The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Sam Gonzales, Inc.--Reconsideration

File: B-225542.2

Date: March 18, 1987

DIGEST

Agency decision not to award a contract under the section 8(a) program because of concerns regarding the capacity of intended subcontractor, a debtor under Chapter 11 of the bankruptcy laws, to perform the contract does not violate 11 U.S.C. § 525, prohibiting discriminatory action against such debtors, since the decision was not based solely on the subcontractor's bankrupt status and simply reflected a legitimate exercise of the agency's broad discretion to determine whether to award a section 8(a) contract.

DECISION

Sam Gonzales, Inc. requests reconsideration of our dismissal of its protest against the Agricultural Research Service's withdrawal of project No. 6A01-86 for renovation of a log lodge at the Agricultural Research Center in Beltsville, Maryland from the Small Business Administration's (SBA) section 8(a) program. We grant the request for reconsideration and deny the protest.

Gonzales, who had filed for protection under Chapter 11 of the federal bankruptcy laws, argued in its original protest that the agency's decision to withdraw the project from the section 8(a) program violated 11 U.S.C. § 525 (Supp. III 1985), which protects those who have filed under the bankruptcy laws against discriminatory treatment. We dismissed the protest because we do not review an agency's decision to withdraw a procurement from the 8(a) program, absent a showing of possible fraud or bad faith on the part of government officials or that regulations have been violated, because such a decision is by statute within the discretion of the agency to make. Bid Protest Regulations, 4 C.F.R. § 21.3(f)(4) (1986); Ernie Green Industries, Inc., B-224347, Aug. 11, 1986, 86-2 CPD ¶ 178.

The protester asserts essentially the same protest grounds but now argues that regulations were violated and that government officials acted in bad faith. The protester offers no evidence in support of its allegation of bad faith and does not even identify which regulations were allegedly violated. Some reasonable showing of bad faith or that a particular regulation has been violated is necessary before we will consider a protest based on such allegations. See M.G. Technology Corp., B-222438, May 29, 1986, 86-1 CPD ¶ 503. No such showing has been made here.

Gonzales also argues that we should reconsider our dismissal of its protest because the matter involves the violation of a federal statute, 11 U.S.C. § 525. In considering bid protests, we are to decide if there has been a violation of statute or regulation. 31 U.S.C. § 3554 (Supp. III 1985); 4 C.F.R. § 21.6(a) (1986). Although protests usually involve alleged violations of procurement statutes or regulations, in some circumstances we will consider the requirements of other statutes and regulations when they directly bear upon federal agency procurements. See Solano Garbage Co., B-225397, et al., Feb. 5, 1987, 87-1 CPD ¶ ___; Monterey City Disposal Service, Inc., 64 Comp. Gen. 813 (1985), 85-2 CPD ¶ 261. In Solano and Monterey, we were called upon to decide whether a federal environmental statute required federal agencies to award sole-source contracts to local government franchisees pursuant to 10 U.S.C. § 2304(c)(5) (Supp. III 1985), a provision of the governing procurement statute authorizing non-competitive awards when a statute requires award to a specified source. Here, there is no statutory procurement provision directly involved in the protester's complaint--the protester would simply have us determine whether an otherwise discretionary agency action violates a provision of the Bankruptcy Act.

While it would seem that such a matter is more appropriate for consideration by the specialized bankruptcy courts provided for by 28 U.S.C. §§ 151-158 (Supp. III 1985), it appears here that the bankruptcy court believes we should consider the matter. A partial transcript of proceedings before the Bankruptcy Court for the Eastern District of Virginia indicates that the bankruptcy judge, while concerned about the possibility of a violation of 11 U.S.C. § 525, declined to issue a temporary restraining order and instead stated that the matter should be referred for further administrative review. The government's response to the protester's request for judicial relief, furnished to us with the reconsideration request, represented to the court that

this Office was the "appropriate reviewing authority for this type of pre-contractual protest." Thus, it is now evident that the court is interested in our review of the protester's complaint.[1/] We therefore will consider the protester's complaint[2/] insofar as it relates to the alleged violation of 11 U.S.C. § 525.

Section 525 prohibits "a governmental unit" from denying or refusing to renew a license, permit or similar grant to a debtor or otherwise discriminating "with respect to employment" "solely because such . . . debtor is or has been a debtor" under the bankruptcy laws. This provision has been held to encompass the award of a procurement contract by a federal agency. See In Re Coleman American Moving Services, Inc. v. Tullos, 8 B.R. 379 (Bankr. D. Kan. 1980). Thus, what we must decide is whether the Department of Agriculture violated section 525 by withdrawing the project from the section 8(a) program and presumably thereby depriving the protester of an award it would have received under that program.

Section 8(a) of the Small Business Act, 15 U.S.C. § 637(a) (1982 and Supp. III 1985), authorizes the SBA to enter into procurement contracts with other federal agencies and to subcontract for the performance of these contracts with socially and economically disadvantaged small business concerns. It is clear from the Small Business Act, however, that whether any particular contract should be awarded under section 8(a), at least insofar as we are concerned here, is solely within the discretion of the procurement officers of the government. Arcata Associates, Inc., B-195449, Sept. 27, 1979, 79-2 CPD ¶ 228. Accordingly, absent a showing of fraud or bad faith or a failure to comply with regulations, we have always viewed contracting agency decisions to award or not to award a contract through the section 8(a) program as legally unobjectionable and therefore not subject to review under

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1/ Our Bid Protest Regulations provide for our consideration of a matter pending before a court of competent jurisdiction when the court requests a decision from us. 4 C.F.R. § 21.9 (1986).

2/ We do so here without seeking a report from the Department of Agriculture since we believe the issue raised can be decided summarily on the basis of the documents already of record. See 4 C.F.R. § 21.3(f).

the bid protest function. This includes decisions to award section 8(a) contracts, see Technical Services Corp., B-185473, May 6, 1976, 76-1 CPD ¶ 304; to not award contracts through the section 8(a) program, see Automated Data Mgt. Inc.--Reconsideration, B-218912.2, June 10, 1985, 85-1 CPD ¶ 663; to cancel an unrestricted competitive solicitation in order to award a section 8(a) contract, see Exquisito Services, Inc., B-222200.3, July 17, 1986, 65 Comp. Gen. ___, 86-2 CPD ¶ 78; and to withdraw a procurement from the section 8(a) program, see Ernie Green Industries, Inc., B-224347, supra; Economy Security Systems--Reconsideration, B-222241.2, June 20, 1986, 86-1 CPD ¶ 576. What is clear from these and many other cases is that no firm has a right to have the government satisfy a specific procurement need through the section 8(a) program or award a contract through the program to that firm.

It is this very broad discretion vested in the procurement agencies by the Small Business Act that leads us to the conclusion that the agency's actions in this case are not violative of section 525. The record contains a letter from the contracting officer which states that the decision not to award a section 8(a) contract reflected the agency's business judgment that Gonzales might not be able to perform the job because Gonzales would be performing "two other larger projects" and the agency had received no reasonable assurances that Gonzales could perform the projects simultaneously. The letter further states that there simply wasn't sufficient time before the end of the fiscal year to evaluate the capacity of Gonzales to meet the requirements of all three projects. As a result, the letter states, the project was withdrawn from the section 8(a) program and no award was made during the fiscal year. (The project was advertised on an unrestricted basis in fiscal year 1987.)

We and the courts have long recognized that the ability of a prospective contractor to perform a particular contract is a matter of business judgment for the agency, in the exercise of its discretion, to make. See, e.g., Keco Industries, Inc. v. United States, 492 F.2d 1200 (Ct. Cl. 1974); Scanwell Laboratories, Inc. v. Shaffer, 424 F.2d 859 (D.C. Cir. 1970); Riocar, B-180361, May 23, 1974, 74-1 CPD ¶ 282; Decker & Co., et al., B-220807 et al., Jan. 28, 1986, 86-1 CPD ¶ 100. Here, the agency appears to have had a legitimate reason to be concerned about the protester's ability to perform the contract in question, a reason that went beyond the fact that the protester was seeking relief under the bankruptcy statutes and was based on the company's overall capacity.

Although it is not entirely clear why the agency believed there was insufficient time to determine the ability of Gonzales to perform this contract in light of the company's other projects[3/] (the decision to withdraw the project from the section 8(a) program was made on August 1, 1986) before the end of the fiscal year on September 30, in light of the agency's broad discretion not to proceed with a section 8(a) award, we do not think that the fact that the SBA and the agency might have been able to make that determination prior to September 30 renders the decision to withdraw the project because of concerns about Gonzales' capability improper or illegal.

In short, we think it is clear from the record that the agency did only what it was entitled to do under the law and regulations governing federal procurement, and did not act as it did solely because Gonzales sought Chapter 11 protection. In this regard, it is important to note that 11 U.S.C. § 525 is intended to protect debtors from discriminatory treatment; it does not grant them rights greater than they would enjoy outside of bankruptcy. Duffey v. Dollison, 734 F.2d 265 (6th Cir. 1984); In Re Professional Sales Corp., 56 B.R. 753 (N.D. Ill. 1985). Outside of bankruptcy Gonzales would have absolutely no right to insist on a section 8(a) contract award. We fail to see how the circumstances here would warrant a different result.

The protest is denied.

Harry R. Van Cleve
General Counsel

[3/] Since Gonzales is a small business and a section 8(a) award was under consideration, it is the SBA that would have had to determine the capability of Gonzales to perform the contract. However, in light of the broad discretion agencies have under section 8(a), the Department of Agriculture could have withdrawn the project from the section 8(a) program even if SBA decided that Gonzales could perform. Cf. Atlantic Petroleum Corp., B-215472.2, Apr. 12, 1985, 85-1 CPD ¶ 417.