

DECISION

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

28797

FILE: B-214568.2 **DATE:** July 17, 1984
MATTER OF: Washington Patrol Service, Inc.--
Reconsideration

DIGEST:

1. Protest against a contracting agency's determination to set aside a procurement under section 8(a) of the Small Business Act on the basis that the agency has acted in bad faith is denied, since the protester has failed to establish that the agency's decision was motivated by a specific and malicious intent to exclude the firm from competing for the contract.
2. A non-8(a) firm is not an interested party under GAO's Bid Protest Procedures to question the qualifications of a particular 8(a)-eligible firm.

Washington Patrol Service, Inc. (WPS) requests reconsideration of our decision Washington Patrol Service, Inc., B-214568, March 27, 1984, 84-1 CPD ¶ 360, in which we dismissed the firm's protest against the Department of the Army's decision to award a contract to the Small Business Administration (SBA) under the 8(a) program.¹ We dismissed the protest because we generally do not review a determination to set aside a procurement under section 8(a) absent a showing of possible fraud or bad faith on the part of government officials, or an allegation that regulations were violated.

¹Section 8(a) of the Small Business Act, 15 U.S.C. § 637(a) (1982), authorizes the SBA to enter into contracts with any government agency with procuring authority and to arrange for the 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 a contract to the SBA upon such terms and conditions as may be agreed upon by the procuring agency and the SBA.

029437

Initially, we viewed the protest as not satisfying the requirement for a showing of possible bad faith. In its request for reconsideration, however, WPS provided documentary evidence in support of its allegation of bad faith. We therefore have now considered the merits of WPS' position on reconsideration, but we deny the protest.

Background

The procurement calls for the acquisition of security and law enforcement services at the Army's Kwajalein Island missile range in the Pacific. The missile range is an activity of the Ballistic Missile Defense Systems Command, and is primarily operated by civilian defense contractors. WPS has held the security and law enforcement contract since 1980.

The record establishes that the Army decided in May of 1983 to make the new solicitation, for performance beginning October 1, 1984, a 100 percent set-aside for small business, and published a notice to that effect in the Commerce Business Daily; this notice was repeated the following December. In February of 1984, WPS learned that the Army had decided to cancel the total small business set-aside and award the new contract to the SBA under the 8(a) program.

Protest and Analysis

WPS alleges that the decision to procure under the 8(a) program was made in bad faith because it was intended to keep WPS from competing for the award. WPS is a graduate of the 8(a) program and as such is no longer eligible for 8(a) awards. The firm further alleges that the Army restricted the procurement as retaliation for the firm's prior requests to the Army for investigations into the conduct of Army agents, who in turn had conducted criminal investigations of certain members of WPS' staff on Kwajalein. Apparently, these WPS staff members were charged with larceny, wrongful disposition of government property, and illegal possession and use of contraband material. In support of its allegation that the Army has acted in bad faith, WPS has furnished a copy of a personal letter written by one member of its staff under investigation which contained the statement that, "The agent I talked to said the Army is out to close the company down."

In our view, a statement in a personal letter from an individual under investigation to the effect that the Army sought to exclude WPS from further contract work at Kwajalein carries little evidentiary weight. We point out that such a statement is mere hearsay, that is, it is offered in evidence by a party not making the statement as proof of the facts the statement asserts. See 29 Am. Jur. 2d Evidence § 493 (1970). Further, the protester's own submission contains a copy of the Army's criminal investigation report which states that this WPS staff member swore under oath that:

"he never told anyone, or was told by anyone, that CID [The Army's Criminal Investigation Division] was trying to close down Washington Patrol Services."

This individual's sworn statement made in response to an investigation thus directly refutes his statement in a personal letter. Thus, under the circumstances, we cannot conclude that the letter establishes the Army's bad faith in this matter.

WPS also contends that the proposed awardee of the 8(a) award is not qualified to perform security and law enforcement services because the firm's principal line of work is research and development. It appears that WPS, as a non-8(a) firm, is not an interested party under our protest procedures to question the qualifications of a particular 8(a)-eligible firm. See Kleen-Rite Janitorial Service, Inc., B-178752, March 21, 1974, 74-1 CPD ¶ 139. In any event, as we pointed out in Gallegos Research Group, B-209992, April 11, 1983, 83-1 CPD ¶ 376, the SBA's apparent policy is to match contract awards to an eligible 8(a) firm on the basis of the firm's business plan² and not merely the company's principal business activity. Furthermore, both the Army and the SBA have concurred that the proposed subcontract awardee is fully capable of performing the requisite services at Kwajalein, and there is evidence in the record relating to the firm's prior experience in

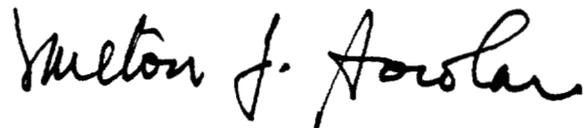
²Once a firm is determined to be eligible for the 8(a) program, the SBA and the firm develop a business plan which contains specific business targets, objectives, and goals for the purpose of eliminating impairments to the firm's ability to compete in the marketplace. 15 U.S.C. § 636(j)(10); 13 C.F.R. § 124.3-1(a)(1) (1984).

B-214568.2

developing model law enforcement programs, which would reasonably justify such a determination. The SBA and the contracting agency have broad discretion in selecting 8(a) subcontractors, and a protesting firm's mere disagreement with their assessment of that subcontractor's capabilities is not grounds to disturb the selection. Id.

WPS also alleges that an improper conflict of interest exists in the fact the proposed 8(a) awardee employs a former high-ranking officer of the Ballistic Missile Defense Systems Command. Apart from the fact, as the Army relates, that this individual served as Chief of Staff for the U.S. Army Missile Command, a separate activity from the Ballistic Missile Defense Systems Command, it is not contrary to statute or regulations for a former government employee to accept employment with a contractor to perform services under a contract with the government, when such services are to begin after the employee terminates his government service. Sterling Medical Associates, B-213650, Jan. 9, 1984, 84-1 CPD ¶ 60. Here, the officer is retired, and the contract work does not begin until October 1, 1984. We see no conflict of interest present in this matter.

WPS asserts that the SBA violated its own established procedures by not conducting an impact study to show the economic effect on WPS before selecting the 8(a) subcontractor. Contrary to WPS' assertion, however, SBA Standard Operating Procedure No. 80-05 only requires that an impact study be conducted when small business concerns will be affected by an 8(a) set-aside, and the record shows that WPS is no longer small.

for 
Comptroller General
of the United States