

DECISION

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

50692

FILE: B-183036

DATE: May 20, 1975

97285

MATTER OF: Kappa Systems, Inc.

DIGEST:

1. Question concerning service classification utilized for small business set-aside procurement is not for consideration by GAO, since conclusive authority over question of this nature is vested by statute in SBA which has promulgated regulations having force and effect of law to resolve such matters.
2. Although record contains misstatement on part of DOL as to its belief that protester would be eligible to compete for procurement in question, there is nothing in evidence to show that misstatement was deliberately made, and statement carries with it proviso "if otherwise entitled to do so."

By letter dated January 14, 1975, counsel for Kappa Systems, Inc. (Kappa), protested against the proposed making of an award by the Job Corps, Department of Labor (DOL). The proposed award was to be made under section 8(a) of the Small Business Act, 15 U.S.C. § 637(a) (1970).

Kappa contended that the proposed method of award would be in contravention of the Small Business Administration's (SBA's) regulations regarding the use of the 8(a) program. In particular, Kappa argued that 13 C.F.R. § 124.8-2(b) (1974) precluded an award of this nature in that DOL had disregarded the extent to which other small concerns had historically been dependent upon the contract in question for a significant percentage of their sales.

In response to Kappa's protest, DOL, after consultation with persons from its office, SBA, and our Office, withdrew "* * * the open requirement * * * to obtain a suitable contractor for the provision of health services to the Job Corps under the Section 8(a) program." By letter dated February 10, 1975, the Assistant Secretary for Administration and Management, DOL, stated to our Office that:

"The contracting officer has reexamined his position in light of Kappa's arguments, and will not award the contract under SBA's 8(a) procedures. A public

solicitation will be offered under the small business set-aside program thus allowing Kappa to compete for the contract." (Emphasis supplied.)

In view of this change in position, our Office found Kappa's protest to be moot and closed our file in the matter.

On March 14, 1975, request for proposals ONP 75-1 was issued by DOL, Manpower Administration, as a small business set-aside. The small business size standard utilized, however, restricted prospective bidders' average annual sales or receipts for the preceding 3 fiscal years to not greater than \$1 million. Kappa, on the other hand, could not qualify as "small business" under this standard and therefore has again protested to our Office claiming that it is being restricted from competition. Kappa also alleges that DOL has misled our Office, from the above-quoted letter, in having us believe that Kappa would be allowed to compete under the new procurement.

DOL, in response to Kappa's revived protest has stated that the proposed project is composed of both a development component and a service component, the preponderance of work being for the latter component. Pursuant to 13 C.F.R. § 121.3-8 (1974), the determination of the appropriate classification of a service being procured shall be made by the contracting officer. Both 13 C.F.R. § 121.3-8 (1974) and 41 C.F.R. § 1-1.701-1(a)(1) (1974) state that if a procurement calls for more than one item and a bidder is required to bid on all or none of such items, the bidder can qualify as small business for such procurement if it meets the size standard for the item accounting for the greatest percentage of the total contract value. Moreover, under 13 C.F.R. § 121.3-8(e) (1974) and 41 C.F.R. § 1-1.701-1(f) (1974) any concern bidding on a contract for services, not elsewhere defined in each respective section, is classified as small if its average annual receipts for its preceding 3 fiscal years do not exceed \$1 million.

Although the classification determination made by the contracting officer is subject to appeal pursuant to 13 C.F.R. § 121.3-6 (1974) (and Kappa has so appealed), the SBA regulations clearly establish it as the sole adjudicator of the classification issue in question. See 53 Comp. Gen. 434 (1973). Accordingly, our Office must decline to consider this issue.

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As concerns Kappa's statement that DOL has misled our Office, while we can understand Kappa's position, it appears from the record that the service classification selected was not chosen purposely to exclude Kappa. Moreover, DOL has stated that when it indicated to our Office that Kappa would be able to participate in any future solicitation, it was unaware of Kappa's size status for this particular procurement. It necessarily follows, we think, that DOL's statement concerning Kappa's right to compete carries with it the proviso "if Kappa is otherwise entitled to do so."

Accordingly, we can find no evidence that would cause us to conclude that DOL purposely misrepresented the facts about Kappa's involvement in the instant procurement, and the protest must therefore be denied.


Deputy Comptroller General
of the United States