

DECISION

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

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FILE: B-185645

DATE: May 18, 1976

MATTER OF: Holloway Enterprises, Inc.

DIGEST:

1. Allegations questioning propriety of determination to set aside procurements under SBA's 8(a) program will no longer be reviewed by GAO absent, as here, prima facie showing of fraud on part of Government officials or such willful disregard of facts as to necessarily imply bad faith.
2. Where, pursuant to request for recertification, SBA has determined proposed awardee to be small business, GAO cannot question SBA's size determination since there has been no prima facie showing of fraud on part of Government officials or such willful disregard of facts as to necessarily imply bad faith.

The instant protest concerns a proposed contract between the Department of the Air Force and the Small Business Administration for the performance of food services at Warner Robins Air Force Base in Georgia and the subsequent subcontract award to Best Services, Inc., pursuant to section 8(a) of the Small Business Act, 15 U.S.C. § 637(a) (1970). Holloway is the present contractor for such services.

Holloway protests the determination to set aside the procurement in question under the 8(a) program. Moreover, Holloway indicates that the procurement in question was improperly set aside as contracts of this nature are normally set aside at the regional level and not in Washington as was done in this case. Thirdly, Holloway argues that Best Services is not a small business due to an affiliation with Worldwide Services, Inc., and therefore is not eligible for award of the instant contract.

With regard to Holloway's allegations as to the propriety of the determination to set aside the instant procurement under the 8(a) program, it must be noted that since the filing of the protest GAO has ruled that it will no longer review such determinations to set aside procurements under the 8(a) program. Jets Services, Inc., B-186066, May 4, 1976. As we stated in Alpine Aircraft Charters, Inc., B-179669, March 13, 1974, 74-1 CPD 135--

"Section 8(a) of the Small Business Act (15 U.S.C. 637(a)) authorizes the SBA to enter into contracts with any Government agency having procurement powers, and the contracting officer of such agency is authorized 'in his discretion' to let the contract to SBA upon such terms and conditions as may be agreed upon between SBA and the procuring agency. It is clear, therefore, that the determination to initiate a set-aside under section 8(a) is a matter within the sound discretion of the SBA and the contracting agency."

In view of the holdings in the cited cases and in the absence of a prima facie showing of fraud on the part of Government officials or such willful disregard of the facts as to necessarily imply bad faith, the issue raised by Holloway is not subject to legal review.

As to the question of Best's size, the SBA has advised that on August 4, 1975, Best Services, Inc., was determined to be a small business concern pursuant to its request for recertification under the small business program. Moreover, on February 9, 1976, Region IV of the SBA reaffirmed its view that Best and Worldwide Services, Inc., could not be found to be affiliated under section 121.3-2(a) of the SBA Size Regulations.

As we stated in Zac Smith & Company, Inc., B-183843, November 4, 1975, 75-2 CPD 276, "* * * questions concerning the propriety of SBA size determinations are not properly for consideration by our Office under our Bid Protest Procedures, 40 Fed. Reg. 17979 (1975), absent a prima facie showing of fraud on the part of the Government officials or such wilful disregard of the facts as to necessarily imply bad faith." Since we do not believe that such a showing has been made in the instant case, we cannot question the SBA's size determination.

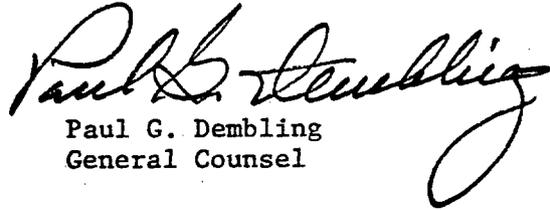
With regard to Holloway's allegation that the instant procurement was handled in an unusual manner, i.e., at the Washington level of SBA rather than at the regional office, SBA indicates "* * * this procurement is being handled by the Regional Office pursuant to delegated authority. Personnel of the Central Office were not involved."

Holloway also raises the issue that another installation at which it was the incumbent contractor, Bolling Air Force Base, Washington, DC., when resolicited, was awarded to an 8(a) firm. However, based on the position of the Office stated above, such matters pertaining to the determination to set aside that procurement under 8(a) are not subject to review by GAO. Moreover, since

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Holloway's protest was not received in this Office until December 31, 1975, it appears that any allegations with regard to a contract let in July 1975 would be untimely under our Bid Protest Procedures, 40 Fed. Reg., supra.

For the reasons set forth above, Holloway's protest is accordingly denied.


Paul G. Dembling
General Counsel