B. Jagiku
Proc. II

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

FILE: B-187856 DATE: March 15, 1977

MATTER OF: Techalloy Company, Inc.

DIGEST:

While GAO finds that contractor was negligent in erroneously certifying itself to be small business, contract is not void in the absence of clear showing of intentional misrepresentation. Even though termination of contract for Government's convenience may be recommended because of certifying firm's negligence, such action is not appropriate where, as here, it would be too costly and impracticable to do so.

Techalloy Company, Inc. (Techalloy) protests award to the Brookfield Wire Company (Brookfield) under Defense Logistics Agency (DLA) solicitations 76-B-2474 and 76-B-2491. The gravamen of Techalloy's complaint is that the contracts awarded to Brookfield should be determined to be void, or terminated for the convenience of the Government, and award made to Techalloy, since both solicitations were restricted to small business concerns and the Small Business Administration (SBA) Size Appeals Board has determined that Brookfield is not a small business.

Techalloy urges that Brookfield's self-certification of small business status must be viewed as having been submitted in bad faith, since Brookfield is, and should have known it was, affiliated with the Armada Corporation (Armada), Brookfield's parent corporation. This complaint also formed the basis of Techalloy's size protest, resulting in a determination by the SBA's Boston Regional Office upholding Brookfield's self-certification, and finding that Brookfield was a small business for purposes of these procurements. In this regard, it appears that the SBA Regional Office was made aware of Brookfield's affiliation with Armada but that it may not have been aware of the full extent of Armada's holdings.

The basic facts are not in dispute. Both procurements were solicited as small business set-asides. Techalloy protested Brookfield's size certification, on the basis that Brookfield was affiliated with the Armada Corporation (Armada), and that Armada was not a small business. The protest was forwarded to the Small

Business Administration's (SBA's) Boston Regional Office, and DLA proceeded to make award following that Office's denial of the protest.

Only after award, and after the time for appeal had run, did Techalloy appeal the SBA Regional Office's decision to the SBA Size Appeals Board. Although the Board found that Techalloy "should be deemed to have waived its rights of appeal insofar as the subject procurements are concerned," because the appeal was untimely, SBA considered the matter to determine Brookfield's eligibility to participate in future procurements. The Board determined that Brookfield was other than small for purposes of procurements having a 1,000 employee size standard. Specifically, it found that Armada holds convertible debentures and warrants in Meridian Industries, Inc., which if exercised would give Armada control of a majority of Meridian's common stock.

A determination of the small business size status of a bidder is a matter for consideration by SBA, under 15 U.S.C. §637(b) (6) (1970), not by the GAO, and an SBA determination is binding on the procuring activity. See, e.g., Tate Engineering, Inc., B-186788, July 23, 1976, 76-2 CPD 76. Further, we have stated that:

> "As can be seen from an examination of * * * [Armed Services Procurement Regulation (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." Propper International, Inc., 55 Comp. Gen. 1188 (1976), 76-1 CPD 400, modified on other grounds, Society Brand, Inc., 55 Comp. Gen. 1412 (1976), 76-2 CPD 202.

Nevertheless, as the cases cited indicate, we will review a protester's assertion that a contract is void where it is alleged that the size status self-certification was made in bad faith. See, also, Bancroft Cap Co., Inc., 55 Comp. Gen. 469 (1975), 75-2 CPD 321.

Although in this case the contracting officer asserts that Techalloy's protest is untimely in this Office, we note that the protest was filed within 10 days following announcement of the Size Appeals Board decision, and that under the rule enunciated in the Bancroft Cap case, an SBA determination that the awardee is other than small is an essential prerequisite to Techalloy's complaint. Accordingly, Techalloy's protest is timely. 4 CFR §20.2(b) (2) (1976).

As to the merits of Techalloy's protest, we have indicated that a bidder cannot justify an erroneous self-certification simply by asserting that its mistake resulted from a complex affiliation question. Bancroft Cap Co., Inc. et al., 55 Comp. Gen. 469 (1975), 75-2 CPD 321. Brookfield's counsel has acknowledged that the failure to note the affiliation was due to an oversight. In our opinion, Brookfield was negligent in certifying itself to be small because the individual responsible for such certification apparently did so without investigating the significant holdings of the bidder's parent corporation. Apparently, the SBA Regional Office made the same error.

In cases such as this where contract performance has progressed prior to resolution by SBA of the contractor's size status, we must consider what corrective action, if any, is appropriate if the contractor is ultimately determined to be large. It is conceivable that an award could be considered void if there is a clear showing of any intentional misrepresentation. Moreover, we would not hesitate to recommend contract termination for the Government's convenience where the certifying firm has not conformed to a reasonable standard of care, except, of course where it would not be in the Government's best interest to do so.

In this case the protester has not made a clear showing of an intentional misrepresentation. While the evidence, in our view, indicates that the contractor was negligent, this, by itself, does not render the award void. As to the appropriateness of a contract termination at Government expense, we were advised that on February 11, 1977, at least 80 percent of the contractor's total costs have been incurred. In such circumstances, it would be too costly and impracticable to terminate the contracts for the Government's convenience at this time.

Accordingly, the protest is denied.

R.F.K.11

Deputy Comptroller General
of the United States