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DECISION

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

FILE: B-215472 DATE: August 2, 1984

MATTER OF: M&M Fuel Co.

DIGEST:

1. GAO will review a protested decision to effect a procurement under the 8(a) program where the protester alleges that Small Business Administration regulations were violated.

2. GAO does not object to the Small Business Administration's (SBA) decision to waive, on a temporary basis, the requirement that nonmanufacturing 8(a) oil suppliers furnish small business products, since the SBA has wide discretion in implementing the 8(a) program, and the SBA reasonably has found that the temporary waiver is necessary to further the program's socio-economic policy of fostering the economic self-sufficiency of 8(a) businesses.

3. It is within an agency's discretion under the Administrative Procedure Act to issue a temporary emergency rule without notice and public participation when the agency finds for "good cause" that immediate adoption of the rule is necessary and incorporates that finding and the reasons behind it in the rule itself.

M&M Fuel Co. protests the proposed award of 8(a) subcontracts by the Small Business Administration (SBA) to twelve socially and economically disadvantaged small business fuel suppliers under solicitation Nos. DLA600-84-R-0124 through DLA600-84-R-0135, inclusive, issued by the Defense Fuel Supply Center (DFSC). The

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subcontracts are to supply a total of 144,736,699 gallons of motor gasoline and heating fuel to various federal military and civilian activities in DFSC Region III under the agency's Post, Camps and Stations Program.[1/] M&M complains that the intended subcontracts will violate the SBA's own regulations governing such 8(a) awards because the twelve firms in question will be supplying fuel that has been obtained from refineries that are not small business concerns. Additionally, M&M asserts that the SBA will have acted improperly in issuing a temporary emergency rule amending these regulations. We summarily deny the protest.

Section 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. We do not review decisions to effect procurements under the 8(a) program, and we do not consider protests of 8(a) awards, absent a showing of possible fraud or bad faith on the part of government officials or an allegation that regulations were violated. Ameriko Maintenance Co., Inc., B-212795, Sept. 29, 1983, 83-2 CPD ¶ 392. Since M&M has alleged that the SBA has violated its own regulations, we will consider the matter.

Background

The SBA's regulations at 13 C.F.R. § 121.5(b)(2) (formerly 13 C.F.R. § 121.3-8(c) (1984)), see 49 Fed. Reg. 5040, Feb. 9, 1984, provide that any concern which submits a bid or offer in its own name, other than on a construction or service contract, and which proposes to furnish a product it does not itself manufacture, will be deemed a small business in the case of a government procurement set aside for small businesses only when the

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[1/] DFSC Region III is comprised of the states of Delaware, Indiana, Kentucky, Maryland, Ohio, Tennessee, Virginia, West Virginia, and the District of Columbia.

concern furnishes the product of a small business manufacturer or producer, which product must be manufactured or produced in the United States; this is commonly known as the "nonmanufacturer" rule. In this regard, both the United States District Court for the District of Columbia and this Office have recognized that the Small Business Act limits participation in the 8(a) program to firms that qualify as small business concerns, see Cal Western Packaging Corp. v. Collins, Civil Action No. 80-2548, D.D.C. April 30, 1982; Computer Data Systems, Inc., B-205521, June 16, 1982, 82-1 CPD ¶ 593, affirmed, 61 Comp. Gen. 545 (1982), 82-2 CPD ¶ 75, with the Cal Western decision squarely standing for the further proposition that an 8(a) concern therefore is not eligible for a subcontract award under the 8(a) program if it violates the "nonmanufacturer" rule by furnishing a product that has been obtained from a manufacturer or producer that is not a small business.

In addition to the limitations imposed by the "nonmanufacturer" rule, the SBA has recently added § 121.4(g)(2) to its regulations at 13 C.F.R. part 121, see 49 Fed. Reg. 5029, 5039, Feb. 9, 1984, to provide that once a firm has been admitted to the 8(a) program, the concern must certify to the SBA, which will verify the certification, that it is a small business for the purpose of performing each individual contract it is awarded. (Section 121.4(g)(2) is hereinafter referred to as the "certification" rule.)

Protest and Analysis

According to M&M, the SBA will violate the "nonmanufacturer" rule by awarding the 8(a) subcontracts because there are no refineries in DFSC Region III (and, apparently, very few nationwide) that are small business concerns, and the 8(a) firms therefore will have to obtain the fuels that are to be furnished to the government from refineries that are large businesses. As a result, these 8(a) firms cannot certify themselves as small under the "certification" rule for purposes of performing the intended subcontracts. M&M states that the lack of small business refineries in Region III is a situation that both DFSC and the SBA have known for a period of time, as evidenced by the fact that there have been no small business set-asides in Region III for this type of procurement even though, M&M asserts, at least 80 percent of the fuel suppliers receiving contracts from DFSC are small business concerns under the SBA's applicable size standards. M&M thus believes that this procurement should be conducted on an unrestricted basis.

M&M further contends that any interim rule that the SBA might issue to deal with the effect of the "non-manufacturer" and "certification" rules upon the subject procurement would be substantively improper as being merely a circumvention of those rules for the sole purpose of making illegal 8(a) subcontract awards, and would be procedurally improper because it would be issued without proper notice and public hearing.

During the pendency of this protest, the SBA has in fact published a temporary emergency rule, see 49 Fed. Reg. 27925, July 9, 1984, which, for a limited time, amends the "nonmanufacturer" rule at § 121.5(b)(2). The temporary rule adds a subparagraph (v) to § 121.5(b)(2) to provide that for the period June 29 through December 31, 1984, in the case of government procurements for motor gasoline and heating fuels in the DFSC Post, Camps and Stations Program reserved for small businesses, a small business concern need not furnish fuels produced by a small business refinery, provided that the end product is refined in the United States.

We do not agree with M&M that this temporary emergency rule is necessarily improper, although it is apparent that it was issued in direct response to the situation affecting this particular procurement. The SBA is given wide discretion under section 8(a) of the Small Business Act to further a socio-economic policy of fostering the economic self-sufficiency of certain small businesses, see Arawak Consulting Corporation, 59 Comp. Gen. 522 (1980), 80-1 CPD ¶ 404, and we believe that that policy was fundamentally pursued here. As the SBA states in the temporary emergency rule itself:

> "This is being issued . . . because of the emergency relief necessary to alleviate the immediate, unintentional dislocations and hardship caused by application of the nonmanufacturer rule to 8(a) awards from the Defense Fuel Supply Center for such products.
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> "Because few 'small' oil refineries exist in the United States . . . application of [the] certification rule in conjunction with the 'nonmanufacturer rule' . . . will have the unintended effect of causing a virtual

termination of SBA's ability to award 8(a) contracts to existing 8(a) firms providing certain refined petroleum products to the government."

Therefore, we think it was reasonable for the SBA essentially to waive the "nonmanufacturer" and "certification" rules for a limited period of time in this instance in order to effectuate the 8(a) program in DFSC Region III, since it is undisputed that the twelve 8(a) firms cannot conform to those rules simply because there are no small business refineries from which they can obtain their fuel supplies. The goal of the 8(a) program, as already indicated, is the enhancement of the economic viability of socially and economically disadvantaged small business concerns through the performance of subcontracts in what is essentially a sheltered market, see Ray Baillie Trash Hauling, Inc. v. Kleppe, 477 F.2d 696 (5th Cir. 1973); cert. denied 415 U.S. 914 (1974); Expand Associates, Inc., B-213425, March 6, 1984, 84-1 CPD ¶ 272, and we have no legal basis to question the SBA's view that its actions here are needed to serve that goal.

M&M also contends that the SBA's temporary emergency rule is procedurally flawed because it was issued without notice or public hearing. M&M points to the SBA's own regulation governing rule-making at 13 C.F.R. § 101.9 (1984), which incorporates by reference the public participation provisions of the Administrative Procedure Act, 5 U.S.C. § 553 (1982). The regulation provides that notice or hearing is not required when it is determined in accordance with 5 U.S.C. § 553 that public participation procedures would be impracticable, unnecessary, or contrary to the public interest, and further provides that a finding to this effect is to be published with the rule in question. Section 101.9 cautions that such exceptions "are not to be favored and will be used sparingly, as for example, in emergencies. . . ." M&M contends that the situation at issue here is not an emergency and thus does not constitute such an exception to the general mandate for public participation.

We cannot conclude, however, that the SBA Administrator acted unreasonably in issuing the temporary emergency rule for immediate application without notice or public hearing. In accordance with 5 U.S.C. § 553, as incorporated in § 101.9, the Administrator set forth in the rule his finding, and the reasons behind it, that for "good cause" public participation was not required since the circumstances demanded immediacy, as follows:

1. application of the "nonmanufacturer" rule would create significant hardships for a significant number of 8(a) firms that have had reasonable expectations of receiving the subcontract awards and have thus incurred significant anticipatory costs;

2. application of the "nonmanufacturer" rule, by prohibiting the awards, would cause a severe disruption to DFSC's current fuels procurement cycle, and would not allow DFSC sufficient time to obtain a satisfactory alternative method of procurement; and

3. the adverse effects of joint application of the "nonmanufacturer" rule and the "certification" rule were not brought to the attention of SBA 8(a) program officials until April 1984, after the "certification" rule had been published.

We find nothing arbitrary or unreasonable in these stated bases for the Administrator's "good cause" finding that public participation procedures were not required in issuing the temporary emergency rule.

Finally, we note that the SBA states in the temporary emergency rule that it considers this to be a "one-time exception" to the "nonmanufacturer" rule and will not issue any further exceptions after the temporary rule's December 31, 1984 expiration.

Accordingly, we have no legal basis to object to the award of the twelve 8(a) subcontracts. The protest is summarily denied.

for Milton J. Socolar
Comptroller General
of the United States