.

Calculating a bid to be submitted near the end of a fiscal year based on assumptions as to whether Congress will continue a program may well involve the perception of risk. If so, it must necessarily be a risk one assumes in doing business with the government. To hold otherwise would require the DLA to apply an evaluation factor and pay a price differential for a contract made on October 24, 1985, under program authority which expired on September 30, 1985, and is no longer authorized by law. Moreover, with the expiration of the test program authority, the remaining provisions of 10 U.S.C. § 2392 strictly prohibit the use of Department of Defense funds to relieve economic dislocations, and any action by DLA to pay a price differential in these circumstances would violate that statute. Accordingly, Magline's protest on this basis is denied.

Harry R. Van Cleve

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