DECISION

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

FILE: B-218602 **DATE:** June 17, 1985

MATTER OF: Prospect Associates, Ltd.

DIGEST:

Protest that Small Business Administration (SBA), in approving the restriction of a procurement to section 8(a) firms, acted fraudulently or in bad faith because such approval is contrary to SBA's Standard Operating Procedures is dismissed because protester has not met its burden of showing the possibility that SBA had a specific and malicious intent to injure protester. Request that GAO infer bad faith from SBA conduct is not sufficient to satisfy burden.

Prospect Associates, Ltd. (Prospect), a small business, protests the restriction to section 8(a) firms of request for proposals (RFP) No. 263-85-P(87)-0076 issued by the National Institutes of Health (NIH), for conference management and related publication services.

The protest is dismissed.

Prospect states that it is presently performing virtually all of the requirements covered by the RFP, and that 98 percent of Prospect's NIH contracts and 96 percent of its total sales would be in direct jeopardy as a result of this procurement. Prospect states that under SBA Standard Operating Procedures (SOP), 8005 para. 63e (Sept. 4, 1979), SBA may not consider a section 8(a) procurement if SBA determines that a small business concern may suffer a major hardship if the procurement is removed from competition, thereby denying the concern, otherwise historically dependent on such recurring procurement, the opportunity to compete. Prospect has requested our consideration of this matter because it believes SBA failed to make the required determination.

Alternatively, Prospect contends that if SBA has made the determination, any finding that the hardship to Prospect does not support the cancellation of the section 8(a) restriction necessarily implies bad faith on the part of SBA officials. Prospect alleges the irreparable hardship which it would suffer would not ordinarily happen in the absence of gross negligence or bad faith on the part of SBA and NIH officials.

The record indicates that Prospect has filed an appeal with the SBA requesting that SBA either make or reconsider the required determination of whether a small business concern will be harmed by the section 8(a) procurement.

Section 8(a) of the Small Business Act, 15 U.S.C. § 637(a) (1982), authorizes the SBA to enter into contracts with government agencies and to arrange for the performance of such contracts by letting subcontracts to socially and economically disadvantaged small business concerns. Under the act, a contracting officer has broad discretion to let the contract to SBA upon such terms and conditions as may be agreed to by the agency and the SBA. Moreover, since SBA's SOP merely provide internal SBA policies and guidelines that complement the SBA regulations implementing the 8(a) program at 13 C.F.R. part 124 (1984), we will not review the SBA's compliance with those internal procedures absent a showing of possible fraud or bad faith. Janke and Company, Inc., B-216152, Aug. 30, 1984, 84-2 CPD ¶ 242; aff'd, 84-2 CPD ¶ 522, infra.

A protester alleging bad faith by government officials bears a very heavy burden of proof. To establish bad faith, the courts and our Office require virtually irrefutable proof that either NIH or SBA officials had a specific and malicious intent to injure Prospect. Prospect asks that we infer bad faith from the SBA's actions. Inference and supposition is not sufficient to meet this burden. Janke and Company Incorporated--Request for Reconsideration, B-216152.2, Nov. 13, 1984, 84-2 CPD ¶ 522.

The protest is dismissed.

Ronald Berger

Ronald Berger
Deputy Associate
General Counsel