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DECISION

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

FILE: B-209912 **DATE:** May 20, 1983

MATTER OF: W.W. Chambers Co., Inc.

DIGEST:

1. Award cannot be made on basis of superseded partial labor surplus area (LSA) set-aside notice improperly included in total LSA set-aside solicitation. Solicitation should have been amended or a resolicitation issued.

2. Procuring agency rejected low bid as nonresponsive under the terms of current labor surplus area requirements, Federal Procurement Regulations § 1-1.804-1, which were not contained in the solicitation. The protest is sustained. A bid cannot be rejected as nonresponsive on the basis of terms not contained in the solicitation.

W.W. Chambers Co., Inc. (Chambers), protests the Department of Health and Human Services (HHS), National Institute of Health, rejection of its bid as nonresponsive under invitation for bids (IFB) No. 263-82-B-(84)-0197. The IFB was a 100-percent small business and labor surplus area (LSA) set-aside for mortuary services. Chambers' low bid was rejected as nonresponsive because Chambers failed to indicate whether they intended to perform in an LSA.

The protest is sustained.

The IFB required bidders to submit with their bids a letter fully describing their facilities, names of the cemetery or cemeteries in which they agree to furnish burial plots and any additional services which they agree to furnish, when appropriate, as incidentals and for which no additional charges will be made. The "Notice of Labor Surplus Set-Aside" also contained the following provision:

> "(c) Identification of Areas of Performance. Each bidder desiring to be considered for award as a labor surplus area concern on

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> the set-aside portion of this procurement shall identify in his bid the geographical areas in which he proposes to perform, or cause to be performed, a substantial proportion of the production of the contract. * * *" (Emphasis added.)

The IFB did not contain a space at which bidders were to designate the location at which they would perform.

Chambers submitted a letter with its bid identifying the cemeteries and describing additional services. The letter did not make reference to the LSA requirement. However, the letter did contain the following statement:

> "We offer under this contract a complete and thorough service. Any one of three (3) funeral homes for the convenience of family and friends is available at no additional charge."

The letterhead listed the address of three funeral homes in the following locations: (1) S.E. Washington, D.C.; (2) Riverdale, Maryland; and (3) Silver Spring, Maryland. The letterhead indicated that Chambers' general offices are in Silver Spring.

The contracting officer rejected the bids of Chambers (low bidder) and Hines Rinaldi Funeral Home, Inc. (second low bidder), as nonresponsive. Award was made to Marshall's Funeral Home, Inc. (Marshall's), the third low bidder. The contracting officer justified this decision as follows:

> "'The low aggregate bids of W.W. Chambers, Co., Inc., and Hines Rinaldi Funeral Home, Inc., are rejected in that they are located in Silver Spring, Maryland which is not listed as a labor surplus area with the U.S. Department of Labor whereas labor surplus area set-aside is specified and required.' (See Statement and Certificate of Award, Standard Form 1036.)"

Chambers contends that the contracting officer erroneously determined that Chambers is not an LSA concern on the basis of the location of its general offices rather than the location at which it would perform. Chambers

argues that its bid is responsive because its signature on the bid binds it to perform in an LSA, and any doubt as to where it will perform is a matter of responsibility that can be resolved after bid opening. Chambers also notes that it has three funeral homes, one of which is located in S.E. Washington, D.C. (an LSA), and contends its letter gave the Government the option of choosing the precise location.

HHS responds that the letter gave the decedents' families rather than the Government the option of choosing the location. HHS contends the letter creates an ambiguity as to both the place of performance ("[a]ny one of three (3) funeral homes") and the manner in which it would be selected ("the convenience of the family").

Chambers also notes that Marshall's provided a Washington, D.C., address but did not indicate where it intended to perform in either its bid or the accompanying letter. Chambers contends HHS's acceptance of Marshall's bid as an LSA bid underscores the fact that HHS based its LSA determinations on the basis of business addresses rather than places of performance. HHS does not respond to this argument.

The arguments presented by both HHS and the protester assume that the IFB contained the "Notice of Total Labor Surplus Area Set-Aside" required by Federal Procurement Regulations (FPR) § 1-1.804-1 (1978), 41 C.F.R. § 1-1.804-1 (1982). This clause requires that bidders which do not certify themselves as LSA concerns be considered as nonresponsive. However, the IFB did not contain this clause. It, instead, contained a "Notice of Labor Surplus Set-Aside" utilized in partial LSA set-asides and based on superseded provision in 29 Code of Federal Regulations (C.F.R.) part 8 (1977). This clause establishes a list of priorities to be utilized in "negotiations" to be conducted on the set-aside portion. The first four preference groups are for Department of Labor certified LSA concerns with a first or second preference. The remaining four groups are as follows:

"Group 5. Persistent or substantial LSA concerns which are also small business concerns.

"Group 6. Other persistent or substantial LSA concerns.

"Group 7. Small business concerns which are not LSA concerns.

"Group 8. Other business concerns which are not LSA concerns."

The clause indicates that the set-aside portion shall be awarded at the highest price awarded on the non-set-aside portion. See 51 Comp. Gen. 719 (1972); 51 Comp. Gen. 335, 338-44 (1971); 41 Comp. Gen. 787 (1962).

This clause is no longer valid. Section 502 of the Small Business Act Amendments of 1977, Public Law 95-89, 91 Stat. 553, 562, amended 15 U.S.C. § 644 (1976), by mandating the use of total LSA set-asides. Brenner Metal Products Corp., 57 Comp. Gen. 595 (1978), 78-2 CPD 32. The current regulation provides that an LSA concern is one that agrees to perform a substantial portion of a contract in an LSA. See FPR § 1-1.804-1, supra.

This superseded notice should not have been incorporated into the IFB. Our Office has held that an award cannot be made on the basis of these superseded labor surplus priorities. Western Filament Inc., B-192148, September 25, 1978, 78-2 CPD 226; Willson Products Division, ESB Incorporated, B-191698, August 8, 1978, 78-2 CPD 102. The inclusion of this notice provided a compelling reason to cancel the solicitation. Western Filament Inc., supra; Willson Products Division, ESB Incorporated, supra. HHS should have recognized the defect and either resolicited or amended the solicitation.

While HHS retained the superseded notice, HHS did not even attempt to apply it. Instead, HHS determined the responsiveness of the bids on the basis of the current notice contained in FPR § 1-1.804-1, supra. However, an award must be made in accordance with the terms of the solicitation. Emerald Maintenance, Inc., The Big Picture Company, B-209082, B-209219, March 1, 1983, 83-1 CPD 208; Space Services International Corporation, B-207888.4, .5, .6, .7, December 13, 1982, 82-2 CPD 525. HHS's evaluation of Chambers' bid on the basis of the current notice was improper because it was not incorporated into the solicitation. The protest is sustained on this basis. Therefore, we need not determine whether the manner in which HHS applied the current notice was correct.

HHS claims that Chambers' letter is ambiguous regarding the place it intends to perform. However, the solicitation is itself ambiguous and failed to advise bidders how they were to qualify as LSA concerns.

Since the contract awarded to Marshall's is a requirements contract effective through September 30, 1983, we recommend that the contract be terminated and that the remaining requirements be resolicited under an IFB which includes the proper LSA notice.

Since our decision contains a recommendation for corrective action, we have furnished a copy to the congressional committees referenced in section 236 of the Legislative Reorganization Act of 1970, 31 U.S.C. § 720 (formerly 31 U.S.C. § 1176 (1976)), which requires the submission of written statements by the agency to these committees concerning action taken with respect to our recommendation.

Harry R. Van Cleve
for Comptroller General
of the United States