

DECISION



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

6/17/76

FILE: B-185302

DATE: August 30, 1976

MATTER OF: Society Brand, Inc.
Request for Reconsideration

98108

DIGEST:

1. In reaching prior decision whether to recommend termination for convenience of improperly awarded contract, GAO should have considered estimated termination costs in relation to total amount of combined small business/labor surplus area set-aside award. GAO therefore recommends that Defense Supply Agency examine current feasibility of terminating contract, and earlier decision is modified to this extent.
2. GAO decisions have recognized propriety of considering estimated costs in deciding whether recommendation that improperly awarded contract be terminated for convenience would be in Government's best interests. Contention that preserving integrity of competitive bidding system requires termination regardless of costs is not persuasive.
3. In regard to contention that bidder had no opportunity to comment on agency's termination for convenience estimate furnished to GAO, Bid Protest Procedures recognize appropriateness of withholding information which, as here, agency believes is not subject to disclosure.
4. Even if labor union is assumed to be "interested party," there is no indication that it submitted written comments during course of protest proceedings. Therefore, its letter submitted after decision was rendered is not for consideration in connection with pending request for reconsideration of protest decision.

Society Brand, Inc. (SBI), requests reconsideration of our decision in the matter of Propper International, Inc., et al., B-185302, June 23, 1976, 55 Comp. Gen. _____, 76-1 CPD 400. The decision found that the Defense Supply Agency (DSA) improperly awarded a contract because the awardee, Propper, was not a small business. The decision stated that termination for convenience was not recommended because (1) the estimated cost (\$461,244 - \$527,136 as of June 25, 1976) indicated that such action would

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not be in the Government's best interests, considering the total amount of the contract (\$658,920), and (2) the award was based on a determination of urgency.

SBI contends that (1) the estimated cost of terminating an improperly awarded contract is an irrelevant factor upon which to base a decision not to terminate the contract, (2) SBI and other parties were not given an opportunity to comment on the estimated costs prior to issuance of our decision, and (3) our decision incorrectly stated that the contract amount was \$658,920, whereas, actually it is about \$1,300,000.

The third issue raised by SBI is the most important. The procurement in question was a combined small business/labor surplus area set-aside. The dollar figure cited in our decision (\$658,920) represents only one-half of the total contract amount (\$1,317,840). Moreover, for a bidder to obtain award of any portion of a combined small business/labor surplus area set-aside it must be a small business. See ASPR § 1-706.7 (1975 ed.). Therefore, in deciding whether to recommend termination for convenience of Propper's contract our Office should have considered the estimated costs in relation to the total contract amount of \$1,317,840.

We recognize that the costs of termination have probably increased since the date of our decision. Moreover, the record indicates that the award was based on the Defense Supply Agency's (DSA) urgent need for supplies to meet a then-critical inventory situation. However, it is possible that in the current status of the contract the feasibility of termination for convenience is not out of the question. Therefore, by letter of today we are recommending to the Director, Defense Supply Agency, that he examine the current feasibility of terminating Propper's contract for the convenience of the Government and advise our Office of his findings as soon as possible.

If termination is found to be feasible, there is the question of which bidder would be entitled to the award. One of the parties to the protest, Bancroft Cap Company, Inc. (Bancroft), contended that award to the apparent second low bidder (SBI) could not be made. Bancroft argued that (1) SBI's self-certification as a small business was made in bad faith (Bancroft filed a protest to this effect with the contracting officer); (2) SBI is nonresponsible because it lacks the requisite financial capability; and (3) SBI is nonresponsible for lack of integrity, because an earlier decision of our Office on a different procurement (Bancroft Cap Co., Inc., 55 Comp. Gen. 469 (1975), 75-2 CPD 321) found that SBI had failed to certify itself as a small business in good faith.

We note that DSA's February 17, 1976, report to our Office contains the following pertinent reply:

Bancroft's protest against an award to SBI is based on Bancroft's contention that SBI is a large business concern, that SBI is ineligible for award under the provisions of ASPR 1-703(b), and that SBI is nonresponsible due to a lack of financial capability and integrity. The question of SBI's size status was referred to the Kansas City Regional Office of the SBA which advised that SBI was considered to be a small business concern. The question of SBI's responsibility is a question primarily for the Procuring Agency."

Our Office does not consider protests involving a bidder's size status since SBA is authorized to make such determinations. Tate Engineering, Inc., B-186788, July 23, 1976, 76-2 CPD 76. Also, our Office no longer considers protests against affirmative determinations of responsibility unless there is a showing of bad faith or the solicitation contained definitive responsibility criteria which allegedly were not applied. ENSEC Service Corporation, 55 Comp. Gen. 494 (1975), 75-2 CPD 341.

As for SBI's contention that termination costs are irrelevant, in a number of decisions our Office has indicated that considering the status of contract performance and the estimated termination for convenience costs is appropriate in reaching a decision whether recommending termination would be in the Government's best interests. See, for example, C3, Inc., et al., Requests for Reconsideration, B-185592, August 5, 1976; Dynamic International, Inc.--request for reconsideration, B-183957, December 29, 1975, 75-2 CPD 412; Data Test Corporation, 54 Comp. Gen. 715, 726-727 (1975), 75-1 CPD 138. SBI's contention that preserving the integrity of the competitive bidding system requires termination regardless of the costs is not, in our view, persuasive.

In regard to SBI's contention that it had no opportunity to comment on the estimate of termination costs furnished to our Office by DSA, we note that our Bid Protest Procedures provide for furnishing copies of agency reports to protesters and other interested parties (4 C.F.R. § 20.3(c) (1976)); however, the procedures also recognize that withholding of information submitted by the agency is

appropriate when "permitted or required by law or regulation." See 4 C.F.R. § 20.5. In past cases, our Office has withheld procurement sensitive information submitted by the agency when requested to do so; we have indicated that the protester's and the other parties' recourse in such circumstances to attempt to obtain the information is under the Freedom of Information Act, 5 U.S.C. § 552 (1970). See, for example, Dynalectron Corporation et al., 54 Comp. Gen. 1009, 1021 (1975), 75-1 CPD 341; Cf. C3, Inc., et al., supra. Here, DSA has indicated to our Office that there is a question as to the releaseability of its termination for convenience estimate, and we understand that a request for this information under the Freedom of Information Act is now pending before the Agency.

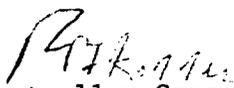
The United Hatters, Cap and Millinery Workers International Union has also submitted a letter concerning our earlier decision. The letter essentially suggests that we investigate the activities of the companies involved in making military caps and hats.

The present matter before our Office does not involve an audit investigation; rather, it is a reconsideration of a protest decision rendered in regard to a particular Government procurement award. In this regard, our Bid Protest Procedures provide as follows (4 C.F.R. § 20.9(a)):

"Reconsideration of a decision of the Comptroller General may be requested by the protester, any interested party who submitted comments during consideration of the protest, and any agency involved in the protest.
* * *"

Assuming, arguendo, that the Union is an "interested party," it nevertheless did not submit written comments during the protest. Therefore, its letter is not for consideration in this matter. See Republic Electronic Industries Corporation, B-183816, December 31, 1975, 75-2 CPD 418.

In view of the foregoing, after reconsideration our earlier decision is modified to the extent indicated herein.


Deputy Comptroller General
of the United States