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DECISION



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

60180

FILE: B-182569

DATE: November 18, 1975

MATTER OF: Bancroft Cap Co., Inc.; Society Brand, Inc.

97718

DIGEST:

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1. Where record indicates that contractor was or should have been aware of its affiliation with large business firm, GAO agrees with protester's contention that firm awarded total small business set-aside contract failed to self-certify its small business status in good faith pursuant to ASPR § 1-703(b), and award was therefore improper. However, since contract has been fully performed no remedial action is possible.
 2. Where firm purchases assets of concern previously found by SBA to be large business, suggestion is made that SBA consider adopting rule requiring such firm to request small business certificate prior to self-certifying status as small.

This matter concerns a protest filed by counsel for Bancroft Cap Co., Inc. (Bancroft), against the award of items 0002 and 0003 to Society Brand, Inc. (SBI), under invitation for bids (IFB) No. DSA100-75-B-0104, a total small business set-aside, issued by the Defense Personnel Support Center (DPSC), Philadelphia, Pennsylvania.

Counsel for Bancroft contends that SBI was not a small business at the time it submitted its bid or at bid opening, and, therefore, SBI submitted a nonresponsive bid, and the award was void ab initio. Accordingly, Bancroft submits that the award to SBI should be canceled, or, in the alternative, terminated for the convenience of the Government.

The subject invitation was issued on September 4, 1974, for supplying 172,536 Army caps. Bids were opened on September 24, 1974, and of the 16 firms solicited, bids were received from three firms. The low bid for items 0002 and 0003 was submitted by SBI, and the second low bid was submitted by Bancroft. Bancroft submitted the low bid for item 0001.

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Preaward surveys were conducted on Bancroft and SBI, and, based on affirmative findings, award was made to Bancroft for item 0001 on October 24, 1974, and to SBI for items 0002 and 0003 on November 22, 1974. No questions regarding SBI's size status were raised prior to its award of a contract.

By letters dated December 2 and December 9, 1974, to our Office, Bancroft protested the award to SBI. By decision dated December 26, 1974, Bancroft Cap Co., Inc., B-182569, 74-2 CPD 390, we stated that a protest which questions the small business status of another bidder is a matter for consideration by the Small Business Administration under 15 U.S.C. § 637(b)(6) (1970), rather than our Office, and SBA's determination is conclusive on the agency involved. We further stated, with regard to the contention that SBI was nonresponsible, that our Office has discontinued its practice of reviewing bid protests involving a contracting officer's affirmative determination of responsibility of a prospective contractor except for actions by procuring officials which are tantamount to fraud.

By letter dated December 30, 1974, Bancroft requested reconsideration of our decision on the basis that it was not asking our Office to determine SBI's size status, which matter had been referred to SBA by the contracting officer on December 19, 1974, but on the basis that if it was determined by SBA that SBI was other than small at the time of award, the award was void. We therefore reopened the case and developed it under our Bid Protest Procedures, 40 Fed. Reg. 17979 (1975).

In a report to our Office on Bancroft's request for reconsideration, the contracting officer states that upon receipt of the December 2 letter from Bancroft he determined that part of Bancroft's protest was in effect a protest of the size status of SBI and as such it was untimely under Armed Services Procurement Regulation (ASPR) § 1-703(b)(1)(c) (1974 ed.), entitled "Action on Protests Received After Award," which 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

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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."

The contracting officer reports that on November 23, 1974, the day following award to SBI, Bancroft sent a telegram to DPSC protesting any award to SBI on the basis that a different corporation, i.e., Society Brand Hat Company (SBHC), had submitted the bid. By letter dated November 25, 1974, the contracting officer denied Bancroft's protest stating that SBI was the original bidder on items 0002 and 0003, that SBI was in existence prior to bid opening, that its bid thus could be considered, and that award was made to it after it was found to be a responsive, responsible firm.

Bancroft contends that the award to SBI was void ab initio because it was based on a nonresponsive bid submitted by SBI, a large business concern, since SBI certified other than in good faith that it was a small business concern. Further, Bancroft contends that the SBI contract was void ab initio because it was issued to other than a "responsible prospective contractor."

The contracting officer disagrees with Bancroft's contention that the bid of SBI was nonresponsive and the resulting contract void ab initio. In this regard, the contracting officer refers to ASPR § 1-703(b), entitled "Representation by a Bidder or Offeror," which provides:

"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 has, or unless he

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could have * * * in good faith represented himself as small business prior to the opening of bids * * *."

Further, the contracting officer cites ASPR § 1-703(b)(1), which provides:

"Any bidders, 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 * * *."

The contracting officer points out that Bancroft failed to protest the size status of SBI within 5 working days from bid opening or by October 1, 1974. Therefore, it is his position that the protest was not timely and was properly forwarded to SBA for consideration on future procurements in accordance with ASPR § 1-703(b)(1)(c). Thus, at the time of award, the contracting officer states that he acted in accord with ASPR § 1-703(b). The contracting officer refers to our decision in Federal Contracting Company, B-180807, May 17, 1974, 74-1 CPD 267, wherein we stated:

"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."

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The contracting officer further states that the February 13, 1975, determination by the SBA which held SBI to be other than a small business does not in any way affect the award under the subject IFB. The contracting officer's position assumes that SBI's self-certification was made in good faith.

For the reasons stated below, we believe that SBI failed to certify itself to be a small business concern in good faith and therefore the award to that firm was invalid. In view thereof, it is not necessary to consider the issue of SBI's responsibility.

Counsel for SBI contends that whether or not a bidder's self-certification as to its small business status has been made in good faith is a subjective decision which must turn on the facts of each case and that under this standard SBI's self-certification was made in good faith. Counsel for SBI states that on September 1, 1974, SBI became a separate entity from SBHC through purchase of SBHC's assets.

We believe that the record indicates that SBI was aware, or should have been aware, of the facts upon which the SBA based its February 13, 1975, determination that SBHC was other than a small business. The record also contains an earlier letter dated October 24, 1974, from the SBA verifying that SBHC was still a large business as of that date. We further believe that SBI's knowledge of its relationship with SBHC constitutes the type of information that would place a reasonably prudent bidder on notice that it should obtain verification of its small business status from SBA prior to self-certification. See B-163128, April 24, 1968. The record indicates that on February 13, 1975, the SBA ruled that SBI was other than a small business on the grounds that Society Brand Incorporated is affiliated with Society Brand Hat Co., Society Brand Industries, et al., and that the total employment exceeds the size standard of 500 employees. The SBA letter advising SBI of the size determination stated, in part:

"You have stated (and DCASR, St. Louis, confirms) that Society Brand Incorporated is under contract to Society Brand Hat Company since no novation agreement was executed. You share common facilities, equipment, and employees, notably Mr. J. Pott who is an officer in both firms. On September 30, 1974, Mr. Michael J. Novoson signed as President of Society Brand Incorporated in authorizing Mr. Klaus Theiss to sign for said

corporation (Society Brand Incorporated). Mr. Michael J. Novoson has interests in firms other than Society Brand Incorporated. You will note that Part 121.3-8(b)(2) of SBA Rules and Regulations precludes any differential as pertains to size determinations for the purpose of Government procurement assistance."

Our Office has stated that the standard of good faith when applied to a certification as a small business is not limited to an incident of intentional misrepresentation. In this regard, we stated in 51 Comp. Gen. 595 (1972), in part:

"* * * bidders are usually in a good position to know their size status and they should not be permitted to casually or negligently utilize the self-certification process without using a high measure of prudence and care. See 41 Comp. Gen. 47, 55 (1961), and 49 *id.* 369, 376 (1969). Cf. B-156882, July 28, 1965. We can understand your belief that your certification was made in good faith. However, we believe that in these cases, since self-certifications usually are not questioned, bidders must be held to a higher than usual degree of care in determining whether they are or are not small business."

Bancroft contends that SBI failed to exercise the "higher than usual degree of care" required of concerns that certify themselves as small and that SBI in fact casually or negligently utilized the self-certification procedures in the subject procurement. Bancroft also contends that SBI submitted erroneous information concerning its affiliation with Society Brand Hat Company. In this connection, Bancroft states that the evidence of record supports its position that SBI, at the time it certified itself as a small business concern for the subject procurement, knew of its relationship with SBHC, knew that SBHC was to perform on the contract if SBI received the award, and knew that SBHC was a large business and therefore ineligible to compete on the subject procurement.

The March 17, 1975, letter from the Chairman of the SBA Size Appeals Board to counsel for SBI supplements the size determination issued by the SBA Kansas City Regional Office. This letter summarizes

the pertinent facts with respect to SBI's affiliation with SBHC as follows:

"Specifically, SBHC and SBI are in the same or related industries or field of operation. SBI was activated to accomplish a sale of assets of SBHC to SBI. Pott, formerly an officer in SBHC, was an officer of SBI at the time of its organization. SBHC has furnished equipment and inventory to SBI, employees are considered interchangeable, and both corporations are at the same address. All contracts issued to SBHC are to be completed by SBHC as well as contracts issued to SBI during an unknown interim period. SBHC retains a demand note for the sale of the inventory to SBI, and there is a lease agreement with the Novoson Investment Trust."

On April 29, 1975, SBI applied to the SBA Kansas City Regional Office for recertification as a small business concern. On May 9, 1975, the SBA Kansas City Regional Office ruled, on SBI's petition for recertification, that SBI was still affiliated with SBHC.

The record discloses that prior to September 1, 1974, the date of the alleged sale of SBHC to SBI, the officers and directors of SBHC were also the officers and directors of SBI, with only one exception. On September 1, 1974, there was a purported sale of SBHC's assets to SBI and a sale of SBI to three former employees of SBHC. It is this alleged sale that formed the foundation of SBI's self-certification on the subject procurement. We agree with Bancroft's contention that SBI failed to exercise the "higher than usual degree of care" which we have held to be required of firms that certify themselves as small and that SBI casually or negligently utilized the self-certification procedures. We believe that a reasonably prudent bidder, in view of the circumstances of SBI's relationship with SBHC, should have been on notice that there was a serious question as to its size status which should have been resolved before certifying that it was a small business.

Moreover, the facts establish that SBI intended at the time it submitted its bid to have SBHC, a large business, manufacture the supplies to be furnished under the contract and failed to indicate this fact in its bid. SBI was under an affirmative obligation to

determine from SBHC its size status prior to representing that the supplies to be furnished were to be manufactured by a small business concern.


The contracting officer states that in cases where our Office has found a bidder to have made other than a good faith self-certification as to its size status, the facts have disclosed empirical data which a bidder could use to determine whether its firm was small. See for example, 51 Comp. Gen. 595, supra, where the question of size status concerned the number of employees; see, also 41 Comp. Gen. 47 (1961), which dealt with a situation where the bidder was aware that the SBA had taken the position that its size status was other than small. The contracting officer contends that in those situations, where there is empirical data with which to make a comparison, a higher degree of care should be placed on the bidder in determining if there in fact was other than a good faith certification. In the present case, the contracting officer points out that SBI was found to be other than a small business based on the theory of affiliation with a large business. The contracting officer states that, although our Office has not distinguished these two completely different areas when deciding if a certification was made in good faith and the corresponding duty of care upon a bidder when it makes a certification, such a difference should be delineated.

The record in this case demonstrates that the question of affiliation involves complex legal and technical issues and in these situations the opportunity for abuse of the self-certification procedure appears to be greater than in other cases where objective criteria such as number of employees or annual receipts of a bidder are readily determinable from standard documents and business records. Since self-certifications usually are not questioned, we continue to believe that bidders must be held to a higher than usual degree of care in determining whether they are or are not small business. Such care is particularly important where, as here, a bidder takes over the business of a concern that it knows, or should have known, is a large business.

Under these circumstances, we agree that SBI failed to self-certify its small business status in good faith. However, since the contract has been fully performed, no remedial action is possible.

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Finally, Bancroft urges the adoption of a rule requiring the new concern in this type of situation, that is, where the prospective bidder has recently purchased another company, to obtain a small business certificate from the SBA prior to self-certifying its status as small. We are bringing Bancroft's suggested rule to the attention of the SBA for its consideration.


Deputy Comptroller General -
of the United States