

*R. Martin PL-2*

**DECISION**



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

**7778**

**FILE: B-192148**

**DATE: September 25, 1978**

**MATTER OF: Western Filament Inc.**

**DIGEST:**

Where solicitation erroneously contained priority listing for labor surplus area set-aside derived from superseded Defense Manpower Policy, agency properly refused to select awardee based on such superseded policy. All parties--bidders and contracting activity--are on constructive notice of change in policy relating to labor surplus area set-aside award preferences because of publication in Federal Register

Western Filament, Inc., (Western) protests the cancellation of the labor surplus area set-aside portion of invitation for bids (IFB) No. DLA-500-78-B-0825 (IFB-0825) and the award of any contract under IFB No. DLA-500-78-B-1565 (IFB -1565) which is a resolicitation of the canceled portion of the former solicitation. Western, the second low bidder for the set-aside portion, contends that award should have been made to it because the low bidder's priority for labor surplus award was determined to be less than Western's.

Both solicitations were issued by the Defense Industrial Supply Center (DISC), Philadelphia, Pennsylvania and called for bids from small business firms for an annual requirements contract to provide polyester lacing and tying tapes. In the first solicitation, 50 percent of each of the two line items was set-aside for small business firms which also qualified as labor surplus area concerns. The IFB incorporated by reference the clause set forth in Defense Acquisition Regulation (DAR) 7-2003.4 and entitled "Notice of Combined Small Business-Labor Surplus Area Set Aside (1975 OCT)."

The bids were opened on March 10, 1978 and the non-labor surplus area set-aside portion of each item was awarded to the low bidder, Eon Corporation (Eon). This award has not been protested. Although its bid for the labor surplus area set-aside portion was low, Eon

was not a properly certified-Eligible concern and therefore was classified under DAR 7-2003.4 as being in the third priority group. This left Western which was properly certified eligible and in the first priority group, as the first firm eligible for award of the labor surplus area set-aside portion of the solicitation.

DAR 7-2003.4(a) and the priorities it set forth among labor surplus area concerns were based upon Defense Manpower Policy No. 4 (DMP-4) which was superseded effective October 27, 1977 by the issuance of Defense Manpower Policy No. 4A (DMP-4A). This set forth a new Federal policy pursuant to Public Law 95-89, 91 Stat. 553, August 4, 1977 regarding the priorities given labor surplus areas. The revised policy rendered inoperative, as of October 27, 1977, Labor Surplus Area set-aside priorities as set forth in DAR 7-2003.4(a). This occurred more than 3 months prior to the issuance of the first solicitation.

On March 27, 1978, Headquarters, Defense Logistics Agency (DLA), advised its procuring activities that effective March 3, 1978, the Department of Labor had redefined "labor surplus area," that the certification procedures for labor surplus preferences had been discontinued, and that a new set of priorities for labor surplus set-asides had been promulgated. DLA also advised procuring activities, with regard to outstanding solicitations, that:

**"WHERE SOLICITATIONS HAVE BEEN OPENED/  
CLOSED BUT NOT YET AWARDED, OFFERS SHOULD  
BE EXAMINED IN THE LIGHT OF THE GUIDANCE  
CONTAINED HEREIN. IF AWARD OF THE SET-  
SIDE PORTION CAN BE MADE UNDER THE REVISED  
PRIORITIES, AWARD SHOULD PROCEED. OTHERWISE,  
THE SET-SIDE SHOULD BE DISSOLVED AND PROCURED  
BY ADVERTISING OR, NEGOTIATION, AS APPROPRIATE."**

In accordance with these instructions, DISC amended the priority for award provision of the clause entitled "Notice of Combined Small Business-Labor Surplus Area Set-Aside" to read, in part, as follows:

"(c)(2) Determining Priority for Award:  
Labor surplus concerns which are also small business concerns and other small business concerns eligible under (1) above will participate in the set-aside in the following order of priority:

"Group 1. Small business concerns which are also labor surplus area (LSA) concerns.

"Group 2. Small business concerns which are not labor surplus area (LSA) concerns.

"Within each of the above groups, offers on the [labor surplus area] set-aside portion will be requested from concerns in the order of their offers on the non-[labor surplus area] set-aside portion, beginning with the lowest responsive offer. \* \* \*

Under the amended clause, both Eon and Western were included in Group 1 and Eon, as low bidder, was first in the order of priority for award of the labor surplus area set aside portion. DISC then determined with regard to this portion of the IFB that since the firm first in order of priority under the amended clause was not the same as under the obsolete IFB clause, it should cancel the IFB and resolicit.

Western objects to the cancellation and contends that the priorities set forth in the first solicitation should be used to select the awardee of the labor surplus set-aside and that the rules should not be changed after the bids have been opened.


In our view, the contracting officer here could not properly have made an award to Western, based on the superseded labor surplus priorities set forth in the initial solicitation. The publication of DMP-4A in the Federal Register on November 3, 1977, 42 Fed. Reg. 57457 (1977), canceled DMP-4 and, in effect, ended the authorized use of the priority listing in DAR 7-2003.4 (a) which erroneously was incorporated in the initial solicitation. Willson Products Division, ESB Incorporated, B-191698, August 8, 1978, 78-2 CPD \_\_\_\_\_.

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All parties, bidders and contracting activity, were on constructive notice that DMP's and its labor surplus area priorities had been superseded because of the publication in the Federal Register of the new superseding policy. See Enterprise Roofing Service, 55 Comp. Gen. 617 (1976), 76-1 CPD 5. An award to Western under the priorities set out in the initial solicitation would not have conformed with the new Federal policy. Moreover, under the new priorities Western was not first in line for award under the first solicitation and therefore could not have been selected for award. The cancellation, therefore, was not prejudicial to the interest of Western.

Accordingly, the protest is denied.

  
Acting Comptroller General  
of the United States