

DECISION

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

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FILE: B-213928**DATE:** February 1, 1984**MATTER OF:** The Federal Research and Information
Group**DIGEST:**

1. GAO generally does not review agency decisions to set aside or not to set aside particular procurements under section 8(a) of the Small Business Act, since contracting officer is authorized to let contracts "in his discretion." Only exceptions are when a protester shows possible fraud or bad faith on the part of contracting officials or alleges that the Small Business Administration did not follow its own regulations.
2. When contracting agency routinely reviews all procurements for possible inclusion in its 8(a) program under the Small Business Act, a decision to set aside a particular procurement appears to be the result of following such procedures, and does not constitute evidence of bad faith.
3. Denial of opportunity to perform a particular contract does not constitute a de facto debarment, and when contracting agency has advised a small business that if it fills out necessary forms, it will be included on the bidders list for future procurements, GAO will deny protest on this basis.

The Federal Research and Information Group protests the Department of Transportation's proposed award of a contract to the Small Business Administration (SBA) under section 8(a) of the Small Business Act, 15 U.S.C. § 637(a) (1982). The SBA in turn will subcontract with a socially and economically disadvantaged small business concern for

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a study of the domestic content provisions of the Fair Practices in Automotive Products Act, H.R. 1235, 98th Cong., 1st Sess. (1983).¹

We deny the protest.

Federal Research alleges that it alerted the Department of Transportation to the need for the study and argues that it has the experience necessary to perform it. As a small, minority-owned business, although admittedly not an 8(a) firm, Federal Research therefore believes it is entitled to consideration for award. The agency's decision to set the procurement aside for an 8(a) firm, Federal Research concludes, was arbitrary, capricious, and made in bad faith, and has resulted in its de facto debarment.

Our Office generally does not review agency decisions to set aside or not to set aside particular procurements under section 8(a). This is because the Small Business Act authorizes the contracting officer to let contracts to SBA "in his discretion." The only exceptions to our policy are when a protester shows possible fraud or bad faith on the part of government officials or alleges that the SBA did not follow its own regulations. Marine Industries Northwest, Inc. et al., 62 Comp. Gen. 205 (1983), 83-1 CPD 159.

Federal Research's protest does not fall within either of these exceptions. The bad faith allegation apparently refers to a dispute with the chief of the Department of Transportation's Procurement Division that occurred when Federal Research, doing business as Wizard Research and Development Group, an 8(a) firm, sought increased contract payments as a result of a constructive change.

We cannot conclude, however, that the decision to set aside the protested procurement for an 8(a) firm stems from this dispute. Rather, as the Department of Transportation advised Federal Research in response to a protest

¹This proposed legislation was passed by the House of Representatives on November 3, 1983, and has been referred to the Senate Committee on Commerce, Science, and Transportation.

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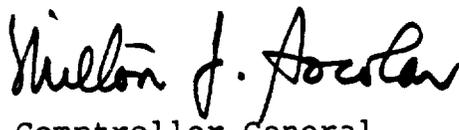
to the agency, all procurements are reviewed for possible inclusion in the 8(a) program. If this is not possible, the agency states, it reviews its small business bidders list to see if the procurement should be set aside for this group before proceeding with an unrestricted competition. Thus, the chief of the Procurement Division appears to have been following agency procedures, rather than acting with a deliberate and malicious intent to exclude Federal Research from competition, which is how we have defined bad faith. Id.

As for Federal Research's alleged de facto debarment, a bidder can only be debarred or suspended from competing from government contracts through the procedures set forth in Federal Procurement Regulations Subpart 1-1.6 (amend. 108, October 1972). It is improper for a procuring agency to subject a bidder to a de facto debarment that voids these procedures, for example by repeated determinations of nonresponsibility. United Aircraft and Turbine Corporation, B-210710, August 29, 1983, 83-2 CPD 267. This, however, is not a case of debarment, since the only thing that Federal Research has been denied is an opportunity to perform a particular contract as a result of an apparently reasonable determination to set it aside for an 8(a) firm. Id.; Community Economic Development Corporation, B-211170, August 23, 1983, 83-2 CPD 235.

The Department of Transportation has advised Federal Research that if it completes the necessary forms, it will be included on the small business bidders list for future procurements. We therefore find no merit to the allegation that Federal Research has in effect been debarred.

To the extent that Federal Research is complaining about its treatment during the period that it was doing business as Wizard Research and Development Group, this would have been a matter of contract administration, and thus is not for our review. HSQ Technology, B-208557.5, July 11, 1983, 83-2 CPD 69.

The protest is denied.

for 
Comptroller General
of the United States