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DECISION



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

FILE: B-201248

DATE: February 10, 1981

MATTER OF: W. M. Grace, Inc.

DIGEST:

Protest alleging bad faith in withdrawal of set-aside under section 8(a)(1)(A) of Small Business Act is without merit where record contains no evidence of bad faith.

W. M. Grace, Inc., protests the Department of the Army's withdrawal of a set-aside under the Small Business Administration's (SBA) 8(a) program and its replacement with a 100 percent small business set-aside on a competitive basis. The purpose of the solicitation was to obtain custodial services at thirteen U.S. Army Reserve Centers.

Grace contends that the Army has no authority to withdraw an 8(a) set-aside without the SBA's approval and alleges that it has never been formally notified that the 8(a) commitment has been withdrawn. Thus, Grace contends, the Army has acted in bad faith.

This procurement was originally set aside under subsection (A) of section 8(a)(1) of the Small Business Act. This provision authorizes the SBA to enter into contracts with any Government agency with procuring authority and to arrange for the performance of such contracts by letting subcontracts to small businesses or other concerns. The Government contracting officer, however, is authorized "in his discretion" to let the contract to SBA upon terms and conditions agreed to between the SBA and the procuring agency. 15 U.S.C. § 637(a)(1)(A) (Supp. III 1979).

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We have held that contracting agencies have broad discretionary authority in this area and consequently that agency decisions to withdraw set-asides under section 8(a)(1) (now section 8(a)(1)(A)) are not matters for review under the bid protest function of this Office, except in limited circumstances, such as where bad faith is alleged. Arcata Associates, Inc., B-195449, September 27, 1979, 79-2 CPD 228.

Although Grace alleges that the Army acted in bad faith here, we find no merit to this contention. Assuming that Grace's allegation concerning lack of formal notice of the withdrawal is true, we are not persuaded that this evidences bad faith.

The Court of Claims has held that in order to support a finding of bad faith the record must show "well-nigh irrefragable proof" that the agency has a specific and malicious intent to injure the party alleging bad faith. Kalvar Corporation, Inc. v. United States, 543 F.2d 1298, 1301 (Ct. Cl. 1976). In this case, Grace has produced no evidence to support a finding that the Army's failure to give formal notice of the withdrawal resulted from a specific and malicious intent to injure Grace.

In this regard we note that the Army provided Grace with a copy of the solicitation as reissued and that Grace was thereby given a full opportunity to compete for the required services. In fact, the Army advises that Grace was the low bidder and awardee for services at three of the Reserve Centers.

The protest is denied.



For the Comptroller General
of the United States