DECISION

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

60755

FILE: B-184313 DATE: April 26, 1976

99022

MATTER OF: Kleen-Rite Corporation

DIGEST:

Contract set aside for small business and awarded to firm ultimately determined to be large business should not be terminated for Government's convenience notwithstanding alleged feasibility of such action since record does not show that contractor certified itself as small business in bad faith and award was made in accordance with applicable regulation on basis of SBA's initial determination that firm was small. However, agency should not exercise option to extend contract term beyond initial period awarded.

Kleen-Rite Corporation has protested to our Office the failure of a contracting officer to terminate two contracts awarded to T&S Service Associates, Inc., which subsequent to the awards was found to be other than a small business and thus ineligible for the procurements.

Invitations for bids (IFB) Nos. DAEA08-75-B-0014 and DAEA08-75-B-0015 were issued by Fort Ritchie, Maryland, for janitorial services. Both solicitations were totally set aside for small business concerns. T&S was the low bidder and Kleen-Rite was the second low bidder.

Kleen-Rite timely protested the size status of T&S to the contracting officer and to this Office. On July 8, 1975, the Small Business Administration (SBA), Boston Regional Office, determined that T&S was a small business concern for purpose of these procurements. Kleen-Rite timely appealed that decision to the SBA Size Appeals Board.

Shortly thereafter, this Office denied Kleen-Rite's protest questioning T&S's responsibility (an issue no longer pursued by Kleen-Rite) and rejected as premature, pending the determination of the SBA Size Appeals Board, Kleen-Rite's contention that T&S was not a small business. Kleen-Rite Corp., B-184313,

July 30, 1975, 75-2 CPD 69. We stated in our decision that Kleen-Rite could reinstate its protest before our Office if it appeared that the contracting officer was preparing to award contracts to T&S in the face of a Board ruling that T&S was not a small business. The procurement did not develop in this fashion, however.

After waiting over 30 days from when Kleen-Rite's appeal had been filed with the SBA Size Appeals Board, the contracting officer inquired as to when the Board's decision would be forthcoming. The contracting officer was advised that not only had no decision been reached, but that the appeal was not even scheduled to be considered by the Board for the next three weeks.

In situations such as this, Armed Services Procurement Regulation (ASPR) § 1-703(b)(3) (1974 ed.) provided in part:

> "(ii) If an appeal from the SBA District Director's determination is made * * * to the Chairman, Size Appeals Board * * * and the contracting officer is notified prior to award, an additional 20 working days (i.e., 30 working days inclusive from the time of initial receipt of the case in the SBA District Office) shall be allowed for receipt of the SBA size determination.
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> "(iii) If the determination of the Chairman, Size Appeals Board, Small Business Administration, on the appeal is not received by the contracting officer within the 30 working day period, it shall be presumed that the SBA District Director's size determination has been sustained."

In view of the District Director's determination that T&S was a small business, and since the 30-day period for suspension of procurement action had expired, the contracting officer proceeded with award to T&S. On October 10, 1975, the SBA Size Appeals Board held that T&S was not a small business for the purpose of these procurements, thus reversing the District Director.

Kleen-Rite then requested the contracting officer to terminate T&S's contracts immediately and to award the remaining work to Kleen-Rite. Kleen-Rite protested to this Office the contracting officer's refusal to terminate the T&S contracts.

Kleen-Rite argues that T&S 's erroneous certification of itself as a small business concern rendered its bids nonresponsive and therefore the awards to it were void ab initio. Alternatively, Kleen-Rite maintains that the awards are voidable at the option of the Government. It is Kleen-Rite's position that because

of the nature of the contracts, their termination for convenience would be an appropriate remedy.

We need not decide whether T&S's contracts are void ab initio or voidable at the Government's option because we have concluded that T&S did not certify itself to be a small business concern in other than good faith. The protester observes that we have held that the standard of "good faith" when applied to a self-certification is not necessarily limited to intentional misrepresentations, but includes instances in which bidders "casually or negligently utilize the self-certification process without using a high measure of prudence and care." 51 Comp. Gen. 595, 597 (1972). The protester asserts that T&S was negligent in certifying itself to be a small business concern.

T&S states that in computing the past three years' average annual receipts for itself and an affiliate, it excluded receipts from section 8(a)(2) contracts. T&S asserts that it was not aware that in order to exclude these receipts an affiliate must possess a divestiture agreement approved by the SBA, because at the time T&S was formed such agreements were not required. Our research shows that the requirement for a divestiture agreement, now found at 13 CFR § 121.3-2(a) (1976), was added subsequent to the time T&S was formed.

Apparently, the SBA's Boston Regional Office failed to note the absence of a divestiture agreement in determining that T&S's average annual receipts for the past three years were within the applicable limit of $3 million. However, in reversing the Regional Office's determination, the SBA Size Appeals Board included all receipts of T&S in the absence of a divestiture agreement. We do not believe these circumstances show such negligence on the part of T&S as to make its self-certification other than in good faith.

In further support of its position that the awards to T&S should be canceled or terminated for convenience, Kleen-Rite states that "it was misled to its disadvantage" by Army officials in a telephone conversation on August 8, 1975, into believing that award would be withheld until the SBA Size Appeals Board determined the size status of T&S. It also insists that the contracts in question could readily be terminated without [illegible] orderly conduct of Government procurement [illegible] the nature of the work (janitorial services) [illegible] nation costs would not be incurred as in the case of a [illegible] contract. Moreover, Kleen-Rite states that it could [illegible] formance immediately "with no major per[illegible] Army would agree to continue these contracts through September 30, 1976.

With regard to the August 8, 1975, telephone conversation, the Army procurement official involved (the contracting officer) admits that he indicated to Kleen-Rite's counsel that no award would be made until a determination as to the size of T&S was made by the SBA Size Appeals Board. However, the contracting officer states that "What was intended was to await an SBA determination provided it was received within the 30 working-day period allowed by ASPR 1-703" and that "There was no promise to wait indefinitely and none was intended." The Army further reports that when the contracting officer had not heard from the SBA Size Appeals Board by August 14, 1975, he called the Secretary of the Board and, as previously stated, was advised that the case was not even scheduled for consideration during the next three weeks. Therefore, rather than extend the existing contracts with the incumbent, Kleen-Rite, for an additional month (the Kleen-Rite contracts had already been extended through August 31, 1975, since the protested contracts were to have begun July 1, 1975), awards were made to T&S on August 14, 1975, based on the Boston SBA office determination that T&S was small business.

On the record before us we cannot say that the contracting officer acted in bad faith in making the awards to T&S on August 14. Presumably Kleen-Rite was or at least should have been aware of the provisions of ASPR § 1-703(b)(3)(iii) concerning the 20 working-day waiting period (or 30 working-days from time of initial receipt of the case in the SBA District office) for a decision from the SBA Size Appeals Board. Therefore, we do not think that Kleen-Rite may reasonably contend that it was misled by the contracting officer into believing that no award would be made pending the size appeal for an indefinite period beyond the timeframe contemplated by the regulation. Not only does the contracting officer deny that he even intended to convey such a promise to Kleen-Rite, but we do not believe that it was reasonable for Kleen-Rite to expect that the Army would delay making these awards indefinitely and without regard to the waiting period prescribed in the ASPR. Since the SBA indicated to the contracting officer on August 14, when the 30 working-day waiting period had expired, that the case was not even scheduled for consideration during the next three weeks (the Size Appeals Board's decision in fact was not reached until October 10, 1975) we find no reason to object to the Army's action in making the award on August 14, notwithstanding the the pending size appeal.

Our Office might feel compelled to recommend termination of a contract awarded to a large business concern where the contractor had certified itself as small business in bad faith in order to be eligible for the award. See 41 Comp. Gen. 47 (1961); 49 Comp. Gen. 369 (1969) and Bancroft Cap Co. et al, 55 Comp. Gen.

469, 75-2 CPD 321. Here, however, we have no basis to conclude that T&S did certify in bad faith. Rather, the protester argues that termination for convenience is appropriate because the costs of termination would be minimal and the work would not be disrupted under either contract since Kleen-Rite stands ready to undertake performance immediately. While termination of these contracts may be feasible, we do not believe our Office should recommend termination in these circumstances. It is clear that the instant award was consistent with applicable regulations, and there is no basis for concluding that the contractor abused the self-certification process. Therefore, we see no reason to recommend that the existing contract should be disturbed. However, since T&S has been determined by SBA to be a large business, we do recommend that the Government not exercise its option to extend the contracts beyond the initial contract term awarded.

Paul G. Dembling

For the Comptroller General
of the United States