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DECISION

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

FILE: B-207019 DATE: December 28, 1982

MATTER OF: Contact International, Inc.

DIGEST:

1. Where a bidder seeking a bid evaluation preference as a Labor Surplus Area (LSA) concern states in its bid that it will incur more than 50 percent of its costs in an LSA, as the solicitation requires, but that its "place of manufacturing or processing" is in a non-LSA, the bid is ambiguous and the bidder is not eligible for the preference.

2. A firm claiming a bid evaluation preference for Labor Surplus Area (LSA) concerns has the burden to demonstrate its responsibility in that respect, i.e., that it indeed can perform as an LSA concern, before being afforded the preference. The nature and extent of the information needed to satisfy the contracting officer that the firm should receive the preference is for the contracting officer to decide, not the bidder.

3. GAO does not consider the legal status of a firm as a "regular dealer" or "manufacturer" within the meaning of the Walsh-Healey Act. By law this matter is to be determined by the contracting agency in the first instance, subject to review by the Small Business Administration (if a small business is involved) and the Secretary of Labor.

Contact International, Inc. (Contact) protests the Defense Logistics Agency's (DLA) finding that Contact is not eligible for a Labor Surplus Area (LSA) preference under invitation for bids (IFB) No. DLA13H-82-B-8130 for canned apple juice. Contact also protests the status of the low bidder under the IFB as a "regular dealer" or "manufacturer" within the meaning of the Walsh-Healey Act.

We deny the protest in part and dismiss it in part.

The IFB solicited bids to supply 6,120 cases of canned apple juice, as well as meet other requirements, and provided a 5 percent cost advantage to bidders who agreed to perform a substantial portion of the contract in an LSA. To qualify for the LSA preference, a firm had to promise to incur in an LSA manufacturing or production costs that would amount to more than 50 percent of the contract price, and be judged capable of fulfilling that promise.

Clause K17 of the IFB provided a space where a firm claiming the LSA preference had to indicate the location where those manufacturing and production costs would be incurred and the percentage of the contract price involved. Contact indicated that the percentage would be 53 percent, and inserted the address of its Chicago plant, which is in an LSA. In IFB clause K64, however, where a bidder had to list the plants or establishment that would be used in processing or manufacturing the contract items, including the bidder's own plant if any work would be performed there, Contact listed for "all" items the Carolina Products plant in Greer, South Carolina, a non-LSA.

The contracting officer made several inquiries to Contact concerning contract costs in relation to Contact's eligibility as an LSA concern. While Contact provided some information in response, Contact refused to answer certain inquiries because in its view they inappropriately involved information about the costs that would be incurred in non-LSAs, as opposed to the LSA costs. Contact protested to our Office when it became apparent that the contracting officer would not give the firm the LSA preference without that information.

In response to the protest, DLA contends that because of Contact's entry in clause K64, Contact is not eligible for LSA consideration, notwithstanding the protest, based on our decision in Kings Point Mfg. Co., Inc., B-205712, April 5, 1982, 82-1 CPD 310. In Kings Point, the solicitation contained clauses similar to clauses K17 and K64 of this IFB. The protester stated in the K17-type clause that it would perform 51 percent of the work at a location in an LSA. In the other clause, which required the name and address of each manufacturing

plant, mill or treating plant, the protester listed only a location in a non-LSA. As is the case here, the protester's bid would be low if the protester qualified for an LSA preference but not low if the protester did not qualify. We found that the protester's bid was ambiguous as to the protester's place of performance. Because the bid would not be evaluated as low under one of two reasonable interpretations, we concluded the protester was not eligible for evaluation as an LSA concern.

Contact contends that Kings Point is inapposite to this protest, as follows:

> "* * * In that instance Kings Point had reserved the right to perform at one of two locations, only one of which would have rendered its offer eligible for labor surplus consideration. * * * Contact * * * intends to incur costs amounting to more than 50 percent in LSAs. Contact has never claimed that more than 50 percent of the contract price would be performed at the Greer, South Carolina location or any other non-LSA location. * * *"

We agree with DLA, however, that Kings Point is dispositive of the issue of Contact's eligibility as an LSA concern. As in Kings Point, the protester stated in its bid that it would incur more than 50 percent of its manufacturing or production costs at a location in an LSA, but the sole place of performance would be in a location in a non-LSA. Despite Contact's assertion that it never claimed that more than 50 percent of the costs would be incurred in the non-LSA, the fact is, by listing Greer, South Carolina in clause K64 as the only place of performance, the firm indeed made precisely that claim. Contact's bid is thus ambiguous as to its place of performance--53 percent in an LSA and the rest elsewhere, or all performance in a non-LSA--making it subject to more than one reasonable interpretation, only one of which would make the bid low. Therefore, Contact is not eligible for the LSA evaluation preference.

While Kings Point disposes of the issue of Contact's eligibility as an LSA concern, we also point out that a provision (such as clause K17) requiring bidders to list the LSA percentage and location does not proscribe the information a contracting officer can request before affording a firm the LSA preference, but only provides the vehicle to claim the preference. A firm that represents that it will substantially perform the contract in an LSA still has the burden to prove it indeed is capable of doing so, that is, it is responsible in that respect. See Lou Ana Foods, Inc., B-205573, May 12, 1982, 61 Comp. Gen. ____, 82-1 CPD 484; Defense Acquisition Regulation § 1-902 (1976 ed.). Since the decision on a firm's responsibility essentially is a business judgment involving considerable discretion on the part of the contracting officer, John Carlo, Inc., B-204928, March 2, 1982, 82-1 CPD 184, it is the responsibility of the contracting officer, not the firm desiring the contract, to determine the nature and extent of the information necessary to establish that the firm can meet its obligations if awarded the contract.

As to the status of the low offeror as a regular dealer or manufacturer within the meaning of the Walsh-Healey Act, the matter is, by law, determined by the contracting agency in the first instance, subject to review by the Small Business Administration (if a small business is involved, as here) and the Secretary of Labor. Voyager Emblems, Inc., B-206301, February 10, 1982, 82-1 CPD 127. We therefore do not consider protests on that issue.

The protest is denied in part and dismissed in part.

for Milton J. Socolar
Comptroller General
of the United States