DECISION

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

60145

FILE: B-184258 DATE: November 12, 1975

97753

MATTER OF: Voss Industries, Inc.

DIGEST:

1. Failure to complete clause in bid certifying that contractor is labor surplus area concern, even though place of manufacture was listed elsewhere in bid, prevents consideration of contractor as labor surplus area concern for purposes of breaking tie bids, since place of manufacture is not by itself determinative of whether contractor is labor surplus area concern.

2. Failure to complete clause in bid certifying that contractor is labor surplus area concern for purposes of breaking tie bids is not minor informality or irregularity that could have been waived under ASPR 2-405, since it is material and does affect relative standing of bidders.

3. Contention by protester that successful bid was nonresponsive for failure to insert item name and test number in Qualified End Products clause of IFB is untimely since first raised 2 months after award. Moreover, record shows that contention is without merit.

This protest by Voss Industries, Inc. (Voss) involves the failure to complete the clause respecting preference for labor surplus area concerns in invitation for bids (IFB) No. DSA-500-75-B-2371, issued May 2, 1975, by the Defense Industrial Supply Center for the purchase of 1500 grooved coupling clamps.

For purposes of evaluation, the bids submitted by Voss and by Aeroquip Corporation (Aeroquip) were considered to be tie bids. With respect to tie bids, Armed Services Procurement Regulation (ASPR) 2-407.6(a)(1974 ed.) provides in pertinent part that where two bids are equal, preference shall be given in the following order of priority:

"* * * * *

(v) persistent or substantial labor surplus area concerns (1-801) that are also small business concerns (1-701)

(vi) other persistent or substantial labor surplus area concerns, and

(vii) other small business concerns."

Although Voss was a small business concern and Aeroquip was not, Aeroquip was considered to be a labor surplus area concern, while Voss was not so considered, due to its failure to complete the clause in its bid respecting labor surplus area concerns. Consequently, in accordance with ASPR 2-407.6(a), the preference for breaking the tie was given to Aeroquip.

Voss protests the failure of the contracting officer to consider it as a labor surplus area concern and the subsequent award to Aeroquip on June 18, 1975.

The invitation for bids included, by reference to the Defense Industrial Supply Center Master Solicitation, clause B-1, a clause concerning preference for labor surplus area concerns. Voss contends that it should have been considered a labor surplus area concern since it fulfilled the requirements stated in section (ii) of clause B-1, which reads in pertinent part as follows:

> "PREFERENCE FOR LABOR SURPLUS AREA CONCERNS B-1
> (1974 APR) ASPR 7-2003.13
>
> "This procurement is not set aside for labor surplus area concerns. However, the bidder's status as such a concern may affect entitlement to award in case of tie bids * * *. In order to have his entitlement to a preference determined if those circumstances should apply, the bidder must:
>
> * * * * *
>
> (ii) identify below the persistent or substantial labor surplus area in which the costs he will incur on account of manufacturing or production (by himself or his first-tier subcontractors) amount to more than fifty percent (50%) of the contract price. (If the bidder proposes to qualify as a persistent or substantial labor surplus area concern by including costs to be incurred by a certified concern not located in a labor surplus area, evidence of such certification must be furnished.)
>
> (To be inserted by offeror in individual portion of solicitation)
>
> "Failure * * * to identify the locations as specified above will preclude consideration of the bidder as a labor surplus concern. Bidder agrees that if, as a

> labor surplus area concern, he is awarded a contract for which he would not have qualified in the absence of such status, he will perform the contract or cause it to be performed, in accordance with the obligations which such status entails."
>
> * * * * *

Appropriate space was provided under the clause for the insertion of the required information beneath the heading "Plant Name and Address or Area." The invitation also included a cover sheet, which contained the following notice:

> "Your attention is directed to clause * * * B-1, Preference for Labor Surplus Area Concerns. * * * Failure to provide evidence/certification/data in strict accordance with clause requirement will preclude consideration of your firm as an LSA concern for the purposes of this procurement."

Nevertheless, Voss failed to complete clause B-1 and thus certify the costs which would be incurred on account of manufacturing or production in labor surplus areas.

Voss contends that since it is actually located in a labor surplus area, and its proposed place of manufacture was included in other parts of the bid, the failure to complete clause B-1 should have been viewed as a minor informality or irregularity and waived by the contracting officer under ASPR 2-405 (1974 ed.)

Clause B-10 of the IFB requires the bidder to insert the name and location of the manufacturing facility where the supplies offered are to be produced. The clause further states that, "The performance of any work contracted for in any place other than that named above is prohibited unless approved in advance by the contracting officer." Voss inserted its plant address in Cleveland, Ohio, which was recognized by the contracting agency to be in a surplus labor area.

However, the offer by Voss to perform the contract at its plant in Cleveland, Ohio, is not sufficient since the place at which the contractor will itself perform may be immaterial with respect to the determination of whether the contractor is a surplus labor area concern if costs greater than fifty percent of the contract price will be incurred for subcontracting or purchase of materials. In 41 Comp. Gen. 160, 164 (1961), we stated:

> "The invitation in this case required that bidders stipulate in their bids the 'place of manufacture' where the work is to be performed. Under the ASPR definition of a labor surplus area concern which will perform (either by itself or others), substantially all the work (more than 50 percent of the contract price) in a distressed labor area, costs of performance include the amounts incurred 'in manufacturing or production.' One of the costs of 'production' is the cost of purchased materials and the examples given in ASPR recognize that such costs alone may be sufficient to qualify a firm or disqualify it as a surplus area concern. Therefore, while it may be ascertained from the invitation that a bidder will 'perform the work' at a plant (place of manufacture), that information alone will not necessarily resolve the question whether more than 50 percent of the total costs of manufacture and production will be incurred in the area where its plant is located." * * *

The above reasoning is equally as applicable to the present case. Therefore, the conclusion must be reached that from the information submitted in the bid, it is not possible to conclude that Voss has agreed to perform the contract as a labor surplus area concern.

The failure of Voss to certify that it qualifies as a labor surplus area concern is material and does affect the relative standing of the bidders. Therefore, the failure to complete clause B-1 was not a minor informality or irregularity that could have been waived.

In rebuttal to the agency's report, Voss also contended that Aeroquip's failure to insert the item name and test number in the Qualified End Products clause of its bid (clause B-21) amounted to a failure to identify the end product and was thus cause for rejection of Aeroquip's bid. Section 20.2 of our Bid Protest Procedures 40 C.F.R. § 17979 (1975), requires that protests be filed not later than 10 days after the basis for protest is known or should have been known, whichever is earlier. While this basis for protest should have been known shortly after June 18, 1975 (the date of the award of the contract to Aeroquip), this ground for protest was not filed with this Office until August 19, 1975 (or 2 months after the award was made), and is therefore untimely.

Furthermore, we believe that the failure of Aeroquip to insert the item name and test number in cluase B-21 did not require rejection of its bid. Clause B-21 provided for rejection of a bid if the bidder did not identify in its bid the product offered either by filling in the blank in the clause or identifying the qualified product elsewhere in the bid. However, the product was sufficiently identified in the description/specification section of Aeroquip's bid by the inclusion of the Aeroquip part number. Identification of the product in the "Item Name" blank of clause B-21 would have amounted to mere repetition. Also, the test number was required to be inserted only if known to the bidder. In this case, the test number in question was known by the contracting agency.

Consequently, the failure to fill in the blanks in the "Qualified End Products" clause was not cause for rejection of Aeroquip's bid. See B-174189, January 19, 1972; B-161779, August 7, 1967; B-158197, April 5, 1966.

Accordingly, the protest is denied.

R.F.Keller

Deputy Comptroller General
of the United States