

DECISION



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

FILE: B-209990

DATE: December 15, 1982

MATTER OF: The Harris Management Company, Inc.

DIGEST:

1. GAO will not review agency determination not to procure mess attendant services under section 8(a) of the Small Business Act, even where such services were previously acquired under the section 8(a) program, absent showing of fraud or bad faith by procurement officials.
2. Where procuring agency finds small business concern is not responsible, Small Business Administration's (SBA) denial of Certificate of Competency will not be reviewed by GAO except in circumstances not present here since by law SBA has conclusive authority to determine all matters of small business firm's responsibility.

The Harris Management Company, Inc. protests the determination by the Department of the Army, Fort Ord, California, not to set aside invitation for bids (IFB) No. DAKF03-83-B-0003 for award under the Small Business Administration's (SBA) section 8(a) program. According to the protester, this requirement for mess attendant services was "successful(ly) and * * * beneficial(ly)" acquired in previous years under the section 8(a) program and agency officials failed to provide a satisfactory explanation concerning the reasons for termination of this "pilot" program.

Harris also states that it is the low, responsive, and responsible bidder under another solicitation for similar services, IFB No. DAKF03-82-B-0104, and objects to a "delay in the award of the contract" which is apparently attributable to a nonresponsibility determination by the contracting officer which was subsequently referred to the SBA for consideration under its Certificate of Competency (COC) program. For the reasons discussed below, we dismiss these protests.

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Concerning the first issue, whether the determination by the agency not to set aside IFB -0003 was proper, section 8(a) of the Small Business Act, 15 U.S.C. § 637(a) (Supp. IV 1980), authorizes SBA to enter into contracts with any Government agency with procuring authority and to arrange for performance of such contracts by letting subcontracts to socially and economically disadvantaged small business concerns. The contracting officer is authorized "in his discretion" to let the contract to SBA upon such terms and conditions as may be agreed upon by the procuring agency and SBA. In light of this broad discretion, we do not review agency determinations whether to set aside procurements under section 8(a) unless there is a showing of bad faith or fraud on the part of Government officials. See Maintenance, Incorporated, B-199854, August 27, 1980, 80-2 CPD 155. Such evidence must include a showing that the agency had a specific intent to injure the protester. See Arlandria Construction Co., Inc.--Reconsideration, B-195044; B-195510, July 9, 1980, 80-2 CPD 21. No such showing exists here. The protester does not allege fraud or bad faith and therefore we have no legal basis to review the matter.

Concerning the delay in award under IFB -0104, Harris advises that it has filed for Chapter 11 reorganization under the bankruptcy laws but that this should not be regarded as the equivalent of bankruptcy since Harris is a "debtor-in-possession" in charge of its own affairs. We have been informally advised by the contracting agency that the contracting officer determined the firm nonresponsible and referred the matter to SBA which declined to issue a COC because Harris would not make available to SBA pertinent records which were necessary for consideration of its responsibility. When a contracting officer determines that a small business bidder is nonresponsible, the law requires that the contracting officer refer the matter to the SBA, which has conclusive authority to determine all elements of responsibility. Accordingly, we normally do not review a contracting officer's determination that a small business is nonresponsible. See Surgical Instrument Company of America, B-201832.3, September 16, 1981, 81-2 CPD 221. Further, in light of SBA's conclusive authority, we will not review the SBA's decision to issue or not to issue a COC absent a prima facie showing of fraud or bad faith.

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Vernitron Corporation, E-201832.4, September 25, 1981,
81-2 CPD 250. Harris again does not allege fraud or bad
faith. Therefore we will not consider the matter.

The protests are dismissed.

Harry R. Van Cleve
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Acting General Counsel