DECISION

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

FILE: B-218730 **DATE:** August 14, 1985

MATTER OF: Air Inc.

DIGEST:

1. Bid submitted under a total labor surplus area (LSA) set-aside was properly rejected as nonresponsive where bid did not contain an express commitment that a substantial portion of the contract will be performed in an LSA.

2. Where low bid is ambiguous as to whether bidder will perform in an LSA, bid cannot be considered eligible for award as an LSA concern.

3. Protest that awardee will be unable to substantially perform in an LSA challenges the affirmative responsibility determination which GAO will not consider.

Air Inc. protests the rejection of its bid as nonresponsive to the labor surplus area requirements applicable to one of 35 items solicited under the General Services Administration (GSA), Office of Federal Supply and Services, invitation for bids (IFB) No. FEP-BA-F0283-A. Air also protests the award of the contract for that item to the second low bidder, Cooper Air Tools/DOTCO. Air contends that it should have received the award for the item because it was the low responsive, responsible bidder.

For the reasons set forth below, we deny Air's protest.

The solicitation was for the government's annual requirements for 35 items of pneumatic handtools. Item 18 (a pneumatic grinder), the subject of this protest, was the only item designated for a total labor surplus area (LSA) set-aside. Air's bid was the lowest of the three bids received for this item. However, the contracting officer determined that the protester's bid was nonresponsive because it did not obligate the protester to perform in an LSA. Consequently, award was made to Cooper Air Tools/DOTCO

whose bid indicated that performance would be in Defiance County, Ohio, an LSA.

Clause B-FSS-23 of the solicitation, entitled "Notice of Total Labor Surplus Area Set-Aside," notified bidders that clause 52.220-2, entitled "Notice of Total Labor Surplus Area Set-Aside," applied only to item 18 of the solicitation. Clause 52.220-2 invited bids for this item provided a bidder agreed to perform as an LSA concern and warned that failure to so agree would render a bid nonresponsive as regards item 18.

In its bid, Air indicated in clause 52.214-14, entitled "Place of Performance-Formal Advertising," that its place of performance would be at its address in San Carlos, California. Similarly, the protester listed the production and inspection point for this item (clause E-FSS-514) as San Carlos, California. San Carlos, California, was not listed by the Department of Labor, at the time of bid opening, as an LSA. However, under clause 52.220-1, entitled "Preference for Labor Surplus Area Concerns," Air inserted "Lane County Oregon." Clause 52.220-1 specifically stated that it was not applicable to the LSA set-aside portion of the IFB.

Air essentially argues that by inserting Lane County, Oregon, under clause 52.220-1, Preference for Labor Surplus Area Concerns, and signing the bid, it represented in its offer that it would substantially perform the contract in an LSA. We disagree.

The commitment to perform substantially in an LSA, which establishes a firm's eligibility for award under a total LSA set-aside, is a material term which must be included with the bid at bid opening and which, therefore, cannot be waived as a minor informality. Alchemy, Inc., B-208948, Mar. 22, 1983, 83-1 C.P.D. ¶ 284; Reynolds Metals Company, B-209042, Oct. 12, 1982, 82-2 C.P.D. ¶ 328. We have held that under the LSA provisions, a bidder is required to list its proposed area of performance. The legal commitment to perform in an LSA arises only if the area listed is an LSA. Since the LSA provisions constitute material terms of the contract, it is essential that a bidder legally obligate itself to perform as an LSA concern at the time of bid opening. Thus, a bidder's designation of a geographic area that is not included on the Department of

Labor's published list of LSA's at the time of bid opening does not create the essential legal obligation to perform the contract in an LSA, and the information necessary to establish that obligation may not be submitted after bid opening. See Anchor Conveyors, Inc., B-215656, Sept. 12, 1984, 84-2 C.P.D. ¶ 285, and cases cited therein.

Air's bid did not establish its eligibility as an LSA concern inasmuch as the bid did not contain an express agreement to perform the required work substantially in an LSA. The information Air provided in clause 52.220-1 can only be used to determine a preference for LSA concerns in those instances where there is a tie bid or in Buy American Act evaluations for the non-set-aside items of the solicitation, i.e., all items except item 18. Moreover, even assuming that this clause could be used to indicate the LSA status for item 18, we note that the Secretary of Labor's published list of LSA's at the time of bid opening classified "Lane County less Eugene City" as an LSA. The protester's bid, which simply listed "Lane County Oregon" as an LSA, is ambiguous as to whether Air intends to perform on item 18 in the LSA parts of Lane County or in Eugene City, which is not an LSA, making it subject to more than one reasonable interpretation, only one of which would make the bid responsive. See Alchemy, Inc., B-207338, June 8, 1983, 83-1 C.P.D. ¶ 621; see also Kings Point Mfg. Co., Inc., B-205712, Apr. 5, 1982, 82-1 C.P.D. ¶ 310. Accordingly, GSA properly determined Air to be ineligible for award of the contract to supply item 18's pneumatic grinders.

We note that clause 52.220-2 does not provide space for bidders to indicate their intention to perform as an LSA concern. Under these circumstances, it appears a bidder could properly commit itself to perform as an LSA concern for the LSA set-aside item merely by signing the bid. Air, however, cannot avail itself of that approach here since, by listing a non-LSA in the place of performance and inspection point clauses and by not specifying where in Lane County the protester intends to perform, Air's bid was ambiguous twice over and therefore properly rejected as nonresponsive.

Alternatively, Air claims that Cooper should not have been awarded the contract on the basis that GSA did not perform a preaward survey or prepare a plant facilities report on Cooper to determine Cooper's intention and capability to perform a substantial portion of the work in Defiance County. Insofar as Cooper specifically indicated

in its bid that it would perform item 18 in an LSA and did not take any exception to the LSA requirement, Cooper's bid was responsive. See Power Testing, Inc., B-197190, July 28, 1980, 80-2 C.P.D. ¶ 72. Insofar as Air questions Cooper's capability to perform a substantial portion of item 18 work in an LSA, the protester essentially questions the contracting agency's affirmative determination of Cooper's responsibility. Our Office, however, does not consider protests concerning affirmative determinations of responsibility absent a showing that the determination may have been made fraudulently or in bad faith or that definitive responsibility criteria in the solicitation were not met. See Pluribus Products, Inc., B-214924, May 23, 1984, 84-1 C.P.D. ¶ 562. 4 C.F.R. § 21.3(f)(5) (1985). Neither exception is alleged here.

Accordingly, the protest is denied.

for Harry R. Van Cleve
General Counsel