

DECISION



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

FILE: B-182926

DATE: January 2, 1976

MATTER OF: Bancroft Cap Co., Inc.

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DIGEST:

1. Where record discloses that low bidder had certified itself to be small business manufacturer of hats and caps approximately 6 weeks after SBA Regional Office determined firm to be small business manufacturer under same size standard, GAO finds no basis to question good faith certification of firm as small business concern in absence of evidence that information submitted to SBA office was intentionally or negligently misrepresented. Later determination by another SBA Regional Office which determined firm to be other than small business does not affect award under subject IFB.
2. Contracting officer has authority to accept at face value small business size certification by bidder in absence of timely protest against size status.

This matter concerns a protest filed by counsel for Bancroft Cap Co., Inc. (Bancroft), against the award of a contract to Propper International, Inc. (Propper), under invitation for bids (IFB) No. DSA100-75-B-0471, a total small business set-aside, issued by the Defense Personnel Support Center (DPSC), Philadelphia, Pennsylvania. Bancroft submits that the award to Propper should be canceled, or, in the alternative, terminated for the convenience of the Government.

The subject IFB was issued on October 25, 1974, for supplying 805,920 caps. Bids were opened on November 14, 1974, and of the 11 firms solicited, bids were received from four firms. The low bid was submitted by Propper in the amount of \$1,083,962.40 and the second low bid was submitted by Bancroft in the amount of \$1,227,238.20. Bancroft and Propper certified that they were small business concerns and that they were manufacturers of the supplies offered.

A preaward survey of Propper was conducted and the survey report dated December 3, 1974, recommended that Propper receive the award. Thereafter, award documents were processed and contract No. DSA100-75-C-0816 was awarded to Propper on December 24, 1974.

By letter dated December 30, 1974, counsel for Bancroft notified the contracting officer that it had filed a protest with our Office on December 26, 1974, contending that Propper was a large business concern at the time of bid opening and at the time of award. Therefore, Bancroft contended that Propper's bid was nonresponsive and that the award to it was void ab initio contending that award was based on a nonresponsive bid. Counsel requested the contracting officer to forward to the Small Business Administration (SBA), pursuant to Armed Services Procurement Regulation (ASPR) § 1-703(b)(1)(c) (1974 ed.), that portion of its December 26, 1974, protest to our Office which pertained to the small business size status of Propper.

By letter dated January 17, 1975, Bancroft's size protest was referred to the SBA for its determination. The Kansas City Regional Office of the SBA determined on February 13, 1975, that Propper is affiliated with Novoson Investment Trust, Society Brand Industries, et al., under SBA Rules and Regulations, part 121.3-2(a)(ii), and therefore Propper and its affiliates result in a large business, dominant in the field of producing military caps and hats. By decision dated July 24, 1975, the Size Appeals Board affirmed the Kansas City Regional Office's decision that Propper was other than a small business firm because of its affiliation with certain other firms. On October 3, 1975, the Size Appeals Board denied Propper's petition for reconsideration of its July 24 decision.

Counsel for Propper contends that its self-certification of its size status as small was made in good faith. In this regard, the record indicates that on October 1, 1974, the New York Regional Office of the SBA determined that Propper qualified as a small business manufacturer of caps. That determination stated, in part:

"We have therefore determined that Propper International Inc. is not dominant in its field of operation, has fewer than 500 employees and is considered a small business concern for the

three previously mentioned bids. This determination would be applicable to other Government procurements whenever the size standard is 500 employees or less, provided that the status does not exceed the size criteria cited in the bid."

The contracting officer disagrees with Bancroft's contention that the contract awarded to Proper was void ab initio once SBA determined that it was a large business. The contracting officer states that such a position is contrary to appropriate provisions of ASPR, decisions of our Office and court decisions. ASPR § 1-703(b), entitled "Representation by a Bidder or Offeror" provides 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 * * * could have * * * in good faith represented himself as small business prior to the opening of bids * * *."

Furthermore, ASPR § 1-703(b)(1) provides as follows:

"Any bidder, offeror, or any other interested party may, in connection with a contract involving a small business set aside or otherwise involving small business preferential consideration, question the small business status of any apparently successful bidder or offeror by sending a written protest to the contracting officer responsible for the particular procurement * * *. Such protest must be received by the contracting officer prior to the close of business on the fifth working day exclusive of Saturday, Sunday, and Federal Legal Holidays (hereinafter

referred to as working day) after bid opening date for formally advertised and small business restricted advertised procurements * * *."

ASPR § 1-703(b)(1)(c) provides:

"A protest received by a contracting officer after award of a contract shall be forwarded to the Small Business Administration district office serving the area in which the protested concern is located with a notation thereon that award has been made. The protestant shall be notified that award has been made and that his protest has been forwarded to SBA for its consideration in future actions."

Under the provisions of the above-cited ASPR's, a timely protest from Bancroft as to the size status of Propper for purposes of the subject IFB was required to be submitted by November 21, 1974, which was 5 working days from bid opening. Bancroft's protest was not received by November 21 and therefore the protest was forwarded to SBA for consideration in future procurements.

The contracting officer contends that at the time of award to Propper, he acted in accord with ASPR § 1-703(b) and our decision Federal Contracting Company, B-180807, May 17, 1974, 74-1 CPD 267, wherein we stated, in part:

"We have held that in the absence of a timely protest as required by ASPR, a contracting officer has authority to accept at face value a representation by a bidder that it is a small business concern and that an award under such circumstances will not be questioned by our Office. 46 Comp. Gen. 342 (1966). Therefore, we cannot conclude that the contracting officer's actions in this case were improper. B-178856, June 26, 1973; B-173629, November 30, 1971."

The contracting officer also refers to our decision in 49 Comp. Gen. 369, 375 (1969), wherein we stated:

"It has long been the position of our office that a contract awarded in good faith on the basis of a bidder's certification that it is a small business concern, which status is subsequently determined erroneous, is not void ab initio but is voidable only at the option of the Government * * *."

The contracting officer further states that the February 13, 1975, determination by the Kansas City SBA Regional Office which held Proper to be other than a small business does not in any way affect the award under the subject IFB.

Counsel for Bancroft takes the position that the self-certification by Proper of its status as a small business was not made in good faith, and that, accordingly, no valid award to Proper could be made under the applicable regulations. Bancroft submits that Proper obtained the favorable size determination as a result of its failure to submit complete information to SBA and that the October 1, 1974, determination by the SBA New York Regional Office that Proper was a small business concern as of that date is not dispositive of the question of Proper's good faith certification in the instant IFB. Bancroft contends that the information concerning Proper's size status available to the SBA New York Regional Office when it made its decision on October 1, 1974, and the information available to the SBA Kansas City Regional Office when it made its decision on February 13, 1975, was significantly different, although the facts supporting the February 13, 1975, determination were in existence and had not changed from October 1, 1974. Under similar circumstances, Bancroft states that our Office has held that an award should be canceled based upon a bad faith certification citing 41 Comp. Gen. 47 (1961). Bancroft states that a bidder should not be permitted to obtain a favorable size determination on the basis of its failure to submit complete information and then utilize that decision to justify a subsequent self-certification. Bancroft further states that if, as is the case in the instant protest, the bidder has full knowledge of facts that would cause a reasonably prudent bidder to question its small business size status, its self-certification must be found to have been lacking in good faith.

Bancroft contends that the evidence clearly establishes that Proper failed to exercise a high degree of prudence and care in its certification of its size status. Bancroft also contends

that the standard of good faith against which Propper's self-certification is to be judged is whether Propper negligently utilized the self-certification process, failed to use a high degree of prudence and care, or whether it had information which would place a reasonably prudent bidder on notice that it should formally apply for a small business certificate prior to self-certification. Bancroft further states that Propper's failure to submit full and complete information to the SBA New York Regional Office when that office was considering Propper's size status in October 1974 is prima facie evidence of Propper's concerted effort to disguise its true size status and the fact that Propper's self-certification on the instant IFB was lacking in good faith.

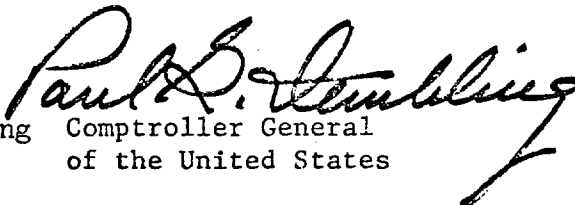
The contracting officer notes that in its submittal to the SBA Size Appeals Board counsel for Bancroft has furnished documents which purport to establish affiliations between Propper and several other firms alleged to be owned or controlled by various relatives of the wife of the president of Propper. These documents are presumably submitted to establish bad faith on the part of Propper regarding its self-certification as a small business firm. The contracting officer contends that the question of affiliation involves a number of extremely complex and highly technical factual and legal issues concerning the status of numerous individuals, companies and corporations vis-a-vis each other. The large amount of data which has been submitted to SBA as well as the time it has spent on this matter is further evidence of the complexity of the issues presented. The contracting officer submits that a small company concerned with the manufacturing of headwear cannot properly be charged with knowledge of all the technical issues involved and could reasonably and properly rely on the October 1, 1974, determination of SBA.

For the reasons stated below, we believe there is insufficient evidence to support Bancroft's contention that Propper's certification was made in other than good faith. Although the record discloses that there are several disputed factual issues, we do not believe it necessary to resolve these issues to reach our conclusion that the record does not justify a finding that Propper certified its firm to be a small business for purposes of the subject procurement in other than good faith. Our Office has held that the test of good faith in the context of a self-certification by a small business of its size status is one of a high degree of prudence and care. See 51 Comp. Gen. 595 (1972).

The record discloses that on October 1, 1974, the New York Regional Office of the SBA determined that Proper qualified as a small business manufacturer of hats and that the firm has fewer than 500 employees. Under these circumstances Proper was entitled to rely on this SBA ruling for procurements where, as here, the size standard was 500 employees or less. Although counsel for Bancroft contends that the New York SBA determination was based on incomplete information submitted by Proper, the record before us does not disclose that Proper intentionally or negligently failed to submit complete information to the New York SBA Office. While the Kansas City SBA Regional Office found certain affiliations of Proper and other interests which were not reported by Proper to the New York SBA, such findings were not sustained by the SBA Size Appeals Board. Therefore, we believe Proper was justified in relying on the New York decision when submitting its bid under the subject IFB, and we are unable to conclude that Proper acted in bad faith at the time it certified its firm to be a small business for purposes of the subject procurement.

In our decision B-178701, reported in 53 Comp. Gen. 435 (1973) we stated that a contracting officer must accept self-certification submitted by a successful bidder that it is a small business concern where the record also contains a determination by an SBA district office that the firm is small, even though the district office decision has been appealed. We have held that in the absence of a timely size protest, a contracting officer has authority to accept at face value a representation by a bidder that it is a small business and that an award under such circumstances will not be questioned by our Office. See Evergreen Funeral Home, B-184149, November 6, 1975. We conclude that Proper was entitled to rely on the SBA Regional decision that it was a small business concern until and unless reversed or modified by the SBA and, therefore, our Office finds no legal basis to object to the award.

Accordingly, Bancroft's protest is denied.


Acting Comptroller General
of the United States