DECISION

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

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FILE: B-182625 DATE: July 18,1975

MATTER OF: Wallace and Wallace Fuel Oil Company, Inc.

DIGEST:

Claim that Small Business Administration (SBA) may not reduce its level of 8(a) support to a supplier without affording supplier a "due process" hearing is not sustained. Prior decision that SBA was not required to continue same level of support to supplier is affirmed.

By letter of May 12, 1975, Wallace and Wallace Fuel Oil Company, Incorporated (Wallace), requests that our decision Wallace and Wallace Fuel Oil Company, Incorporated, B-182625, April 1, 1975, be reconsidered.

The decision which is appealed was based on Wallace's protest against the Small Business Administration's (SBA) determination not to award it specific items of fuel oil requirements under Defense Fuel Supply Contract DSA600-75-0002. As a minority owned small business, Wallace has participated in the SBA's 8(a) program for the past four years. The purpose of that program as set forth at 13 C.F.R. 124.8-1(b) (1974 ed.), is to assist small business concerns owned or controlled by socially or economically disadvantaged persons to achieve a competitive position in the market place.

Under its previous 8(a) contract (DSA600-74-D-2245) Wallace was the supplier of seven items of fuel oil requirements. Its protest arose in connection with SBA's proposal to award to four other 8(a) firms requirements of some 10 million gallons which Wallace had previously supplied. Our decision held that SBA was not required to continue to supply Wallace its former level of 8(a) assistance and, further, that it was justified in reallocating the requirements of some of Wallace's previous contracts to other 8(a) firms.

In asking that our Office reconsider its decision of April 1, 1975, Wallace asserts that it had a due process right to participate in a hearing prior to the SBA's determination to reallocate a portion of its previous contractual

requirements to other firms. In so claiming, Wallace cites the Supreme Court case of Goldberg v. Kelly, 397 U.S. 254 (1970), holding that, as a matter of procedural due process, a welfare recipient is entitled to a pretermination evidentiary hearing. Wallace also cites two other Supreme Court cases, Cafeteria and Restaurant Worker's v. McElroy, 367 U.S. 886 (1961) and Flemming v. Nestor, 363 U.S. 603 (1960). However, those two cases do not appear to lend any support to Wallace's appeal in view of their respective holdings that procedural due process does not afford an individual the right to a hearing incident to exclusion from work premises for security reasons or incident to termination of benefits under the Social Security system.

As Wallace suggests, the Supreme Court has recognized that procedural due process affords the right to a hearing in various situations where the interest of the affected party is tantamount to a property right. Goldberg, supra. However, compare Arnett v. Kennedy, 416 U.S. 134 (1974), and Board of Regents v. Roth, 408 U.S. 564 (1972), where a property interest sufficient to invoke procedural due process requirements was not found. We are not aware of any authority for the proposition suggested by Wallace that its interest in continued 8(a) support is of such a nature as that found in Goldberg so as to guarantee it a right to be heard incident to a reduction or cessation of that support. The interest of an 8(a) subcontracting firm is defined by the Small Business Administration regulations and Small Business Policy No. 60-40 as follows:

> "Applicants to the 8(a) program must submit a business plan * * * which will demonstrate that 8(a) assistance will foster its participation in the economy as a self sustaining profit oriented small business. In no event may the acceptance or approval of a business plan by SBA be construed as a commitment by SBA to award a single contract, a continuing series of contracts or provide any other assistance contractual or otherwise." 13 C.F.R. 128.8-2(a) (1974 ed.) (Emphasis supplied.)
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> "It is not intended that 8(a) contracts will support a concern indefinitely but rather will serve as an adjunct to its development." Small Business Policy No. 60-40.

The above policy of the SBA is consistent with the general proposition that an incumbent contractor has no "right" to the continuance of a requirement for his benefit. Perkins v. Lukens Steel Co., 310 U.S. 113 (1940). Also, see Roth and Arnett, supra. While it has more recently been recognized that a disappointed bidder has standing to judicially challenge a contract award upon a prima facie showing that the award was made arbitrarily, capriciously or in a manner contrary to applicable procurement regulations, Scanwell Laboratories, Inc. v. Thomas, 424 F. 2d 859 (1970), the theory of that decision does not vest a contractor with a right in any particular contract. Therefore, we are unable to agree with Wallace's claim of entitlement to a hearing. Moreover, SBA has reported that in fact Wallace was not only accorded the review given to all 8(a) applicants under this program but was accorded a "full opportunity to be 'heard' well in excess of that review normally afforded an applicant."

In addition to its claim of entitlement to a hearing, Wallace urges that the SBA determination to reduce its allocation of fuel oil requirements may have been made without a clear understanding on SBA's part of the impact of that reduction on its business posture. In this regard, Wallace states:

> "* * * The figures /indicated in the SBA's administrative report/ do not reflect that the contracts withdrawn from Wallace and Wallace all called for the delivery of No. 2 fuel oil and that these contracts represented over 90% of its requirement for No. 2 oil. The equipment used for delivering the various grades of oil are not the same. Essentially, No. 2 oil is largely a tank truck business while No. 4 and No. 6 oil is a large business. Therefore, by removing all of its No. 2 oil contracts, the SBA effectively idled the equipment purchased to serve these requirements and placed Wallace and Wallace in a severe cash flow pinch due to underutilization of its capital equipment. * * *
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> "It is likely that the SBA did not realize the drastic effect its reassignment of No. 2 fuel oil would have on the actual business operations of Wallace and Wallace. In fact, it is unlikely that it recognized that its reduction in support of Wallace and Wallace impacted only its No. 2

fuel oil business. However, had Wallace and Wallace been informed of the specific manner in which SBA intended to allocate available supplies, it would have made these effects known to the SBA prior to the implementation of its decision."

We are advised by procurement officials of the New York Regional Office, SBA, that it did in fact recognize that its reallocation of fuel oil requirements would impact largely on Wallace's supply of No. 2 fuel oil. However, it originally felt that Wallace could absorb the loss and that those requirements would better benefit other 8(a) contractors. We are advised that in fact neither Wallace nor the other 8(a) firms receiving SBA support fared as well as SBA had expected and that, in Wallace's case, notwithstanding our decision upholding its reallocation of fuel oil requirements, the SBA has made agreements with Wallace which will replace a very substantial quantity of the previously withdrawn requirements. Since it does not appear that the SBA's original action was taken on the basis of misinformation, we find no basis to conclude that our decision was based on an erroneous assumption of fact or is incorrect as a matter of law.

For the foregoing reasons, our decision Wallace and Wallace Fuel Oil Company, Incorporated, B-182625, April 1, 1975, is affirmed.

Paul G. Dembling

For the Comptroller General
of the United States