

DECISION

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

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FILE: B-210172**DATE:** September 15, 1983**MATTER OF:** International Alliance of Sports Officials**DIGEST:**

1. The Small Business Administration, not the General Accounting Office, has the statutory authority to conclusively determine whether a concern is a small business for the purposes of a particular procurement.
2. Agency did not abuse its discretion in determining that it may accept low bid for sports officiating services from organization it regards as substantially owned or controlled by Government employees where price of only other bidder is approximately 25 percent higher and record indicates that same individuals actually would perform this essentially part-time work regardless of which bidder was awarded the contract.
3. Protest that performance of sports officiating services by active duty military and by civilian Government personnel would violate dual compensation laws is denied where protester has not borne its burden of proof.

International Alliance of Sports Officials (IASO) protests the proposed award of a contract to Westside Officials Association under invitation for bids No. F02604-83-B0001, a 100-percent small business set-aside, issued by the Department of the Air Force for sports officiating services at Luke Air Force Base, Arizona. IASO contends that (1) Westside is not a small business concern and therefore is not eligible for award; (2) Westside is substantially controlled by Government employees and award to such a firm is contrary to public policy; and (3) award to Westside would result in Government employees being paid by the Government for two different positions and therefore it would violate dual employment restrictions on Government employees. We dismiss the protest on the first ground and deny it on the other two.

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Bids were opened on December 9, 1982. The low bid was submitted by Westside in the amount of \$223,058 for the basic contract and 2 option periods. The only other bid was submitted by IASO in the amount of \$275,045--a difference of \$51,987. IASO filed this protest with our Office on December 14. It also filed a protest with the Small Business Administration (SBA) challenging Westside's size status. That protest was untimely but the contracting officer filed an independent protest requesting that the SBA make a size determination on Westside. The SBA Regional Office determined that Westside is a small business concern for the purposes of this contract and upon appeal this determination was affirmed by the SBA Size Appeals Board.

IASO maintains that Westside is not a business entity organized for profit and therefore it does not qualify as a small business concern. See 13 C.F.R. § 121.3-2(i) (1983). However, under 15 U.S.C. § 637(b)(6) (1976), the SBA is empowered to conclusively determine small business size status for Federal procurements. It is the duty of the SBA, not this Office, to determine whether a concern is a small business concern for the purposes of a particular procurement and SBA's determination is not subject to our review. Putnam Mills Corporation, B-210063, January 21, 1983, 83-1 CPD 74. The SBA has determined that Westside is a business entity organized for profit and qualifies as a small business under the size standard applicable to this procurement and therefore is eligible for award of this contract. We shall not review this determination.

IASO next asserts that all of Westside's officers and 75 percent of its membership are active duty Air Force military personnel and civilian employees and therefore the concern is substantially controlled by Government employees. It maintains that as a consequence award to Westside would violate Defense Acquisition Regulation (DAR) § 1-302.6, which provides that no agency knowingly shall enter into a contract with employees of the Government or a business organization that is substantially owned or controlled by Government employees except for the most compelling reasons, such as where the needs of the Government cannot reasonably be otherwise supplied.

The record in this case, insofar as it relates to the ownership, organization and operation of Westside, is sparse. It does indicate that the "president" and "owner" of Westside is a retired Marine Corps Gunnery Sergeant who

has stated that in the event Westside is awarded a contract, 90 percent of its employees will be drawn from active duty and retired military personnel, dependents of active duty and retired military personnel, and civilian Air Force employees. Not explained in the record is how these individuals would "substantially own or control" the Association. We note, however, that the Air Force has assumed that they would and that Westside therefore falls within the prohibition in DAR § 1-302.6 against the Government contracting with its employees. On the other hand, it is the Air Force's position that the additional cost of approximately \$52,000 which it would incur by contracting for these services with the protester rather than with Westside constitutes a "compelling reason" for making an exception to the general rule that the Government should not contract with its employees. In response, IASO maintains that the fact that the Government can realize a cost savings by contracting with a concern controlled by Government employees does not constitute a compelling reason to make an award to that concern.

The record in this case does not contain sufficient information for us to determine whether Westside is, in fact, "substantially owned or controlled" by Government employees. Even assuming, however, that Westside is so owned or controlled, under the facts of this case that does not provide a basis upon which we would object to the proposed award.

Although as a general policy contracts should not be entered into between the Government and its employees, or business organizations they substantially own or control, because of the appearance of favoritism which this may create, an exception may be made for "compelling reasons, such as where the needs of the Government cannot reasonably be otherwise supplied." DAR § 1-302.6.

Here, it would cost the Air Force an additional \$52,000 over a 3-year period if it were to reject Westside's bid and contract with IASO; this represents an increase in the contract price of almost 25 percent. In addition, the record indicates that because of the limited number of people in the Phoenix area qualified to do sports officiating, and because this essentially is part-time work, in all likelihood the same individuals would actually perform this contract irrespective of whether it was awarded to the protester or Westside. In view of the fact that it would cost approximately 25 percent more for the same people to perform the same services if the contract

were awarded to IASO, we cannot conclude that the Air Force has abused the discretion committed to it in deciding that IASO cannot "reasonably" supply its needs. This aspect of the protest is denied.

IASO also alleges that were Westside to be awarded the contract, it would result in the improper dual employment of individuals by the Government with respect to the active duty military personnel and civilian employees, since they would be paid for officiating sports events held in addition to receiving compensation for their regular positions. Except in limited circumstances, Federal civilian employees are prohibited from receiving pay from more than one Government position for more than an aggregate of 40 hours of work in 1 calendar week. 5 U.S.C. § 5533(a) (1982). In addition, in the absence of specific statutory authority, active duty military personnel are precluded from undertaking concurrent Federal civilian employment. 54 Comp. Gen. 431 (1974); 46 Comp. Gen. 400 (1966).

The question presented by IASO's protest is whether being a member of the Westside Officials Association would constitute an employment relationship with the Government. See, e.g., 45 Comp. Gen. 757 (1966); B-200240, May 5, 1981. The protester's argument, however, consists of little more than the bare assertion that to contract with Westside would violate the dual compensation laws: the protester has not presented any detailed analysis of the facts of this case or of the law involved. As we indicated above, moreover, the record does not contain copies of Westside's by-laws or constitution, or descriptions of its procedures, organizational structure or operations. The protester says, however, that its position is supported by an "opinion" of this Office. The "opinion" is a non-decisional letter written in response to a general inquiry made by IASO's predecessor organization prior to when it filed this and other bid protests concerning the award of contracts for sports officiating services. Contrary to the protester's assertion, we did not in this letter express the opinion that it would necessarily violate the dual compensation restrictions for active duty military personnel and Department of Defense civilian employees who were members of local officials organizations to be paid for officiating at sports events.

On the basis of this record we must conclude that the protester has not borne the burden of proof necessary to sustain its position; we therefore deny the protest as to this issue also.

The protest is dismissed in part and denied in part.

for *Milton J. Fowler*
Comptroller General
of the United States