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DECISION

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

FILE: B-204337; B-204337.3 DATE: February 10, 1982

MATTER OF: Louis "J" Sportswear, Inc;
Lancer Clothing Corporation

DIGEST:

1. Where, even conceding protester's argument regarding labor surplus area (LSA) concern status of bidders, protester is not low bidder following LSA concern evaluation. Therefore, protest against agency's determination of LSA status is academic.

2. Protester's questioning of propriety of contracting agency's decision to exercise option provision at time of award rather than amend invitation for bids prior to bid opening to notify bidders of change in funding and quantity to be awarded is not in the nature of additional support for protester's initial protest; it is a new and independent ground of protest which must independently satisfy timeliness criteria of GAO Bid Protest Procedures.

Louis "J" Sportswear, Inc. (Louis "J"), protests the award of a contract to Winfield Manufacturing Co., Inc. (Winfield), under invitation for bids (IFB) No. DLA100-81-B-1146, issued by the Defense Personnel Support Center, Defense Logistics Agency (DLA), Philadelphia, Pennsylvania.

The IFB, a total small business and labor surplus area (LSA) set-aside, solicited bids for 31,259 "Vests, Fragmentation Protective, Ground Troops (Body Armor)," with an option for an additional quantity, not to exceed 50 percent of the basic quantity. DLA ruled that none of the bidders qualified as LSA concerns and awarded the base and option quantity to Winfield as the low bidder.

Louis "J"--the third low bidder--protests that it qualifies and since neither Winfield nor Lancer Clothing Corporation (Lancer)--the second low bidder--qualifies as LSA concerns, after adding

a 5-percent price differential, Louis "J" becomes the low bidder and, thus, is entitled to the award. As an alternative argument, Louis "J" questions the propriety of DLA's decision to exercise the option at the time of award. Lancer has also filed a protest that no award be made until our Office has had a chance to consider the issues already raised.

We find no basis to disturb the award to Winfield.

DLA received seven bids on August 5, 1981, of which the three lowest bids were as follows:

Bidder	Unit Price for Basic Quantity	Unit Price for Option Quantity
Winfield	$182.40	$182.40
Lancer	185.05	194.29
Louis "J"	191.00	210.00

Since the procurement was set aside for firms in areas designated by the Secretary of Labor as having surplus labor, the IFB contained paragraph K17, entitled "Eligibility for Preference as a Labor Surplus Concern," which provides in pertinent part:

> "Each offeror desiring to be considered for award as a Labor Surplus Area (LSA) concern on the set-aside portion of this procurement * * * shall indicate below the address(es) where costs incurred on account of manufacturing or production (by offeror or first tier subcontractor) will amount to more than fifty percent (50%) of the contract price.
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> "NOTE: IT IS IMPERATIVE THAT INFORMATION REQUIRED BE SUBMITTED WITH THE OFFER IF LABOR SURPLUS ELIGIBILITY IS BEING CLAIMED."

Louis "J" supplied the necessary information, indicating that it would incur 16.3 percent of the costs of manufacturing or production and that its first-tier subcontractor, the Gentex Corporation (Gentex), would incur the remaining 83.7 percent in a labor surplus area. However, in indicating that Gentex would incur 83.7 percent of the costs, Louis "J" also noted that this figure included the cost of purchasing Kevlar yarn from E.I. DuPont De Nemours & Company (DuPont). The cost of this yarn amounted to 57.6 percent of the total contract price. Thus, Gentex's individual contribution to the contract was indicated by Louis "J" to be only 26.1 percent of the total price.

In evaluating the Louis "J" bid, the contracting officer concluded that Louis "J" did not qualify as an LSA concern because the total costs Louis "J" and its first-tier subcontractor, Gentex, would incur "on account of manufacturing or production" amounted to less than 50 percent of the total contract price. The contracting officer noted that, by Louis "J's" own admission, 57.6 percent of the total contract price would be the cost of Kevlar yarn and that DuPont manufactures this yarn in only one location, which is not a labor surplus area. The contracting officer found that the cost of the Kevlar yarn alone prevented Louis "J" from qualifying as an LSA concern.

In view of the need for all bidders to purchase Kevlar yarn from DuPont, and since the cost of Kevlar yarn amounted to more than 50 percent of any bidder's contract costs, it was impossible for any firm to meet paragraph K17's requirement that more than 50 percent of the contract costs be incurred "on account of manufacturing or production" within a recognized labor surplus area. In light of this, the contracting officer held that Winfield, Lancer and Louis "J" were all subject to the addition of a 5-percent evaluation factor to their bids and, therefore, the relative standing of the bidders remained unchanged; Winfield remained the low bidder.

Louis "J" disagrees with the contracting officer's interpretation of paragraph K17, arguing that it does qualify as an LSA concern because the contracting

officer, in effect, is looking beyond the first-tier subcontractor's costs when he examines the cost of the Kevlar yarn. Also, Louis "J" has questioned the propriety of DLA's decision to exercise the IFB's option at the time of award. In this regard, Louis "J" contends the burden is on DLA to prove that it was not required to amend the IFB prior to bid opening to notify bidders that total funding had been obtained for the full quantity of protective vests and that award would be made for the full quantity. The IFB stated that bids would be evaluated on the basic and option quantities if funds were available for both.

We have held that where a protester initially files a timely protest and later supplements it with new and independent grounds, these later-raised bases for protest must independently satisfy the timeliness criteria of our Bid Protest Procedures. James G. Biddle Company, B-196394, February 13, 1980, 80-1 CPD 129. Our Procedures require a protest of this type to be filed "not later than 10 days after the basis for protest is known or should have been known, whichever is earlier." See 4 C.F.R. § 21.2(b)(2) (1981).

Louis "J" argues that it has not raised a new independent ground of protest because its original protest was "against award to any other bidder." Thus, since DLA chose to make an award in the face of the protest, "the procuring agency has only opened itself to inquiry regarding the circumstances of such award, and it is therefore appropriate and timely that the procuring agency should be required to demonstrate that its award was indeed properly made," citing our decision in Kappa Systems, Inc., 56 Comp. Gen. 675 (1977), 77-1 CPD 412.

We do not find Kappa Systems, Inc., supra, to be controlling here. In that decision, the protester, Kappa, stated that "the contracting officer intends to award a contract to an offeror whose offer is not that which is most advantageous to the Government." In response to our request for an additional statement in support of its protest, Kappa specifically argued that the contracting officer violated

the procurement regulations by failing to give written notice that best and final offers were requested. The awardee argued that this issue was untimely raised. However, we held that this issue was in the nature of additional support for the contention that the award was not "most advantageous to the Government" and could not be properly regarded as an entirely separate ground of protest. Thus, we considered the matter on the merits.

Essentially, Louis "J's" initial protest was that it qualified as an LSA concern, but that Winfield and Lancer did not, and that, as a result, after the 5-percent evaluation factor was added to the Winfield and Lancer bids, Louis "J" became the low bidder and entitled to the award. Clearly, the question of whether it was proper for DLA to exercise the option at the time of award, rather than decide to amend the IFB prior to bid opening and inform bidders that the total quantity would be awarded, cannot be classified as something "in the nature of additional support" for Louis "J's" contentions regarding LSA eligibility. To the contrary, it is a new matter which must independently satisfy the timeliness criteria of our Bid Protest Procedures.

Louis "J" first raised this issue orally at a bid protest conference on October 21, 1981. It did not submit the matter to our Office in writing until November 2, 1981. DLA informed us by letter dated September 25, 1981, that it was going ahead with the award, despite the pending protest, on the basis of the urgency of the requirement; this letter also notified us that the award was being made for both the basic and option quantities. Louis "J" maintains that it never received a copy of this letter and that it was not officially notified of the DLA award until October 26, 1981.

However, on the record presented, we find that Louis "J" had actual knowledge of the availability of funds and the likelihood of a contract award for the full quantity more than 10 days prior to the October 21 conference. By letters dated September 9 and 25, 1981, Winfield noted that full funding had been available as of August 4, 1981, the day before

bid opening and, therefore, Winfield was entitled to an award for both the basic and option quantities. Both these letters indicate that a copy was sent to Louis "J." This information was sufficient for Louis "J" to raise in a timely manner the issue of whether DLA should have amended the IFB rather than have exercised the option at the time of award. Since Louis "J" did not raise this issue until October 21, 1981, we find that the issue was untimely raised and, therefore, will not be considered on the merits.

Even if we assume Louis "J" was an LSA concern and Winfield not so qualified, Winfield was the low bidder for the basic and option quantity. Therefore, Louis "J's" protest concerning the LSA status of the firm is academic and need not be decided.

As to Lancer's protest against any award being made before we rendered a decision on Louis "J's" protest, our Office did not receive Lancer's protest until 4 days after DLA had already made the award to Winfield on an urgency basis. Moreover, in view of our findings, Lancer was not prejudiced in any way.

We dismiss the protests.

Harry R. Van Cleve

Harry R. Van Cleve
Acting General Counsel

UNITED STATES GENERAL ACCOUNTING OFFICE
WASHINGTON, D.C. 20548

OFFICE OF GENERAL COUNSEL

B-204337; B-204337.3

February 10, 1982

The Honorable Joseph M. McDade
Ranking Minority Member
Committee on Small Business
House of Representatives

Dear Mr. McDade:

We refer to your letter to our Office dated September 16, 1981, in regard to the protest of Louis "J" Sportswear, Inc., concerning the award of a contract under solicitation No. DLA100-81-B-1146, issued by the Defense Personnel Support Center, Defense Logistics Agency, Philadelphia, Pennsylvania.

By decision of today, copy enclosed, we have dismissed the protest.

Sincerely yours,

Harry R. Van Cleve

Harry R. Van Cleve
Acting General Counsel

Enclosure