

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

61017

FILE: B-185302

DATE: June 23, 1976

MATTER OF: Proper International, Inc.; Society Brand, Inc.;  
Bancroft Cap Company, Inc.

98408

## DIGEST:

1. Bidder found large by SBA Size Appeals Board and which thereafter sought, but as of date of bid opening had not received, recertification as small business could not properly represent itself as small business at time of bid opening. Bidder was not therefore eligible for award of total small business set-aside.
2. Being small business under existing SBA size standard is legal status which although entered into either through bidder's self-certification/representation or administrative decision is not just matter of existing fact. While self-certification/representation is initial step by which bidder obtains small business status, if and when SBA issues ruling that bidder is other than small business, until decision is reversed or overruled, bidder no longer enjoys status of being small under existing size standard.
3. In accordance with ASPR § 1-703(b) (1975 ed.) contracting officer cannot accept bidder's bid opening representation of itself as being small business if he knows that bidder has not subsequently been recertified by SBA as being small.
4. In view of estimated cost of terminating improperly awarded contract (\$329,460 as of May 25, 1976; \$461,244-\$527,136 as of June 25, 1976), recommendation cannot be made that instant contract be terminated for convenience since that action would not be in Government's best interest where total contract price was \$658,920 and contract award was based on determination of urgency.

Invitation for bids (IFB) DSA100-76-B-0033, issued by the Defense Personnel Support Center, Defense Supply Agency (DSA), Philadelphia, Pennsylvania, solicited bids for 182,400 service caps. Originally issued on a 50-percent labor surplus set-aside basis, the IFB was subsequently amended to a combined small business/labor surplus area set-aside. Bids were opened on December 30, 1975.

PUBLISHED DECISION

55 Comp. Gen. ....

During the period preceding the opening of bids, protests were filed regarding the basis upon which the procurement would be let, i.e., a 50-percent labor surplus set-aside. Both protests received in this regard were withdrawn subsequent to DSA's determination to make the procurement a combined set-aside. However, by telegram of December 5, 1975, Propper protested DSA's decision to proceed with a combined set-aside.

On December 30, 1975, the following bids were received:

	<u>Unit Price</u>
	<u>Items 1 through 3</u>
Propper	\$7.225 plus 1/20 of 1-percent discount
Society Brand	\$7.4485 plus 1/2 of 1-percent discount
Bancroft	\$7.485 plus 1/10 of 1-percent discount

On January 5, 1976, Bancroft protested that:

1. Propper is ineligible for award in that its bid was nonresponsive because as of the date of bid opening Propper was other than a small business. (As set forth infra, Propper, while indicating in its bid that it was a large business, also stated its contention that it was a small business.)
2. Propper is nonresponsible since it lacked the required production capacity.
3. Society Brand's self-certification as to its small business status was submitted in bad faith.
4. Society Brand is nonresponsible on two counts--its lack of both financial capability and integrity.

On January 8, 1976, the Small Business Administration (SBA) Size Appeals Board issued its findings and decision in the matter of Propper's previously filed petition for recertification of Propper as a small business. The Size Appeals Board found that Propper " \* \* \* is a small business concern for the purpose of

self-certification on procurements having a size standard not to exceed 500 employees."

In its report to our Office dated March 11, 1976, DSA concluded that Propper's bid was responsive inasmuch as Propper "\* \* \* was in fact a small business concern at the time of submission of its bid and up to the present time \* \* \*." In accordance with this view, based on a determination of urgency, on April 8, 1976, DSA awarded the contract to Propper under Armed Services Procurement Regulation (ASPR) § 2-407.8(b)(3)(iii) (1975 ed.).

With regard to the question of Propper's eligibility for award of the instant procurement as a small business the following chronology is relevant:

- February 15, 1975 - Propper found to be other than small by the Kansas City Regional Office of SBA.
- July 24, 1975 - SBA Size Appeals Board determined that Propper was other than small by reason of affiliation with certain other firms, thus affirming the Kansas City Regional Office decision on this point although reversing the regional office's decision on finding that Propper was not dominant in the industry.
- October 3, 1975 - Propper's petition for reconsideration denied by SBA Size Appeals Board.
  - Propper filed petition for recertification with SBA Size Appeals Board.
- December 16, 1975 - Oral hearing held on Propper's petition for recertification.

Subsequent to the oral hearing at SBA regarding Propper's petition for recertification, Propper submitted its bid on the instant procurement. Propper indicated on the bid documents that it was a large business. However, accompanying the bid was the following telegram:

"IT IS OUR CONTENTION THAT WE ARE A SMALL BUSINESS CONCERN. THE SIZE APPEALS BOARD OF SBA HELD AN ORAL HEARING DECEMBER 16, 1975 IN WASHINGTON DC FOR THE

PURPOSE OF MAKING A DETERMINATION OF OUR SIZE STATUS AT OUR REQUEST. OUR COUNSEL, ANTHONY CHASE, ASSERTS THAT BY HIS RESEARCH WHICH WAS CONFIRMED CORRECT BY DSA AND SBA REPRESENTATIVES IN WASHINGTON DC OUR BID WILL BE CONSIDERED RESPONSIVE IF SBA'S FAVORABLE DETERMINATION IS ISSUED BEFORE DATE OF AWARD. THIS WILL SERVE AS OUR UPDATED CERTIFICATION AS TO OUR STATUS. ALL OTHER TERMS AND CONDITIONS OF OUR BID REMAIN THE SAME"

Based on this telegram and the fact that Proper was determined to be small by SBA on January 8, 1976, which although after bid opening was considerably prior to award, DSA concluded that Proper was eligible for award.

The pertinent provisions of ASPR § 1-703(a) and (b) (1975 ed.) state:

"(2) \* \* \* Except as provided in (b) below, the contracting officer shall accept at face value for the particular procurement involved, a representation by the bidder or offeror that it is a small business concern.

"(b) Representation by a Bidder or Offeror. 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 [(size protest determinations)], 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, or unless he could have (in those cases where a representation as to size of business has not been made), in good faith represented himself as small business prior to the opening of bids or closing date for submission of offers (see 2-405(ii) with respect to minor informalities and irregularities in bids). A representation by a bidder or offeror that it is a small business concern will

not be accepted by the contracting officer if it is known that (i) such concern has previously been finally determined by SBA to be ineligible as a small business for the item or service being procured, and (ii) such concern has not subsequently been certified by SBA as being a small business. If SBA has determined that a concern is ineligible as a small business for the purpose of a particular procurement, it cannot thereafter become eligible for the purpose of such procurement by taking affirmative action to constitute itself as small business."

Both DSA and Propper are of the view that in order to come within the general rule that under a small business set-aside the final determination of the bidder's eligibility for award as a small business is made at the date of award (see B-143630, October 13, 1960), the bidder must at the time of bid opening and in good faith either represent itself as a small business concern, or have been able to do so. This representation, it is argued, can be accomplished either by the process of self-certification, i.e., checking the appropriate block on the bid form, or by other means. Propper contends that "[s]elf-certification is a term of art which in the context of government procurement means the checking of the appropriate box on the bid form." However, the form to which Propper alludes, standard form 33 (Nov. 1969 ed.), states that: "The Offeror represents and certifies \* \* \* that \* \* \* [h]e [ ] is [ ] is not, a small business concern." (Emphasis added.) We agree with Bancroft that there is no practical or legal consequence between designating an act as a "representation" of a bidder's size status or a "self-certification" of its status.

The question then is whether Propper was in a position as of the date of bid opening to represent itself as a small business. DSA indicates that it was and believes that (1) the July 24, 1975, decision of the Size Appeals Board which found Propper to be other than a small business concluded that there was an affiliation between Propper and Society Brand based only on those firms' use of the same attorneys and accountants; (2) Propper discharged the attorneys and accountants which SBA had found created the affiliation; (3) on December 16, 1975, an oral hearing was held on Propper's petition for recertification as a small business; and (4) based on

that hearing and the evidence presented, Propper determined that it would receive a decision to the effect that it was in fact a small business.

In this regard, Propper takes the view that whether or not a business is small is a question of actual fact and that, if the facts indicate that a bidder is small under a size standard in effect, the bidder can determine itself to be small and make that representation. Bancroft, on the other hand, takes the view that membership in the class of small business is not a matter of fact but is rather a legal status the determination of which is ultimately the province of the SBA. We agree with Bancroft that being a small business is a legal status which although entered into either through self-certification/representation or administrative decision is not just a matter of existing fact. This position has been recognized by the Court of Claims in upholding the validity of an award to a firm which certified itself as a small business but which in fact became large after bid opening. The court in Otis Steel Products Corporation v. United States, 316 F.2d 937, 940 (Ct. Cl. 1963), stated:

"\* \* \* The regulation [ASPR § 1-703(b)] provides that in the absence of a question about a bidder's representation of his status, it shall be deemed to be a small business concern for the purpose of that contract. This means it shall be deemed to be one, whether it was one in fact or not. \* \* \*"

Similarly, the court has on other occasions taken the view that the legal status of the bidder at the date of award as determined by the SBA is determinative of a bidder's being small notwithstanding the fact that at the date in question the bidder was not actually small. Allen M. Campbell Company v. United States, 467 F.2d 931 (Ct. Cl. 1972); Mid-West Construction, Ltd., v. United States, 387 F.2d 957 (Ct. Cl. 1968). Our Office has implicitly recognized that being a small business is a matter of legal status in 42 Comp. Gen. 108, 112 (1962), wherein it was stated that "[a] bidder must qualify as a small business as a condition of bidding under an invitation containing a total small business set-aside, and he must also qualify as small business at the time of receiving the award." (Emphasis added.) B-167223, September 4, 1969.

As recognized by the ASPR, SBA's regulations and our Office, the initial method by which a firm achieves the legal status of being a small business is by self-certification/representation. ASPR § 1-703(b), supra; 13 C.F.R. § 121.3-8 (1975). See discussion 40 Comp. Gen. 550 (1961), at 553-554. The existence of this method is based (1) in part on the congressional desire to simplify and expedite size determinations and the procurement process; and (2) the fact that the bidder should know its annual receipts, number of employees, etc., and thus if it cannot represent itself as a small business at bid opening the interests of orderly and timely procurement as set out in ASPR § 1-703(b) require rejection of the bid as "ineligible for award." See, generally, 40 Comp. Gen., supra. However, while self-certification/representation is the initial step by which a bidder obtains small business status, if and when the SBA issues a ruling to the effect that the bidder is other than a small business, the bidder from that date forth and until the decision is reversed or overruled no longer enjoys the status of being small under the existing size standard. See 53 Comp. Gen. 434, 439 (1973), affirmed Dyneteria, Inc., B-178701, February 22, 1974, 74-1 CPD 89. A bidder which self-certifies/represents itself to be small but which as of the date of bid opening has been found to be other than small by SBA is ineligible for award. 53 Comp. Gen., supra, at 440. But see, B-174292, April 20, 1972, involving a retroactive Size Appeals Board determination that the bidder was small. In our reconsideration of 53 Comp. Gen., supra, which involved the effect of an SBA regional office determination that the successful bidder, Dyneteria, was other than small, and the award to Dyneteria as a small business during the pendency of an appeal of this decision to the SBA Size Appeals Board, we stated:

"In our system of jurisprudence generally, and administrative law particularly, a party may appeal an adverse decision to a higher authority. However, the existence of the higher authority and the exercise of the right of appeal do not justify an action inconsistent with the appealed ruling. To take a contrary view and adopt the position espoused by Dyneteria would permit and perhaps even encourage the circumvention of the established judicial or administrative process. An individual or official would be free to act contrary to the unfavorable decision of the lower tribunal by the simple expedient of causing an appeal to be filed. We cannot condone an interpretation which permits such a practice. \* \* \*" Dyneteria, Inc., supra.

With regard to the instant case, Propper made its representation as to its small business status after an SBA regional office declared it to be other than small; that decision was in part affirmed by the Size Appeals Board; reconsideration of that decision was denied by that body and a decision on recertification was pending. Under the circumstances, Propper did not then have the legal status of a small business, a fact which the contracting officer was aware of by virtue of Propper's telegram, supra, and its designation of itself on the bid form as a large business. As indicated in 13 C.F.R. § 121.3-8 (1975), since Propper did not have this legal status at the time of bid opening, it could not properly represent itself as being a small business. The regulation in question states in pertinent part:

"\* \* \* In the submission of a bid or proposal on a Government procurement, a concern which meets the criteria provided in this section and which either has not been determined by SBA to be ineligible, or has been determined to be ineligible but subsequently has on the basis of a significant change in ownership, management or contractual relations, applied for recertification and had its application granted, may represent that it is a small business. \* \* \* If a concern has been determined by SBA to be ineligible as a small business under a particular size standard and it has already self-certified as a small business on a pending procurement subject to the same or lower number of employees or annual receipts size standard (whichever is applicable), it shall immediately notify the contracting officer of such adverse size determination and shall not thereafter self-certify on a procurement subject to the same or a lower employee or annual receipts size standard (whichever is applicable) until it has applied for recertification based on a significant change in its ownership, management, or contractual relations, and has been determined eligible as a small business under such size standard by either the regional office which issued the adverse determination or the Small Business Size Appeals Board. \* \* \*"

As the regulation clearly indicates, a bidder, such as Propper, which has been determined to be other than small by the SBA may represent itself as being small only if it has both applied for and has been granted recertification. Propper was found to be large by the SBA regional office whose decision was affirmed by the Size Appeals Board which subsequently denied Propper's request for reconsideration of



the matter. Per 13 C.F.R. § 121.3-6(g)(5) (1975), the decision of the Size Appeals Board constituted the final administrative remedy afforded by SBA. Therefore, in order for Proper to regain small business size status it could only do so through an application for recertification based on a significant change in ownership, management or contractual relations. 13 C.F.R. § 121.3-8, supra. However, since its application for recertification was not granted until after December 30, 1975, as of that date it could not properly represent itself as being small in accordance with 13 C.F.R. § 121.3-8, supra, and ASPR § 1-703(b), supra.

Moreover, in accordance with ASPR § 1-703(b), a contracting officer cannot accept the bid opening representation of a bidder as to its being a small business if the contracting officer knows that the bidder has been found large by the SBA (see 53 Comp. Gen., supra, affirmed Dyneteria, Inc., supra, and B-174292, supra), and the bidder has not subsequently been recertified by SBA as being small. Proper argues that this interpretation is contrary to the focus and structure of the ASPR section in that (1) the focus of ASPR § 1-703(b) is toward determining a bidder's size status at the date of award, and (2) to read the phrase "at the date of bid opening" into the section in front of the sentence establishing the circumstances under which the contracting agency may not accept a good-faith representation as to size status would render the last sentence in ASPR § 1-703(b) unnecessary and merely redundant.

We do not agree. As to the question of when a bidder must have small business status to be eligible for award, we have held while the bidder must have small business status under the applied size standard at the time of award, it must also have this status (achieved through a proper good-faith self-certification/representation) at the time of bid opening. 42 Comp. Gen., supra. As we stated in 40 Comp. Gen., supra, at 553-554:

"Unless the submission of bids under a 100 percent small-business set-aside can be restricted solely to those who, in good faith, can certify in their bids that they are small business, no useful purpose would be served by requiring, in every instance, self-certification on size status. If bidders who, prior to bid opening, cannot in good faith certify themselves as small business may be permitted to delay contract awards in order to

allow time to make application to the Small Business Administration for a small business certificate on the basis that their status may have changed sufficiently in the interim--between bid opening and award--so as to qualify as small business, the effectiveness of the small-business set-aside procedure would be seriously impaired. \* \* \*"

As to Proper's other argument, regarding the meaning of the section and the effect of our interpretation of the last sentence of ASPR § 1-703(b), we note that the initial sentence of the section deals with the effectiveness of a bidder's representation as to being a small business even though the matter is protested to SBA. We also note that ASPR § 1-703(b)(1)-(5) (1975 ed.) deals exclusively with the matter involving size protests and related areas.

The particular sentence in question reads:

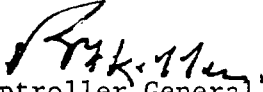
"\* \* \* If the SBA has determined that a concern is ineligible as a small business for the purpose of a particular procurement, it cannot thereafter become eligible for the purpose of such procurement by taking affirmative action to constitute itself as small business." (Emphasis added.)

As can be seen from an examination of ASPR § 1-703(b)(1)(b) (1975 ed.), in its entirety, it is only upon receipt of a timely size protest against a bidder's representation that it is small that SBA can take action with regard to the particular procurement in question. In other events, the SBA's actions are limited to prospective procurements. Therefore, we believe that the portion of ASPR § 1-703(b) to which Proper alludes merely indicates that where a timely size protest is lodged against a bidder who represents itself in good faith to be a small business and SBA sustains that protest, the bidder cannot reconstitute itself to make itself come within the applicable size standard. Accordingly, our interpretation of the sentence preceding that one in question would not make it mere surplusage.

As stated above, and without questioning Proper's good faith, we do not believe that it could properly have made the necessary certification/representation of its being a small business nor do we believe that the contracting officer could, under the regulations, have accepted Proper's representation. Therefore, we

believe that Propper was not eligible for award as a small business. Accordingly, since ASPR § 1-706.7 (1975 ed.) provides that in order 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, we believe the award to Propper was improper. However, based on the estimated cost of terminating Propper's contract (\$329,460 as of May 25, 1976; \$461,244-\$527,136 as of June 25, 1976), we cannot recommend that the instant contract be terminated for the convenience of the Government, since that action would not appear to be in the Government's best interests where the total contract price was \$658,920 and the contract award was based on a determination of urgency.

In view of this conclusion, we see no need to consider the additional points raised by the parties.

  
Deputy Comptroller General  
of the United States