DECISION

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

FILE: B-221186 **DATE:** February 24, 1986

MATTER OF: Flexfab, Inc.

DIGEST:

1. Agency properly refused to apply a 2.2 percent price differential in evaluating price offered by labor surplus area concern notwithstanding inaccurate solicitation language that payment of a price differential in favor of labor surplus area concerns was authorized by legislation at the time of solicitation issuance where statutory authority to do so had expired as of the time of award. The solicitation specifically warned bidders that "if no legislation is in effect at the time of award which authorizes payment of a price differential, no evaluation factor will be added to the bids submitted."

2. Agency properly considered protester's price for first article testing in determining its total evaluated bid price where solicitation specifically required bidders to include a price for first article testing and provided that award would be made on the basis of price and price related factors.

Flexfab, Inc. (Flexfab), protests the proposed award of a contract for hoses to Industrial Design Laboratories (Industrial) under invitation for bids (IFB) No. DLA700-86-B-0027 issued by the Defense Logistics Agency (DLA).

We deny the protest.

The solicitation was issued on October 15, 1985, and bids were opened on November 14, 1985. Although Flexfab and Industrial bid the same unit price of $8.60 per item,

Flexfab bid $2,000 for first article testing while Industrial bid no charge and Industrial was evaluated as the lowest priced bidder.

Flexfab, a labor surplus area (LSA) concern, argues that it was misled in preparing its bid by a solicitation provision advising bidders that, at the time of solicitation issuance, a 2.2 percent price differential would be applied in favor of bids submitted by LSA concerns when, in fact, no such preference was authorized on the October 15, 1985, solicitation issuance date. In this regard, Flexfab states that "the preference for LSA concerns was eliminated on September 30, 1985, by the House Joint Resolution 388" (Pub. L. No. 99-103, 98 Stat. 471 (Sept. 30, 1985)), and therefore DLA improperly included the above provision in the solicitation. Flexfab contends that the misleading information "resulted in a violation of Flexfab's right to be fully informed in preparing its bid." Flexfab's bid would have been low if Industrial's price was increased by 2.2 percent for evaluation purposes.

The solicitation provision at issue reads as follows:

> "(a) Restriction and Evaluation. Offers under this acquisition are solicited from small business concerns only. After all other evaluation factors described in the solicitation are applied, . . . offers will be evaluated by adding a factor of 2.2 percent to offers from small business concerns that are not Labor Surplus Area (LSA) concerns, except as provided in (e) below. . . .
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> "(e) The evaluation factor described in subparagraph (a) above is authorized by legislation in effect at the time of solicitation issuance. If the authorized percentage factor is changed by legislation which takes effect before award, offers will be evaluated using the percentage factor so authorized. If no legislation is in effect at the time of award which authorizes the

payment of a price differential, no evaluation factor will be added to the offers submitted. Offerors are cautioned that this solicitation will not be amended solely to advise of a change in the applicable percentage to be used as an evaluation factor."

Under section 1109 of Pub. L. No. 97-252, 96 Stat. 746 (September 8, 1982), as amended by section 1205 of Pub. L. No. 98-94, 97 Stat. 683 (September 24, 1983), the Secretary of Defense was authorized to conduct a test program during fiscal year 1983 and 1984 and pay up to a 2.2 percent price differential under contracts awarded to a qualifying LSA concern. Section 1254 of Pub. L. No. 98-525, 98 Stat. 2611 (October 19, 1984), popularly known as the Department of Defense (DOD) Authorization Act, 1985, specifically extended the test program for 1 additional year through the end of fiscal year 1985. House Joint Resolution 388 (Pub. L. No. 99-103, 99 Stat. 471 (September 30, 1985)), making continuing appropriations for fiscal year 1986, was the funding authority in effect when this solicitation was issued on October 15, 1986; the LSA preference test program was not specifically included in this continuing resolution.1/ On November 8, 1985, Congress passed the (DOD) Authorization Act, 1986 (Pub. L. 99-145, 99 Stat. 583 (November 8, 1985)), without authorizing or funding the LSA preference test program. This legislation was the funding authority in effect on the November 14, 1985, bid opening date.

We find Flexfab was not prejudiced by DLA's inclusion of the above-quoted clause and deny the protest.

Under the solicitation provision at issue, whether or not the preference was in effect at the time of solicitation issuance is irrelevant because, at the time of award, the preference was not authorized and the preference could not be applied. In the DOD Authorization Act, 1986, which, as noted above, was in effect on the November 14, 1985, bid opening date, Congress did not extend, provide funds or

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1/ The term "continuing resolution" refers to legislation enacted by Congress to provide budget authority for federal agencies and specific activities to continue in operation until regular appropriations are enacted. See generally 58 Comp. Gen. 530, 532 (1979).

address the LSA preference test program in any way. Thus, DLA, consistent with the terms of the solicitation, declined to evaluate bids on the basis of the 2.2 percent price differential and Flexfab clearly was on notice that this could occur by the solicitation language. See Lite Industries, Inc.; Magline, Inc., B-221031, B-220409, Feb. 18, 1986, 65 Comp. Gen. ___ 86-1 C.P.D. ¶ ___. Accordingly, Flexfab's reliance on the application of the LSA evaluation preference where bidders were told it might not be authorized, was not reasonable.

Flexfab also believes that DLA improperly considered the firm's price for first article testing in determining its bid price and, as a result, its bid improperly was determined not low.

Flexfab's bid was properly evaluated. The solicitation specifically required bidders to include a bid price for first article testing. Here, as noted above, while both Flexfab and Industrial bid the same unit price per item, Flexfab bid $2,000 for the required first article testing and Industrial bid no charge. Thus, Flexfab was not low on the basis of total evaluated bid price. In this regard, the IFB incorporated by reference Federal Acquisition Regulation § 52-214.10 (Federal Acquisition Circular No. 84-5, April 1, 1985), which provides that "the government . . . will award the contract to the responsible bidder whose bid . . . will be most advantageous to the government considering only price and price related factors." The IFB thus called for evaluation of total prices for the items solicited including a price for first article testing and therefore DLA properly determined Industrial as the low bidder. See, e.g., BVR, Inc., B-209511, Jan. 28, 1983, 83-1 C.P.D. ¶ 96; Lavelle Aircraft Co., B-204381.3, June 2, 1982, 82-1 C.P.D. ¶ 515.

We deny the protest.

for Harry R. Van Cleve
General Counsel