DECISION

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

FILE: B-191806 DATE: October 23, 1978

MATTER OF: Virginia Abrasives Corporation

DIGEST:

Procuring agency's consideration on the merits of protest not filed within the time limits established by GAO's bid protest procedures does not preclude GAO from dismissing protest when subsequently filed with it. Protest of cancellation of IFB initially filed with procuring agency more than 10 working days after protester knew the basis therefor, but filed with GAO four days after agency's denial of protest, is dismissed.

On January 19, 1978, the General Services Administration (GSA) issued invitation for bids (IFB) No. CHN-FT-78-028 for 54 items of coated abrasives. The procurement was totally set aside for those firms which qualified as labor surplus area (LSA) concerns "at the time of bid opening and time of award" either by submitting with their bids evidence that they were "certified eligible" by the Department of Labor (DOL) or by agreeing to substantially perform the contract in areas designated as "labor surplus" by the DOL as of the proposed date of award. In the latter instance, the bidder was required to identify in its bid the geographical areas in which it proposed to perform the contract.

At the time of issuance of the IFB, DOL had identified 1,171 geographical areas as eligible for LSA set-aside consideration. Virginia Abrasives Corporation (VAC), along with four other bidders, bid upon 17 items (1-5, 9-12, 13-15, 17-18 and 22-24).

VAC's bid did not contain evidence of certification and the designated production area, Petersburg, Virginia, had not been classified as a labor surplus area by DOL. Thus VAC was determined to be ineligible for award. One other bidder was also ineligible for award as it provided neither a certification nor did it designate where the work would be done. Of the three remaining bidders one, Industrial Abrasives Co. (IAC), was initially eligible since it submitted evidence that it had been "certified eligible" by DOL. However as a result of the change in regulations described below it too became ineligible.

On the same day that bids were opened in the instant case, DOL published new regulations governing eligibility for LSA set-asides superseding the previous regulations contained in 29 Code of Federal Regulations (CFR) Part 8. The new regulation reduced the number of eligible LSA's from 1,171 to 453. The new regulations also removed the certification program upon which IAC had solely relied to qualify pursuant to the terms of the IFB. Thus although IAC would have been an eligible bidder at the time of bid opening it could not have been an eligible bidder at the time of award i.e., on or after March 3, 1978, since in accordance with the IFB provisions, it had to qualify as a labor surplus area concern at time of award.

The remaining two bidders were eligible for award since both had designated areas which were on the old and new lists of labor surplus areas. However, neither of these bidders bid on one item and only one of them bid on four other items at prices averaging 36 percent higher than the previous year's contract. On the remaining 12 items, the low eligible bid ranged from three to 35 percent higher than the previous year's contract.

In view of the effect which the new DOL regulations had upon competition, the contracting officer cancelled the set-aside IFB and resolicited on an unrestricted basis. VAC, the low bidder for these 17 items, protested the cancellation to GSA.

VAC has not disputed the contracting officer's assertions that three of the five bidders (including VAC) were not eligible for award under the original solicitation and that the prices offered by the two remaining eligible bidders averaged 20 percent higher than the previous year's contract. VAC's primary desire appears to be to protect its low bid from competition upon resolicitation: it suggested to GSA that "the award be based on the prices as originally submitted by all companies." (In fact, upon resolicitation, VAC was underbid by IAC, whose prices were on the average 2 percent lower than the previous year's contract.)

GSA has argued that not only was the cancellation of the IFB and resolicitation a proper exercise of discretion, but that VAC's protest of the cancellation of the original solicitation was untimely. We agree.

VAC received notice of the cancellation of the solicitation on March 27, 1978 and protested to the agency by letter dated April 11, 1978. The agency denied VAC's protest by letter dated April 19, 1978. Within four days of its receipt of this letter, VAC filed a protest with our Office.

Section 20.2 (a) of our Bid Protest Procedures, 4 C.F.R. part 20 (1977), provides that when a protester initially files its protest with the contracting agency, that protest must be timely filed. In this case, the applicable period for timely filing, as noted in section 20.2 (b) (2), is within 10 working days after the basis for protest is known. VAC knew of the basis for its protest on March 27, 1978, but did not send its letter of protest to the agency until April 11, 1978, or more than 10 working days after the basis of the protest was known. Consequently, VAC's protest to our Office is untimely.

VAC argues that since GSA responded to its protest on the merits, despite its untimeliness, our timeliness

rules have in effect been waived. However, a procuring agency cannot waive the procedures established by our Office which govern our consideration of bid protests. Therefore, an agency's consideration on the merits of a protest not filed within the time limits established by our procedures does not preclude our later dismissal of a protest filed with us. We also note that the circumstances of this case are similar to those in Western Filament Inc., B-192148, September 25, 1978, 78-2 CPD ___, in which we upheld an agency's cancellation of an IFB and resolicitation following the March 3, 1978 change in labor surplus policy.

Deputy Comptroller General
of the United States