

**DECISION**

PPA 12  
24588

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

**FILE:** B-208948**DATE:** March 22, 1983**MATTER OF:** Alchemy, Inc.**DIGEST:**

To be eligible for consideration as a labor surplus area (LSA) concern, a bidder must submit a bid which at bid opening establishes the bidder's commitment to perform the contract substantially in an LSA. A bid that, as submitted, fails to do so cannot be considered for an LSA evaluation preference.

Alchemy, Inc. protests the Defense Logistics Agency's refusal to consider Alchemy's bid under invitation for bids No. DLA-82-B-1750 eligible for an evaluation preference as a labor surplus area (LSA) concern. Alchemy, which submitted a telegraphic bid that made no reference to the LSA terms of the invitation, argues the contracting officer had either actual or constructive knowledge that Alchemy would perform the contract as an LSA concern based upon Alchemy's bids under prior procurements. We deny the protest.

The invitation, to acquire tubing, was totally set aside for small business concerns and provided an evaluation preference for concerns offering to perform a substantial portion of the contract in an area (or areas) classified by the Secretary of Labor as an LSA. Implementation of the preference would occur through the addition of a five percent evaluation factor to the bids of small business concerns that are not LSA concerns.

The invitation contained a clause (K22) entitled "ELIGIBILITY FOR PREFERENCE AS A LABOR SURPLUS CONTRACT," which required that each bidder desiring to be considered for award as an LSA concern must indicate the address(es) where a substantial proportion (more than 50 percent) of the contract costs would be incurred, and the percentage of costs to be incurred at each address. The failure to do so, the invitation warned in boldface type, would preclude consideration of the bidder as an LSA concern. The

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invitation repeated the warning under the notice that the procurement was a small business set-aside with an LSA concern price differential (clause L27a). As a further aid to bidders, the contracting officer circled the warnings.

Alchemy's telegraphic bid did not list any location of performance and did not otherwise indicate Alchemy's commitment to incur more than 50 percent of the contract costs in LSAs. After bid opening, Alchemy submitted a written bid in which it completed clause K22 to include the name and address of its own plant in an LSA and stated that 60 percent of the costs would be incurred there.

The contracting agency determined it could not consider the late written bid to resolve Alchemy's eligibility as an LSA concern. Since the telegraphic bid made no mention of an LSA, the agency did not give Alchemy's bid an evaluation preference. Alchemy would have been the low bidder with the benefit of the five percent evaluation preference, but was not low without it.

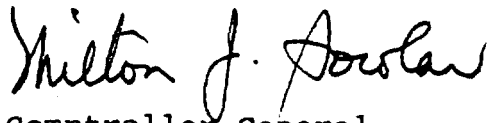
The commitment to incur more than 50 percent of the contract costs in an LSA, which establishes eligibility for the LSA preference, affects the relative standing of the bidders. We therefore have held that in order for a bidder to be eligible for consideration as an LSA concern, its bid must publicly disclose the commitment at bid opening. Uffner Textile Corporation, B-205050, December 4, 1981, 81-2 CPD 443. The commitment is a material term, and thus its omission cannot be waived as a minor informality. Id. Absent the commitment, any resulting contract would not impose a legal obligation for the contractor to perform substantially in LSAs.

Therefore, to have been eligible for the evaluation preference, Alchemy's bid at bid opening would have had to contain Alchemy's express commitment to perform the contract in accordance with the LSA-concern provisions in the invitation. Notwithstanding the warnings in the two IFB clauses noted above, a bidder also may establish its commitment by expressly agreeing to perform as an LSA concern elsewhere in its bid. Alchemy's telegraphic bid, however, was devoid of any information related to the LSA preference. The telegraphic bid did not include any address for performance (the clause K22 information) or a promise to perform as an LSA concern. Because a material bidding term is involved, information submitted after bid opening, or the contracting officer's knowledge of a firm's prior bids, are not relevant to a determination of a bidder's

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eligibility for the preference where the bidder failed to commit itself in its bid to perform as an LSA concern.

The contracting agency thus correctly refused to give Alchemy's bid an evaluation preference. The protest is denied.

*for*   
Comptroller General  
of the United States