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DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20546

FILE: B-187810

DATE: April 6, 1977

MATTER OF: Capital Fur, Inc.

DIGEST:

1. Since record contains no indication that low bidder was either negligent in certifying itself to be small business or intentionally misrepresented its size status this Office is unable to conclude that low bidder acted in bad faith when submitting its bid under subject IFB.
2. Contracting Officer has authority to accept at face value small business size certification by low bidder in absence of timely protest against size status, and where SBA Regional Director has determined low bidder to be small business concern.
3. Contention that bidder is not manufacturer or regular dealer within purview of Walsh-Healey Act is for consideration by contracting officer subject to final review by Department of Labor.

Capital Fur, Inc. (Capital) has protested against the award of a contract to Kings Point Manufacturing Company (Kings Point), under invitation for bids (IFB) DSA100-76-B-1486, a total small business set aside issued by the Defense Personnel Support Center (DPSC), Philadelphia, Pennsylvania.

The subject IFB, issued on September 10, 1976, requested offers for 34,992 pairs of socks. At bid opening Kings Point was the low bidder and Capital the second low bidder. Both bidders certified that they were small business concerns.

By telegram dated October 27, 1976, Capital notified DPSC that it was protesting any award to the low bidder on the grounds that Kings Point was a large business concern. On November 2, 1976, award was made to Kings Point. Thereafter, by letter dated November 4, 1976, DPSC advised Capital that its failure to comply with provisions contained in the Armed Services Procurement Regulation (ASPR) precluded

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consideration of its protest on the instant procurement but that the matter would be referred to the Small Business Administration (SBA) for consideration in any future action. In this connection it is noted that while bids were opened on October 11, 1976, Capital first protested to DPSC by telegram dated October 27, 1976.

ASPR § 1-703(b)(1) (1976 ed.) states, in part, as follows:

"Any bidder, offeror, or other interested party may, in connection with a contract involving a small business set aside or otherwise involving small business preferential consideration, challenge the small business status of any bidder or offeror by sending or delivering a protest to the contracting officer responsible for the particular procurement. * * * In order to apply to the procurement in question, such protest must be filed with and delivered to the contracting officer prior to the close of business on the fifth day exclusive of Saturday, Sunday, and legal holidays after bid opening date for formally advertised and small business restricted advertised procurements. * * *" (Emphasis added.)

ASPR § 1-703(b)(1)(b) further provides:

"b. Untimely Protests Received Prior to Award. -- A protest which is not timely, even though received before award, shall be forwarded to the Small Business Administration district office serving the area in which the protest concern is located, with a notation thereon that the protest is not timely. The protestant shall be notified that his protest cannot be considered on the instant procurement but has been referred to SBA for its consideration in any future actions; however, see (2) below for authority of contracting officer to question small business status of an apparently successful offeror at any time prior or subsequent to award."

On November 3, 1976, the day following award to Kings Point, the SBA Size Appeals board, in two companion cases, reversed an earlier determination by SBA's New York Regional Office which had held that Kings Point qualified as a small business. The Size Appeals Board found that Kings Point was other than a small business because of its affiliation with certain business concerns.

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Counsel for Capital asserts that the instant contract should be canceled on the grounds that Kings Point entered a bid that was fraudulent and false within the meaning of 18 U.S.C. § 1001 (1970). In this connection Capital points out that the SBA Size Appeals Board decisions show that the various affiliates of Kings Point were acquired as long ago as 1972. The protester also argues that since an appeal was pending at the time the contract was awarded the contracting officer should have taken the appeals into consideration when making the award.

DPSC disagrees with Capital's contentions and asserts that the protester's position is contrary to appropriate provisions of ASPR, decisions of our Office and the Code of Federal Regulations (CFR). ASPK § 1-703(b) (1976 ed.) provides, in part, as follows:

"Representation by a bidder or offeror that it is a small business concern shall be effective, even though questioned in accordance with the terms of this subparagraph (b), unless the SBA, in response to such question and pursuant to the procedures in (3) below, determines that the bidder or offeror in question is not a small business concern * * *. The controlling point in time for a determination concerning the size status of a questioned bidder or offeror shall be the date of award, except that no bidder or offeror shall be eligible for award as a small business concern unless he has * * * in good faith represented himself as small business prior to the opening of bids * * *."

Moreover, 13 C.F.R. § 121.3-4 (1976) states, in pertinent part, that:

"Original size determinations shall be made by the regional director or his delegate * * *. Such determination shall become effective immediately and shall remain in full force and effect unless and until reversed by the Small Business Size Appeals board * * *."

Additionally, DPSC has cited our decisions in Federal Contracting Company, B-180807, May 17, 1974, 74-1 CPD 267 and Propper International Inc., et al., B-185302, June 23, 1976, 76-1 CPD 400 in support of its position that its award to Kings Point was proper.

It is to be noted first that DPSC, citing Bancroft Cap Company, Inc., B-182569, December 26, 1974, 74-2 CPD 390, has indicated that Capital's protest to our Office should be dismissed because it requests the General Accounting Office to assume jurisdiction which

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has been delegated solely to the SBA under 15 U.S.C. § 637(b)(6) (1970). While a protest which questions the small business status of another bidder is a matter for consideration by the SBA under 15 U.S.C. § 637(b)(6) (1970), rather than our Office, nevertheless our Office might feel compelled to recommend termination of a contract awarded to a large business concern where the contractor had certified itself as a small business in bad faith in order to be eligible for award. See 41 Comp. Gen. 47 (1961); 49 Comp. Gen. 369 (1969) and Bancroft Cap. Co., et al., 55 Comp. Gen. 469 (1975), 75-2 CPD 231. Accordingly, Capital's protest is for consideration by our Office.

In cases such as this where an award has been made prior to the SBA's final resolution of the contractor's size we must consider what corrective action, if any, is appropriate if the contractor is ultimately determined to be large. In such circumstances we are compelled to consider the degree of negligence which caused the erroneous self-certification. We would not hesitate to recommend contract termination for the Government's convenience where the certifying firm has not conformed to a reasonable standard of care. Moreover it is conceivable that an award could be considered void if there is a clear showing of any intentional misrepresentation. Techalloy Company, Inc., B-187856, March 15, 1977, 77-1 CPD ____.

In the instant case a clear showing has not been made that Kings Point was negligent or made any intentional misrepresentation which led the SBA Regional Office to conclude that Kings Point was a small business. Although the Size Appeals Board ultimately determined that Kings Point was a large business because of its affiliation with two concerns it should be noted that as recently as September 2, 1976, DPSC was advised by the Regional Office that Kings Point was a small business notwithstanding its affiliation with these same two concerns. In view of the foregoing this Office is unable to conclude that Kings Point acted in bad faith when it submitted its bid under the subject IFB. Bancroft Cap Co., et al., B-182926, January 2, 1976, 76-1 CPD 1, Kleen Rite Corporation, B-184313, April 26, 1976, 76-1 CPD 279.

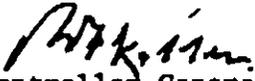
Further, we do not believe there is any basis upon which our Office may legally object to the contracting officer's award of the contract to Kings Point one day prior to the Size Appeals Board's reversal of the decision of SBA's New York Regional Office. In this connection we note that at the time award was made on November 2, 1976, DPSC was unaware that a decision from the Size Appeals Board on Kings Point's size status was imminent. Moreover, as noted above the record discloses that as recently as September 2, 1976, DPSC was advised by SBA's New York Regional Office that Kings Point was a small business. Additionally Capital's size status protest to SBA was clearly untimely under the regulations quoted above and thus

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was for consideration only in future procurements. In such circumstances we do not think the contracting officer erred in failing to question Kings Point's size status which, at that time, had been determined by SBA's New York Regional Director to be small. See 53 Comp. Gen. 435 (1973).

Finally, Capital has indicated that Kings Point was ineligible for bidding on the subject solicitation because it did not comply with the Walsh-Healey Act, 41 U.S.C. §§ 35-45 (1970). In this connection, numerous decisions of our Office have recognized that the responsibility for applying the criteria of the Walsh-Healey Act is vested in the contracting officer subject to final review by the Department of Labor. See Arista, Co., B-181091, July 10, 1974, 74-2 CPD 20. Therefore, we will not consider the merits of this contention.

Accordingly, Capital's protest is denied.


Acting Comptroller General
of the United States