

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

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**FILE:** B-212734; B-212734.2      **DATE:** September 29, 1983**MATTER OF:** Calplant Engineering Services Inc.;  
Del-Jen, Inc.**DIGEST:**

Procuring agency's decision to procure services, upon Small Business Administration's (SBA) approval, under 8(a) contract from firm which has applied to SBA for certification as an 8(a) contractor, will not be questioned by GAO absent a showing of fraud or bad faith by Government officials.

Calplant Engineering Services Inc. (Calplant) and Del-Jen, Inc. (Del-Jen), protest the award of an 8(a) contract to J. B. Industries (JBI) by the Los Angeles Air Force Station (Air Force). The protesters contend the procurement for base maintenance and civil engineering services should be competitively procured as it has been for 15 years, JBI does not qualify as an 8(a) firm and the contracting officer is biased in favor of JBI.

The protests are dismissed without obtaining an agency report since it is clear that the protests are not for our consideration. 4 C.F.R. § 21.3(g) (1983) as amended by 48 Fed. Reg. 1931 (1983).

JBI has requested certification by the Small Business Administration (SBA) as an 8(a) contractor, and has requested award of the base civil engineering contract. The SBA apparently has made no decision regarding JBI's certification and the initiation of an 8(a) rather than small business set-aside procurement.

Under section 8(a) of the Small Business Act, SBA is authorized to enter into contracts with any Government agency with procuring authority and to arrange the performance of such contracts by letting subcontracts to socially and economically disadvantaged small business concerns. 15 U.S.C. § 637(a) (1978); 13 C.F.R. part 124 (1983). The contracting officer is authorized "in his discretion" to let contracts to SBA upon such terms and conditions as may be agreed upon by the procuring agency and SBA. Therefore, we will not review protests against section 8(a) set-asides

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unless fraud or bad faith on the part of Government officials can be shown. Gateway Warehouse Service Corp., B-208350, August 17, 1982, 82-2 CPD 141.

Calplant protests that JBI is not a disadvantaged firm and therefore ineligible for award under the 8(a) program. This matter is for determination by the SBA and not our Office. This ground of protest is premature because the SBA has not yet determined JBI's eligibility. We note, however, that our review of SBA's determination under the 8(a) program is limited to determining whether SBA has followed its own regulations. Because of the broad discretion afforded SBA by statute, judgmental decisions under section 8(a), absent a showing of fraud or bad faith on the part of Government officials, will not be questioned. Gateway Warehouse Services Corp., supra.

Calplant also contends that this procurement should be competitively procured because of the large dollar amount involved, to do otherwise indicates fraud or bad faith. However, the fact that the Government may otherwise save money does not demonstrate fraud or bad faith by the contracting officer. Since SBA has not yet decided whether to set aside the contract for an 8(a) contractor, a protest against SBA is premature. We note, however, that it is SBA's policy to consider any adverse impact on a small business before agreeing to accept procurements under the 8(a) programs. See MGL Construction, Inc., B-210766, February 22, 1983, 83-1 CPD 184.

The protesters contend that the Air Force has demonstrated favoritism towards JBI. Del-Jen contends the Air Force desires to avoid the aggravation of the competitive process and has emphatically indicated to Del-Jen that if the SBA does not select "Jan Dykes' firm" the Air Force will compete the procurement and cancel the 8(a) set-aside.

The fact that the contracting officer supports an 8(a) contract to JBI upon SBA's approval is not evidence of fraud. See International Business Services, Inc., B-209279, October 20, 1982, 82-2 CPD 354. Moreover, the protester bears a very heavy burden of proof when alleging bad faith by Government officials. Bad faith requires irrefutable proof that the contracting officer had a specific and malicious intent to injure Calplant or Del-Jen. Prior procurement practices, inefficiency or negligence do not suffice to meet the high standard of proof required to show bad faith. See Boone, Young & Associates, Inc., B-199540.3, November 16, 1982, 82-2 CPD 443. The protesters have not

demonstrated bad faith. Moreover, if the 8(a) set-aside is dissolved, the protesters will be able to compete under a competitive procurement.

The protests are dismissed.

*Harry R. Van Cleve*  
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