



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Ernie Green Industries, Inc.

File: B-224347

Date: August 11, 1986

DIGEST

Protest of agency's withdrawal of procurement from the Small Business Act's section 8(a) program is denied where the protester does not present evidence that demonstrates a specific and malicious intent by government officials to injure the firm.

DECISION

Ernie Green Industries, Inc. (EGI) protests the Department of the Navy's withdrawal of request for proposals (RFP) No. N00123-85-R-1171 for ammunition containers from the Small Business Administration (SBA) section 8(a) program. 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 procurement authority and to subcontract for performance with socially and economically disadvantaged small business concerns. EGI alleges that the SBA and the Navy acted in bad faith and violated procurement regulations.

We deny the protest.

The Navy issued RFP 1171 to the SBA under the 8(a) program in August 1985, and the SBA then furnished the RFP to EGI. EGI responded to the RFP and, while the Navy, the SBA and EGI held price negotiations, the Navy conducted a preaward survey of the firm. During this survey, the Navy found that EGI appeared to be ineligible to receive a section 8(a) award because EGI intended to subcontract the work to another firm in violation of SBA Standard Operating Procedure (SOP) 80-05. This SOP requires a manufacturing firm awarded a section 8(a) contract to perform 50 percent of the dollar value of the contract with its own labor force. The Navy informed SBA of this finding and requested SBA's opinion concerning whether the solicitation should be withdrawn from the 8(a) program. While awaiting the SBA's response, the Navy continued price negotiations with EGI.

In April 1986, the requirement for the ammunition containers became urgent and the Navy requested the SBA to expeditiously resolve whether EGI was eligible to receive the section 8(a) award. The SBA conducted its own survey and, by letter of May 2, informed the Navy that EGI was

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not eligible for the award and agreed that the Navy should withdraw the requirement from the section 8(a) program. On May 14, the Navy received a second letter from the SBA stating that in response to a request from EGI the agency was going to meet with the firm on May 9 to review its determination on EGI's eligibility for the award. The SBA requested that the Navy delay withdrawing the solicitation from the section 8(a) program, and stated that the SBA would inform the Navy of the outcome of the May 9 meeting. The Navy reports that by this time the procurement already had been withdrawn from the 8(a) program and that, in any event, it never heard from the SBA concerning the May 9 meeting.

EGI protests that the Navy and the SBA acted in bad faith and violated procurement regulations. EGI's charge as it applies to the SBA is based on the firm's belief that the SBA did not adhere to its own procedures. Specifically, EGI asserts that in applying SOP 80-05, the SBA requires an 8(a) contractor to perform 50 percent of the total dollar value of the contract exclusive of material costs with its own labor force. EGI complains that in finding EGI noncomplaint the SBA did not exclude material costs from the value of the contract. EGI contends that the Navy engaged in bad faith because it unilaterally withdrew the procurement from the section 8(a) program.

A contracting officer has broad discretion in deciding whether to let contracts under section 8(a) of the Small Business Act, and this discretion extends to situations in which the contracting agency decides to withdraw a procurement from the section 8(a) program. Kenko, Inc., B-215553, July 2, 1984, 84-2 C.P.D. ¶ 11. Consequently, we will object to an agency's actions under the section 8(a) program only where the protester proves that agency officials violated regulations or engaged in bad faith or fraud. To establish bad faith, the protester must present irrefutable proof that the officials involved had a specific and malicious intent to harm the firm. Inter Systems, Inc., B-220056.2, Jan. 23, 1986, 86-1 C.P.D. ¶ 77. EGI has not met this burden of proof.

Concerning the SBA's actions, we have held that the agency's SOPs merely provide internal SBA policies and guidelines that complement the SBA regulations implementing the section 8(a) program. Prospect Associates, Ltd., B-218602, June 17, 1985, 85-1 C.P.D. ¶ 693. Thus, even assuming the SBA did not apply SOP 80-05 properly, this in itself does not constitute bad faith. Marine Industries Northwest, Inc., et al., B-208270, et al., Feb. 16, 1983, 83-1 C.P.D. ¶ 159. Further, we note that despite its own survey finding that EGI intended to subcontract performance of the contract and, therefore, was ineligible to receive the award, the SBA agreed to meet with EGI and review the matter; EGI, however, chose not to attend the meeting. (This is the May 9 meeting about which the SBA told the Navy.) We do not think these facts demonstrate that the SBA acted in bad faith and we do not find any other evidence in the record that suggests the SBA's decision that EGI was ineligible for the award was motivated by a conscious desire to harm EGI. This protest basis therefore is without merit.

EGI asserts that the Navy engaged in bad faith by unilaterally withdrawing the procurement from the 8(a) program. We disagree with this position. Although the Navy did believe EGI was ineligible for award after it conducted a preaward survey, the agency left the final decision of EGI's eligibility to be determined by SBA. While awaiting the SBA's decision, the Navy continued to hold price negotiations with EGI, and it withdrew the procurement from the program only after it received the SBA's approval to do so. We find no bad faith in these circumstances.

The protest is denied.

for Seymour Gross
Harry R. Van Cleave
General Counsel