

DECISION

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

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FILE: B-217283, B-217283.2, **DATE:** March 14, 1985
B-217283.3

MATTER OF: Crysen Corporation; Edgington
Oil Company, Inc.; Kern Oil &
Refining Co.

DIGEST:

1. The award of contracts for the sale of crude oil from the Naval Petroleum Reserve under a solicitation containing a small business preference (25 percent of sales to go to small refiners) prior to resolution of a size protest against the status of one potential awardee by the Small Business Administration (SBA) is not improper where the agency relied on the bidder's self-certification and on a prior SBA size determination and where the agency waited more than 10 business days for the SBA's determination in accordance with applicable regulations.
2. Termination of contracts awarded for sale of crude oil from the Naval Petroleum Reserve under a solicitation containing a small business preference (25 percent of sales to go to small refiners) is not required when, months after award, the Small Business Administration determines that, for prospective purposes only one contractor which was considered small, is other than small, where awards were properly made and where the contractor involved would be eligible for award anyway notwithstanding its size.

Crysen Corporation (Crysen), the parent company of Crysen Refining, Inc. and Sound Refining, Inc., protests the sale of crude oil from the Naval Petroleum Reserve (NPR)

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No. 1 and No. 2, Kern County, California, for a 6-month period, under invitation for bids (IFB) No. DE-FB01-84FE60554, issued by the Department of Energy (DOE). Kern Oil & Refining Co. (Kern) and Edgington Oil Company, Inc. (Edgington) also have filed protests which adopt and incorporate by reference the fully detailed protest by Crysen. Therefore, discussion of Crysen's protest also reflects the interests of Kern and Edgington. Crysen contends that DOE failed to properly adhere to the terms of the IFB by not applying the solicitation's "small refiner preference" clause. Crysen Refining, Sound Refining, Kern, and Edgington would have been eligible for award if DOE had applied the clause.

The protest is denied.

The production and sale of NPR crude oil is governed by the Naval Petroleum Reserves Production Act of 1976 (Act), as amended, 10 U.S.C. § 7420-7438 (1982). Although the Act authorizes the government to set aside a quantity of the oil for small refiners, DOE did not do so. Instead, to satisfy the government's objective to award approximately 25 percent of the crude oil offered under the IFB to small refiners, DOE included a small refiner preference clause which stated in relevant part:

L-3 SMALL REFINER PREFERENCE

"If the pre-award evaluation of the crude oil bids indicates that small refiners would receive less than approximately 25% of the 92,259, BOPD (Barrels of Oil Per Day) offered, it is the intent of the Department of Energy to invoke the small refiner preference (see L-4)."

Clause L-4 provided an evaluation scheme by which small refiners would displace higher bidding non-small refiners until approximately 25 percent of the crude oil had been awarded to small refiners.

The preaward evaluation of bids indicated that four bidders, including Golden West Refining, Inc. (Golden), were small refiners and, based solely on their competitive prices, were in line for awards. Because award to these four firms would provide to small refiners 23.22 percent of crude oil offered for sale, the DOE determined that the goal of awarding approximately 25 percent to small refiners had been met on the basis of price competition. DOE decided, therefore, not to invoke the "small refiner preference" clause.

Kern filed a timely size status protest with DOE, alleging that Golden was not a small refiner because its capacity exceeded 45,000 BOPD and because Golden and its affiliates have more than 1,500 employees, the two criteria set forth in the applicable Standard Industrial Classification. DOE referred Kern's protest to the Small Business Administration (SBA) for a determination. After waiting more than the required 10 business days from when SBA received the size status protest, the contracting officer determined that further delay would be disadvantageous to the government and awarded the contracts on September 17, 1984. See Federal Acquisition Regulation (FAR), § 48 C.F.R. § 19.302(h) (1984). This determination was based on the belief that continued delay of awards would result in either the extension of existing contracts on a non-competitive basis in violation of 10 U.S.C. § 7430, or the curtailment of oil production in violation of 10 U.S.C. § 7422, which could possibly cause reservoir damage. Relying on Golden's self-certification that it was a small refiner, and on a November 1983 SBA determination (based on the same size standard) that Golden was a small refiner as evidence that the self-certification was in good faith, DOE included the total quantity of oil awarded to Golden, 15,000 BOPD, in its calculations of awards to small refiners. Consequently, as stated above, DOE found it unnecessary to invoke the "small refiner preference" clause.

On November 1, 1984, Region IX of the SBA issued a decision, in which it determined that for the "purposes of any future Government contracts subject to a size standard of 1500 employees or less and a crude oil refining capacity of no more than 45,000 barrels per day" Golden is other than a small business. The SBA decision stated that since a contract had been awarded to Golden, the determination "is made for prospective uses."

Upon learning of the SBA's decision regarding Golden's size status, Crysen requested that the DOE terminate the contracts of those large refiners which would not have received awards if prior to award Golden was determined to be other than small and DOE therefore had invoked the "small refiner preference" clause. DOE responded by letter dated November 20, 1984, with its decision not to disturb the awards. DOE stated that the decision was based on the prospective language contained in the SBA determination regarding Golden, on the provisions of 48 C.F.R. § 19.302(h), and on the desire not to disrupt the commitments and plans current purchasers may have made as a result of the contracts awarded in September.

Crysen's protest outlines three options for corrective action which Crysen believes DOE could take. Firstly, Crysen suggests, DOE could invoke the "small refiner preference" clause and terminate for convenience the contracts to the non-small refiners that would be displaced under the clause and reaward those quantities to the appropriate small refiners. In that case, Golden's contract would not be terminated because if it is considered a non-small refiner it would not be displaced under the "small business preference" clause. The second option suggested is that Golden's contract be terminated and the award of Golden's 15,000 BOPD be made to small refiners, without disturbing awards to other non-small refiners. Finally, Crysen suggests that the DOE could increase the percentage of oil reserved for small refiners on the next 6 month contracting cycle to ensure that 25 percent of the annual production from the NPR is awarded to small refiners. Crysen states that this option is its last choice because, while it would benefit small refiners as a class, it would not compensate those particular small refiners that lost contracts on this solicitation.

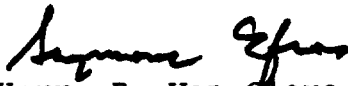
DOE has taken the third possible corrective action option suggested by Crysen. On December 28, 1984, DOE issued IFB No. DE-FB01-85FE60696 for the sale of NPR oil to commence April 1, 1985. The new IFB provides for an 18 percent increase, from 25 percent to 43 percent, in the small refiner preference to compensate for the apparent 18 percent under allotment to small refiners under the current IFB. The net effect of the new IFB would be to bring the yearly sales to small refiners to the 25 percent level.

We find no basis to disagree with DOE's actions here. DOE waited more than the required 10 business days for the SBA's size determination before making award, in accordance with 48 C.F.R. § 19.302(h)(1). After the 10-day period expired and SBA still had not made its determination, the contracting officer determined, in accordance with 48 C.F.R. § 19.302(h)(2), that further delay in award would be disadvantageous to the government. In deciding to award to Golden, the contracting officer had both Golden's self-certification and a November 1983 Region IX SBA determination that Golden was a small refiner in a sale with the same size standard as the present one. Under these circumstances, the award to Golden must be considered to be valid. See, e.g., John C. Holland Enterprises, B-216250, Sept. 24, 1984, 84-2 C.P.D. ¶ 336; J.R. Youngdale Construction Co. and John R. Selby, Inc., B-214448, B-214484, Mar. 13, 1984, 84-1 C.P.D. ¶ 306.

Crysen cites a number of our decisions which suggest that since Golden was subsequently determined to be other than small due to a timely size protest, the contracts awarded are voidable at the option of the government and should be terminated. See, e.g., Superior Asphalt Concrete Company, B-184337, Dec. 5, 1975, 75-2 C.P.D. ¶ 372. While we agree that in certain circumstances a contract awarded to a large business which miscertified itself as small under a small business set-aside may be voidable at the option of the government, we think DOE is acting reasonably here in deciding against termination of the contracts awarded.

First, the SBA size determination by its own express terms is prospective only. Also, Crysen acknowledges that because Golden bid such a high price for the oil, even if it had not certified itself to be small it still would have received the full 15,000 BOPD on which it bid (other large refiners would have been displaced). Therefore, a termination which would acknowledge that Golden is not small would not affect Golden, but would impact on parties which played no part in Golden's size status situation. DOE argues, and we agree, that such a termination would disrupt the operations and commitments of bidders who bid in good faith and were awarded contracts in compliance with the terms of the IFB.

The protest is denied.

for 
Harry R. Van Cleve
General Counsel