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DECISION

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

19589

FILE: B-203374 DATE: September 21, 1981

MATTER OF: Chem-Tech Rubber, Inc.

DIGEST:

1. Failure of a bidder to complete a clause in its bid indicating that it is a labor suplus area (LSA) concern, even though a place of manufacture was listed elsewhere in its bid, prevents consideration of the bidder as an LSA concern not subject to a five percent evaluation penalty; place of manufacture is not by itself determinative of whether a contractor is an LSA concern.

2. Failure of a bidder to complete a clause in its bid indicating that it is an LSA concern is not a minor informality which could be waived by the agency; the omission affects the relative standing of bidders, and is material since the bidder thereby fails to commit itself to incur the requisite proportion of costs in LSAs.

3. Where a bidder represents in eligibility clause set forth in the IFB that 100 percent of contract costs will be incurred in a particular LSA, but after bid opening indicates that a significant portion of contract costs will be incurred in previously unspecified LSAs, the bidder's LSA status is not affected since the bidder has committed itself to incur the required minimum costs (50 percent) in LSAs and it is not material in which LSAs such costs will be incurred.

4. A bidder qualifies as a small business, even though it buys materials from, or subcontracts a major portion of work to, a large business, so long as the bidder makes a significant contribution to the manufacture or production of end items.

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Chem-Tech Rubber, Inc. protests the award of a contract for 14,000 yards of coated nylon cloth, to any other firm, under invitation for bids (IFB) No. DLA100-81-B-0793, issued by the Defense Logistics Agency's (DLA) Defense Personnel Support Center in Philadelphia, Pennsylvania. Chem-Tech contends DLA improperly refused to consider it eligible for a labor surplus area (LSA) evaluation preference on the ground that Chem-Tech failed to indicate on the bid form that it was an LSA firm, and that no other bidder qualified for the preference. We deny the protest.

This solicitation was issued as a total small business/LSA small business set-aside which provided that non-LSA small businesses were subject to a five percent evaluation factor.[1] The criteria for eligibility as an LSA small business were set forth generally under section K of the IFB. Paragraph K17, entitled "ELIGIBILITY FOR PREFERENCE AS A LABOR SURPLUS CONCERN," instructed bidders as follows:

> "Each offeror desiring to be considered for award as a Labor Surplus Area (LSA) concern on the set-aside portion of this procurement, specified elsewhere in the schedule, shall indicate below the address(es) where costs incurred on account of manufacturing or production (by offeror or first tier subcontractor) will amount to more than fifty percent (50%) of the contract price. * * *"

The paragraph concluded with a warning to bidders:

> "Caution: Failure to list the location of manufacture or production and the percentage, if required, of cost to be incurred at each location will preclude consideration of the offeror as a LSA Concern."

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[1] Historically, a provision known as the Maybank Amendment was included in the annual Department of Defense (DOD) appropriation acts to prohibit the use of appropriated funds to pay price differentials on contracts for the purpose of relieving economic dislocation. In the 1981 DOD Appropriation Act, Pub. L. No. 96-527, 94 Stat 3085, however, the Maybank Amendment was modified to permit DLA, on a test basis, to pay up to a 5 percent price differential on these contracts. The contract here was issued pursuant to this authorization.

Similar warnings were set forth on the IFB cover sheet, and the notation "FILL IN ALL CLAUSES" was also handwritten in both margins alongside paragraph K17.

Chem-Tech's bid of $3.45 per yard was the lowest of the five bids received. Aldan Rubber Company was the second low bidder at $3.47 per yard. Aldan completed paragraph K17 of its bid indicating that 100 percent of the contract would be performed at its plant in Philadelphia, Pennsylvania, an LSA, and thus was not subject to the five percent price increase assessed against non-LSA firms. Chem-Tech's sole manufacturing facility apparently is located in New Haven, Connecticut, an LSA, but Chem-Tech did not complete paragraph K17 in its bid and thus failed to indicate that at least 50 percent of the contract costs would be incurred in an LSA. DLA accordingly determined that Chem-Tech was not an LSA concern and, in evaluating Chem-Tech's bid, increased its price by five percent. Consequently, Chem-Tech was displaced as the low bidder by Aldan. The award has been postponed pending the outcome of this protest.

Chem-Tech characterizes its failure to complete the LSA eligibility clause as a clerical omission which DLA should have waived as a minor informality, since the missing information had no bearing on the contract price or terms or the relative standing of the bidders. Chem-Tech believes DLA's position emphasizes form over substance inasmuch as its manufacturing facility is actually located in an LSA and it indicated in paragraph K39 of the IFB that the contract would be performed at that facility. Chem-Tech asks that the omission be waived and that it now be permitted to certify itself as an LSA concern even though bids have been opened.

Paragraph K39 of the IFB, entitled "PLACE OF PERFORMANCE," required bidders to insert the name and location of the manufacturing facility where the contract work would be performed. The paragraph further stated that "the performance of any of the work contracted for in any place other than that named in the offer and any resulting contract is prohibited unless the same is specifically approved in advance by the Contracting Officer." Chem-Tech inserted its New Haven plant address and indicated that the total contract would be performed there.

This offer by Chem-Tech to perform the contract at its New Haven plant does not satisfy the requirements of the LSA eligibility clause set forth in paragraph K17 of the IFB. The place at which the contractor will perform may be immaterial with respect to the determination of whether the contractor is an LSA concern if costs greater than 50 percent of the contract price will be incurred for subcontracting or purchase of materials. Voss Industries, Inc., B-184258, November 12, 1975, 75-2 CPD 298. We have specifically recognized, for example, that the cost of purchased materials is a cost of production which alone may be sufficient to qualify or disqualify a firm as an LSA; the determining factor is the location of the seller. See 41 Comp. Gen. 160, 164 (1961). It appears that significant portions of the production costs here were attributable to purchases of material and other non-manufacturing expenses. Aldan's cost breakdown indicates, for example, that approximately 45 percent of its costs will be incurred in purchasing various materials. DLA thus properly concluded that Chem-Tech's offer to perform the manufacturing at its plant was not necessarily a promise to incur costs constituting at least 50 percent of the total contract price in an LSA.

We further disagree with Chem-Tech's view that its omission here should have been waived as a minor irregularity. The regulations provide for such a waiver by the contracting officer where the irregularity or informality would have a negligible effect on price, quality, quantity or delivery, and the correction would not affect the relative standing of, or otherwise prejudice bidders. Defense Acquisition Regulation (DAR) § 2-405 (1976 ed.). If Chem-Tech became eligible as an LSA concern after bid opening, the five percent differential would affect its contract price only for evaluation purposes, and other contract terms would not be affected. However, the relative standing of the bidders would obviously be altered since Chem-Tech would displace Aldan as the evaluated low bidder. Indeed, Chem-Tech desires to qualify for the LSA preference only because its bid would thereby be reduced below Aldan's. Moreover, a bidder's failure to complete the LSA certification clause is, in effect, a failure to enter a commitment to perform the requisite proportion of the contract in LSAs. We have thus specifically held that this is a material omission which cannot be waived as a minor informality. Voss Industries, Inc., supra; Standard Bolt, Nut and Screw Co., Inc., B-184755, July 21, 1976, 76-2 CPD 62. We reach the same conclusion regarding the clause in this case.

Chem-Tech also maintains that no other bidder qualified as an LSA concern. DLA considered Aldan an LSA concern based on its indication in paragraph K17 that it would incur 100 percent of the contract costs in Philadelphia. After Chem-Tech protested, however, the contracting officer asked Aldan to submit a cost breakdown. The information submitted by Aldan indicated that significant portions of the contract costs would be incurred in Wilmington, Delaware and New Bedford, Massachusetts. Both of these areas are LSAs and the contracting officer determined Aldan was still eligible for the LSA preference inasmuch as at least 50 percent of the contract costs would be incurred in LSAs. Chem-Tech argues that Aldan should be ineligible as an LSA concern because the information supplied in its bid was inaccurate. Chem-Tech believes that by allowing corrections in Aldan's list of locations where costs would be incurred, DLA, in effect, was allowing Aldan to establish its eligibility as an LSA concern after bid opening. We disagree.

Aldan established its eligibility as an LSA concern when it submitted its bid indicating that at least 50 percent of the contract costs would be incurred in an LSA, thereby obligating itself to incur that proportion of the contract costs in LSAs. In Clark Division of Euclid Design and Development Company, B-185632, April 21, 1976, 76-1 CPD 270, a bidder represented in its bid that 100 percent of contract costs would be incurred in a particular LSA, but after bid opening, reduced that amount to 30 percent (which still exceeded the 25 percent minimum set forth in that IFB). In concluding that the change did not affect the bidder's eligibility for award, we stated that:

> "We interpret clause B17 to require a commitment in the bid to perform not less than the designated percentage of the work at the stated locations in order to qualify for the preference category sought. Any indication of a commitment to perform more than the minimum called for cannot affect the bidder's eligibility for the preference. Therefore, if a bidder indicates at least

> the minimum pecentage called for to qualify for the preference category and the contracting officer is satisfied that he can and will meet that commitment in performance, he should not be disqualified because his bid showed a percentage exceeding the minimum which he cannot in fact meet."

The only factor distinguishing this case from Clark is that Aldan's cost breakdown showed that Aldan would not incur the minimum percentage in the stated location (Philadelphia). We do not think this disqualifies Aldan from eligibility as an LSA concern. The cost breakdown confirmed that Aldan intended to incur approximately 70 percent of the contract costs in LSAs and thus, that Aldan would satisfy the minimum requirements of the solicitation. Although two of those LSAs were not indicated in Aldan's bid, the solicitation does not prohibit substitution of a subcontractor in one LSA for a subcontractor in another LSA, and we do not see how substitution in this manner would prejudice the Government or other bidders. Again, the determining factor is that Aldan clearly committed itself in its bid to perform in accordance with the minimum requirements for LSA concerns. These requirements are that more than 50 percent of the work represented by the contract price be performed in LSAs. It is not legally significant which LSAs ultimately are involved; Aldan qualifies simply by virtue of its commitment reflected in its bid. We thus conclude that DLA properly determined that Aldan qualified as an LSA concern.

It is true, as Chem-Tech observes, that Aldan, after its status was challenged, could have chosen to submit a cost breakdown which would make it ineligible as an LSA concern, and thus had the option of accepting or rejecting the award after bid opening. However, this same possibility is always present when a firm's eligibility or responsibility is in question; a firm can usually take steps after bid opening to assure its ineligibility or nonresponsibility. The deterrent in these situations is the threat of sanctions if a firm has acted in bad faith. We finally note that if Aldan decided after award not to perform in an LSA, it would be subject to default. Cf. Hendry Corporation, B-195197, March 31, 1980, 80-1 CPD 236.

In its comments submitted in response to the agency report on this matter, Chem-Tech complains it was confused by the criteria used to determine a bidder's status as an LSA concern. It is Chem-Tech's view that in small business/LSA small business set-aside procurements, the solicitations should not permit bidders to qualify as LSA concerns by contracting with suppliers and other subcontractors in LSAs unless those firms are also small businesses. Absent such a prohibition, the protester maintains, a small business could qualify for the award even though its own manufacturing or production costs would constitute only a small percentage of the contract price; the small business portion of the set-aside would be defeated.

We have held that as long as a small business firm makes some significant contribution to the manufacture or production of the items to be supplied under the contract, it has fulfilled its contractual requirement that the end item be manufactured or produced by a small business.[2] Fire & Technical Equipment Corp., B-191766, June 6, 1978, 78-1 CPD 415. Thus, it is of no consequence that a firm may get its raw materials from or subcontract a major portion of the work to a large business if it satisfies this significant contribution requirement. This rule is not changed by addition of the LSA requirement. The record here indicates Aldan will make a significant contribution to the manufacture of the end item; more than one third of the contract costs will be incurred at its Philadelphia plant. In any event, if the protester did not understand the terms of the IFB, or objected to them, it should have protested prior to bid opening. See Bid Protest Procedures, 4 C.F.R. § 21.2 (b)(1) (1981).

The protest is denied.

Milton J. Socolar

Acting Comptroller General
of the United States

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[2] This requirement is contained in paragraph 1 on page 14 of the subject IFB, Standard Form 33, Part 2.