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**DECISION**

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

*Protest Alleging SBA Violated Policies and Procedures*

FILE: B-199721

DATE: March 11, 1981

MATTER OF: Jets Services, Inc.

**DIGEST:**

1. GAO will review Small Business Administration compliance with its Standard Operating Procedures governing award of 8(a) subcontracts only when showing of bad faith or fraud on part of Government procurement officials has been made.
2. Maybank Amendment prohibition on use of Department of Defense appropriations for payment of price differential on contracts made for purpose of relieving economic dislocation does not apply to 8(a) subcontracts.
3. Allegation that violations of Small Business Administration's Standard Operating Procedures (SOP) for award of 8(a) subcontracts make award of subcontract a violation of 41 U.S.C. § 11 (1976) statement that "no contract \* \* \* shall be made, unless \* \* \* authorized by law" is denied because purpose of provision is to prevent officers of Government from contracting beyond legislative authorization. Provision is not violated by mere procedural irregularities in award of authorized contract. Here, contract is authorized by section 8(a) of Small Business Act, and sufficient appropriations are available for purpose.

Jets Services, Inc. (Jets), protests the proposed award of a contract by the Department of the Army (Army) to the Small Business Administration (SBA) and the proposed award of a subsequent subcontract to Wilsyk, Inc. (Wilsyk), under section 8(a) of the Small Business Act, 15 U.S.C. § 637(a) (1976), as

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amended by Pub. L. No. 95-507, October 24, 1978, 92 Stat. 1757. The contract is for the operation of Government-owned laundry and drycleaning facilities at Fort Richardson, Alaska, and Fort Wainwright, Alaska, and Jets is the incumbent.

Jets argues that the SBA has violated its policies and procedures as set forth in its Standard Operating Procedures (SOP), and that any contract payments by the Army would violate the Maybank Amendment to the Department of Defense Appropriation Act and could violate the 41 U.S.C. § 11 (1976).

Jets' protest is dismissed in part and denied in part.

Concerning Jets' allegations that the SBA has not followed the guidelines set forth in SOP 80 05 for processing 8(a) procurements, our review is limited. Because of the broad discretion afforded the SBA under the applicable statute, SBA determinations will not be questioned absent a showing of fraud or bad faith on the part of Government procurement officials. Tidewater Protective Services, Inc., B-190957, January 13, 1978, 78-1 CPD 33. Also, allegations of SOP violations generally are not sufficient to invoke our review, since the SOP is "primarily for the internal guidance of agency employees in performing their official functions" (SOP 80 05 § 2(e)), and provisions may be waived. Orincon Corporation, B-194053, July 19, 1979, 79-2 CPD 39.

Jets argues that Delphi Industries--request for reconsideration, B-193212, January 30, 1979, 79-1 CPD 76, and MISSO Services Corporation, B-197393, June 19, 1980, 80-1 CPD 432, stand for the proposition that GAO will review, without a showing of bad faith or fraud, SBA compliance with SOP provisions that do not require an SBA judgmental determination. According to Jets, the SOP violations in the instant case do not require judgmental determinations, and, therefore, are reviewable without a showing of bad faith or fraud. Jets also argues that while SOP provisions can be waived, there is no evidence that

the provisions in question here have been waived and, therefore, they are reviewable.

Concerning Jets' waiver argument, we have held that questions regarding the waiver of an SOP are a matter for SBA and not GAO. A.R. & S. Enterprises, Inc., B-189832, September 12, 1977, 77-2 CPD 186. Thus, we will not consider whether or not an SOP provision has been waived, or if it has, whether that waiver was effected properly.

Regarding Jets' reading of the MISSO and Delphi-reconsideration decisions, MISSO does state that GAO will not review whether a particular procurement falls within the parameters of an 8(a) firm's business plan, absent a showing of fraud or bad faith because that is a judgmental decision for SBA. However, the decision does not indicate that GAO will review violations of nonjudgmental SOP provisions on a different basis. The Delphi reconsideration does seem to indicate that GAO will review purely procedural compliance with the SOP, but does not define the nature of the review. In Delphi, the review amounted only to our being "advised" by the SBA that the SOP in question had been followed. We answered the protester's substantive allegations by stating that the SBA's determinations under the allegedly violated SOP would not be questioned absent a showing of bad faith or fraud.

It is our opinion that the use of different standards for the review of procedural compliance with a SOP provision as opposed to substantive determinations under the provision is an artificial and impractical exercise which serves no useful purpose, especially in view of our position on SOP waiver. Therefore, we will not review alleged SOP violations without a showing of bad faith or fraud. To the extent that Delphi Industries, Inc.--request for reconsideration, supra, holds otherwise it will no longer be followed.

Here, no showing of bad faith or fraud has been made. Therefore, this portion of Jets' protest is dismissed.

Jets contends that the current version of the so-called Maybank Amendment to the Department of Defense Appropriation Act (§ 724 of Pub. L. 96-527, December 15, 1980, 94 Stat. 3068), which provides that "no funds herein appropriated shall be used for the payment of a price differential on contracts hereafter made for the purpose of relieving economic dislocations," will be violated by an award to Wilsyk because a price differential will allegedly be paid, and because Wilsyk might be located in a labor surplus area.

The legislative history of the Maybank Amendment shows that the prohibition applies only to a price differential paid on a contract awarded to a firm as a result of a preference granted to that firm because it operates primarily in a labor surplus area. B-145136, April 14, 1978. Here, the subcontract award to Wilsyk is based on a preference granted to Wilsyk because it has been determined to be a small business, owned by socially and economically disadvantaged persons. Therefore, the prohibition does not apply. This result is not altered even if Wilsyk coincidentally does operate primarily in a labor surplus area, so long as the contract or subcontract in question was not awarded as a result of a preference based on that fact. See Maybank Amendment, 57 Comp. Gen. 34 (1977), 77-2 CPD 333.

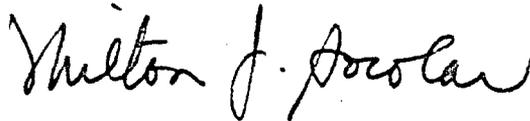
Finally, Jets argues that the alleged violations of the SOP in this case render the award of a subcontract to Wilsyk a violation of 41 U.S.C. § 11 (1976), which states that:

"No contract or purchase on behalf of the United States shall be made, unless the same is authorized by law or is under an appropriation adequate to its fulfillment. \* \* \*"

The purpose of this provision is to prevent executive officers from involving the Government in expenditures and liabilities beyond those authorized by the legislature. 21 Op. Atty. Gen. 248 (1895). The provision is not violated by mere procedural irregularities in the award of a contract. Here the subcontract

is authorized by section 8(a) of the Small Business Act and there are sufficient appropriated funds available for this purpose. Therefore, there is no violation of the provision.

The protest is dismissed in part and denied in part.



Milton J. Fowler

Acting Comptroller General  
of the United States