



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Martin Tool & Die, Inc.

File: B-230915.2; B-231780

Date: August 11, 1988

DIGEST

1. Protester, offering one of two equal prices, was not entitled to a labor surplus area evaluation preference where the contracting agency was unable to determine that 50 percent of the protester's total costs will be incurred on account of manufacturing or production in a labor surplus area.
2. Protest of cancellation of solicitation and issuance of a new one for the same item, based on allegation that these actions were taken to avoid contract award to protester under the first solicitation, is denied where the protester was not entitled to an award in the earlier procurement.

DECISION

Martin Tool & Die, Inc., protests (1) that it should have been awarded a contract under request for proposals (RFP) No. DAAA09-87-R-1502 (RFP No. 1502), and (2) the issuance of RFP No. DAAA09-87-R-0691 (RFP No. 0691); both RFPs were issued as total small business set-asides by the U.S. Army Armament, Munitions and Chemical Command, Rock Island, Illinois, for elevation indexes for the M-16 rifle. Martin complains that the Army canceled RFP No. 1502 for lack of funds, yet apparently is resoliciting the requirement under RFP No. 0691.

We deny the protests.

In an earlier protest involving RFP No. 1502, Martin contended that the Army improperly awarded the contract to Harder Precision Components, which had offered the same price as did Martin. Martin, contending that it is a labor surplus area (LSA) concern, argued that the award contravened section 14.407-6(a) of the Federal Acquisition Regulation (FAR) (FAC 84-7), which specifies the order of

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priority that must be followed when an agency receives two or more equal bids, and requires that first priority be given to an LSA concern. The Army instead had held a drawing by lot in order to break the tie, pursuant to FAR § 14.407-6(b), and subsequently awarded the contract to Harder, the successful draw.^{1/}

We dismissed the earlier protest as academic because the Army responded by agreeing with Martin that the agency should have considered the LSA preference before drawing lots. The Army then conducted an investigation to determine whether either offeror qualified as an LSA concern, and concluded that the information provided by Martin did not substantiate the firm's assertion that it qualified; the Army decided that contract award to Martin therefore was not appropriate under the circumstances.

The Army also noted that RFP No. 1502 did not contain the clause at FAR § 52.220-1 (FAC 84-31) advising prospective offerors that a firm's status as an LSA concern might affect entitlement to award in case of tie offers. That clause also provides space for an offeror to indicate the LSA in which the contract would be performed, and states that an offeror's failure to identify LSA locations will preclude consideration of the offeror as an LSA concern. Accordingly, on the basis that the clause was not in the RFP, the Army concluded that the solicitation had been defective, and the agency chose to remedy the defect by terminating the protested contract; at that point, the Army stated it intended to resolicit the requirement. Martin then protested to our Office about the Army's action and the agency's failure to award Martin the contract under RFP No. 1502.

Subsequently, the M-16A2 rifle overhaul program that had generated the requirement for elevation indexes under RFP No. 1502 was canceled due to Army-wide budgetary constraints, and the intended resolicitation action was dropped. Shortly after canceling RFP No. 1502, however, the Army issued RFP No. 0691, and Martin then filed the second protest that is the subject of this decision.

The Army explains that the two solicitations were issued to satisfy different requirements by different internal supply managers, using different funds. RFP No. 1502 was issued to replenish the supply of elevation indexes in the depot stock

^{1/} Although FAR § 14.407-6 applies to sealed bidding where two or more equal low bids are received, the Army decided to follow the regulation in order to break the tie between Martin and Harder.

and was to be funded by the Army Stock Fund. Because the requirement levels and reorder cycles for elevation indexes were reduced to conserve Stock Fund money, and the overhaul program for M-16A2 rifles, for which this item was needed, was canceled, the requirement covered by RFP No. 1502 was not resolicited. The elevation indexes to be procured under the new solicitation, RFP No. 0691, will be used in converting a quantity of M-16A1 rifles into M-16A2 rifles. The new requirement is being funded by the United States Army Procurement appropriation, which is used to support the M-16 rifle.

Martin protests that the cancellation of RFP No. 1502 due to a lack of funds was no more than a way to avoid contracting with the firm, and that RFP No. 0691 in fact represents a resolicitation for the same requirement. Martin argues that it does qualify for the LSA preference and that, in these circumstances, RFP No. 1502 should be reinstated and Martin awarded a contract for the items. Implicit in Martin's position is the assumption that whatever funds are available for award under RFP No. 0691 could be used for award under the canceled solicitation.

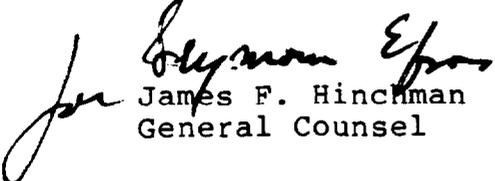
We will not review the specific issues Martin's raises. The reason is that, irrespective of the legitimacy of the Army's internal funding problems, we cannot find that Martin ever was entitled to an award under RFP No. 1502, so that the firm has not been prejudiced by the Army's actions.

The commitment to perform substantially in an LSA, which establishes a firm's eligibility for an LSA preference, is material and must be evident from the offer itself. See Silent Partner, Inc., B-224262.2, Nov. 7, 1986, 86-2 CPD ¶ 535 (concerning a sealed bid procurement). As discussed above, the clause at FAR § 52.220-1 was not in the RFP, and there was nothing else in Martin's offer evidencing an LSA commitment under RFP No. 1502. Moreover, the record indicates that after considering all available facts, including information provided by Martin, the Army was unable to conclude that, in any event, Martin would incur more than 50 percent of its costs on account of manufacturing or production in an LSA, which is necessary for a firm to qualify for a preference. See FAR § 20.101 (FAC 84-5). We have reviewed the Army's analysis, as well as a rebuttal to it that Martin had submitted in a protest filed directly with the Army, and we see no legal basis on which to disagree with the Army's position.

In these circumstances, we cannot say that Martin, instead of Harder, was entitled to the award under RFP No. 1502. Martin therefore was not prejudiced by the Army's decision

to cancel the solicitation. Martin's only proper entitlement thus is precisely what the firm is receiving by the issuance of RFP No. 0691, i.e., the chance to compete to fulfill the government's needs.

The protests are denied.


James F. Hinchman
General Counsel