Comptroller General
of the United States

Washington, D.C. 20548

8061410

Decision

Matter of: Unique Presort Services, Inc.

File: B-251317.4

Date: October 14, 1993

Jeffrey W. Horwitz, Esq., for the protester.
Jeffrey L. Michelman, Esq., Blumenfeld, Kaplan & Sandweiss, for Zip Mail Services, Inc., an interested party.
William E. Thomas, Jr., Esq., Department of Veterans Affairs, for the agency.
Scott H. Riback, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that offeror is a de facto labor surplus area (LSA) concern because of the composition of its workforce is denied; in order to be considered an LSA concern eligible for award under LSA set-aside, a firm must agree to substantially perform the contract at a location within the geographic boundaries of a Department of Labor-designated labor surplus area, notwithstanding composition of workforce.

2. Protest that agency should be precluded from terminating a contract for the convenience of the government because of its prior course of dealings and the costs incurred by the protester in contemplation of performing the terminated contract is denied where the record shows that the agency's decision to terminate the contract was proper because the protester was ineligible for award.

DECISION

Unique Presort Services, Inc. protests the termination of a contract awarded to it, and the subsequent award of a contract to Zip Mail Services, Inc., under request for proposals (RFP) No. 793-7-92, issued by the Department of Veterans Affairs (VA) as a labor surplus area set-aside for mail presorting and metering services. Unique principally argues that the VA improperly terminated its contract on the basis that it is not LSA concern.

We deny the protest.

The RFP contemplated the award of a requirements type contract for a base period and two 1-year option periods. The RFP further provided that the agency would evaluate offers in terms of both technical and cost considerations, and would make award to the firm submitting the proposal offering the best overall value to the government. Additionally, offerors were advised that the requirement had been set aside exclusively for LSA small business concerns.

The VA received offers from Unique and Zip. After conducting discussions and receiving best and final offers (BAFO), the agency determined that Unique's proposal represented the best overall value to the government, and made award to that firm. Following two protests to our Office by Zip and one by Unique, the VA advised our Office that it intended to reopen discussions and solicit new BAFOs. The VA further advised that, in connection with the reopening, it would reaffirm the offerors' compliance with the RFP's LSA requirements.

After reopening discussions, the VA requested that the offerors provide updated certifications regarding their status as LSA concerns. Zip certified that it was an LSA concern. Unique on the other hand, did not provide the necessary certification. Instead, the firm stated that, although it did not technically qualify as an LSA concern because of its geographical location, it should be accorded LSA concern status because approximately 78 percent of its employees resided in one or another LSA. The VA, after considering these responses, determined that Unique was not an LSA concern eligible for award. The VA therefore terminated Unique's contract for the convenience of the government, and made award to Zip, which did qualify as an LSA concern. Upon learning of the agency's actions, Unique filed this protest in our Office.

Unique argues that the VA's termination of its contract was improper. Although Unique concedes that it is not technically an LSA concern because of where it is located, it nonetheless maintains that it should be afforded de facto LSA status because of the composition of its labor force. According to the protester, it is located near two labor surplus areas and the majority of its workforce resides in one or the other of these areas.

Federal Acquisition Regulation (FAR) § 20.101 defines an LSA as a geographic area designated by the Department of Labor as such, and an LSA concern as a firm which, together with its first tier subcontractors, will perform the contract substantially in an LSA; in order to perform substantially in an LSA, a firm must incur costs which exceed 50 percent of the contract's price in an LSA. FAR § 20.101. Because, as Unique concedes, it would perform the contract in a

geographic area not designated as an LSA, it was not an LSA concern, and its offer thus properly was rejected by the VA. FAR § 20.204(b); Silent Partner, Inc., B-224426.2, Nov. 7, 1986, 86-2 CPD ¶ 535. Unique's theory that its workforce qualifies it as a de facto LSA concern does not change our conclusion; under the FAR, LSA concern status is based on the location of the place of performance, not on the location of employees' residences.

Unique cites our decision 39 Comp. Gen. 609 (1960) as supporting its de facto LSA concern argument. That decision involved the issue of whether an award to a firm that had submitted a bid from an address located in an LSA was proper where the end-item was to be supplied from a location outside a designated LSA. We ultimately did not disturb the award because the version of the LSA regulation then in effect permitted award to a firm in an LSA even where the end-item would not be produced in an LSA. We noted that the regulation was in the process of being amended to require performance within a designated LSA, as the regulation currently requires. This decision, based on a regulation no longer in effect, therefore is inapposite here.

Unique argues that the agency's termination of its contract is improper because it was the contractor for this requirement under a predecessor solicitation which was set aside for LSA concerns, and also because it spent substantial sums to purchase equipment in contemplation of performing the contract.

These arguments are without merit. The fact that the agency may have improperly awarded the predecessor contract to Unique as an LSA concern is irrelevant to this acquisition; each procurement is a separate transaction, and an agency's actions under one procurement do not affect the propriety of its actions under a different procurement. Pearl Properties, B-249524, Nov. 17, 1992, 92-2 CPD ¶ 355. Similarly, the costs incurred by Unique in contemplation of performing this contract are irrelevant. Termination for the convenience of the government of an improperly awarded contract is appropriate even where termination cost will be incurred, where the termination is proper and serves to promote the integrity of the competitive bidding system. See O.K Tool & Die Co., B-219806, Oct. 9, 1985, 85-2 CPD ¶ 398.

Finally, Unique argues that the agency improperly failed to withdraw the LSA set-aside when it became apparent that only one firm was eligible for award. While an agency may withdraw an LSA set-aside under appropriate circumstances, FAR § 20.205(a), the decision to do so is largely a matter committed to the agency's discretion. Id. If the contract can still be performed by an LSA concern, it is well within

the agency's discretion to proceed with award of the contract to an LSA concern rather than withdraw the set-aside. General Elec. Co.; Westinghouse Elec. Corp., 67 Comp. Gen. 178 (1988), 88-1 CPD ¶ 6.

The protest is denied.

for James F. Hinchman
General Counsel