



The Comptroller General
of the United States

Washington, D.C. 20548

Morrow

Decision

Matter of: Kinross Manufacturing Corporation
File: B-234465
Date: June 15, 1989

DIGEST

Allegation that procuring agency acted in bad faith by withdrawing M781 practice cartridge requirement from the section 8(a) set-aside program is denied where the procuring agency did so because the protester, the current section 8(a) supplier of the requirement, had been given several negative responsibility determinations and was delinquent on an existing contract with the agency and the Small Business Administration was unable to recommend another 8(a) subcontractor.

DECISION

Kinross Manufacturing Corporation protests the United States Army Armament, Munitions and Chemical Command's (AMCCOM's) actions in withdrawing the M781 practice cartridge from the program authorized by section 8(a) of the Small Business Act, 15 U.S.C. § 637(a) (Supp. IV 1986), and conducting a competitive procurement. Section 8(a) of the Small Business Act authorizes the Small Business Administration (SBA) to enter into contracts with government agencies and to arrange for the performance of those contracts by socially and economically disadvantaged small business concerns. Kinross alleges that AMCCOM violated regulations and, motivated by racial prejudice and personal dislike, acted in bad faith.

We deny the protest.

The Army historically has procured the M781 practice cartridge under a combined 8(a) and partial small business set-aside; Kinross has been the SBA's 8(a) subcontractor since June 1987. However, by letter dated November 3, 1988, the AMCCOM Chief of the Small Business Office advised the

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SBA that the contracting officer recommended release of the M781 practice cartridge requirement from section 8(a) contracting unless the SBA could provide a subcontractor other than Kinross. The letter stated that during the previous fiscal year, Kinross had received five negative preaward surveys on AMCCOM solicitations based on deficient production, plant safety, and the inability to obtain credit, and in every instance the SBA declined to issue a certificate of competency (COC). Also, Kinross was delinquent in performing an AMCCOM contract for MK124 signal kits. Moreover, in September 1987, the SBA had determined Kinross to be nonresponsible in regard to two other 8(a) contracts. The letter advised SBA that if no written reply was received by November 21, the contracting officer would determine the method of procurement. The SBA did not file a written response by this date, but verbally informed AMCCOM that it acquiesced in releasing the cartridge from section 8(a) subcontracting. Therefore, AMCCOM issued a solicitation on February 10, 1989, as a small business set-aside. AMCCOM advises that the closing date was on March 27 and Kinross was determined to be the low offeror. However, before the commencement of the preaward survey, Kinross withdrew its offer in view of its allegations in this protest.

The SBA reports that it did not officially respond to the Army's letter because the SBA was familiar with the responsibility of Kinross, including the denial of several COC applications, and was unable to find another section 8(a) subcontractor to recommend for award of AMCCOM's requirement. The SBA also advises that on January 27, 1989, Kinross was issued an "Order to Show Cause" why it should not be terminated from the program based on matters not related to AMCCOM's request, which the SBA advises resulted in a preliminary decision to terminate Kinross from the section 8(a) program on April 20, 1989.

A contracting officer has broad discretion in deciding whether to let contracts under section 8(a) of the Small Business Act; this discretion extends to decisions to withdraw a procurement from the section 8(a) program. Ernie Green Industries, Inc., B-224347, Aug. 11, 1986, 86-2 CPD ¶ 178. Consequently, we will object to an agency's actions under the section 8(a) program only where it is shown that agency officials violated regulations or engaged in bad faith or fraud. To establish bad faith, the protester must present convincing evidence that the officials involved had a specific and malicious intent to harm the firm. Id.

Kinross argues that the November 3 letter to SBA from the Chief of the Small Business Office and the SBA's subsequent verbal decision to acquiesce in release of the practice cartridge from section 8(a) subcontracting violated the Federal Acquisition Regulation (FAR) and the SBA Standard Operating Procedures. Kinross states that the regulations name the Small and Disadvantaged Business Utilization Specialist (SADBUS) as the agency official authorized to interface with the SBA concerning the section 8(a) program but that the SADBUS was not involved here. Also, Kinross argues that the regulations require each agency to make every effort to award a section 8(a) contract, which AMCCOM did not do, and place the function of selecting section 8(a) subcontractors with the SBA; thus, Kinross asserts that AMCCOM had no authority to recommend that it not be considered as a section 8(a) supplier. See Department of Defense Federal Acquisition Regulation Supplement (DFARS) §§ 219.201 and 219.801 (1988 ed.); FAR §§ 19.802, 19.803 and 19.804.

We do not find that AMCCOM has violated any regulations in this case. DFARS § 19.401(b) states that the SADBUS shall be the focal point for interface with the SBA. While the November 3 letter was signed by the Chief of the Small Business Office, that individual is the SADBUS supervisor; moreover, the person listed in the letter as the point of contact for the SBA is a SADBUS who was familiar with the recommendation. Second, AMCCOM did not abandon the 8(a) program or itself select an 8(a) supplier; it only recommended that the SBA provide a supplier other than Kinross. Given the contracting officer's broad discretion in determining whether to award a section 8(a) contract, we think that official clearly could seek a contractor other than Kinross. Finally, even if we were to conclude that the SBA's verbal approval of releasing the M781 practice cartridge from the section 8(a) program violated SBA procedures, the procedures only represent internal SBA policies and guidelines rather than regulations having the force and effect of law. The violation of such internal procedures does not provide a legal basis for sustaining a protest. See Inter-Con Security Systems, Inc., B-227008, July 24, 1987, 87-2 CPD ¶ 81.

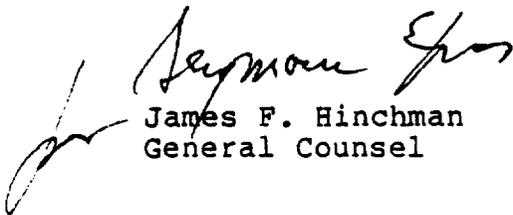
Kinross argues that AMCCOM's recommendation was made in bad faith because the responsibility information on which it was based was not the most current available and involved its performance on a contract unrelated to the M781 practice cartridge. However, it was proper for AMCCOM to consider Kinross' past responsibility record and current performance on an unrelated contract. FAR § 19.804(a)(3) provides that in determining whether to commit a procurement to the

section 8(a) program, the procuring agency should consider problems encountered in previous acquisitions of the items or work from the SBA's contractor and/or other contractors. Moreover, while Kinross argues that more current information would show that its performance had improved, the information on which AMCCOM based its November 3 letter appears to have been current as of that time.

We think the record establishes that AMCCOM's November 3 letter was based on Kinross' performance and responsibility record, not on racial or personal bias. Although Kinross contends that it is ahead of schedule on its current M781 contract with AMCCOM and that the delinquent performance on the MK41 contract resulted from a deficient technical data package, AMCCOM reports that Kinross has requested several waivers under its current contract for the cartridges and that AMCCOM has received malfunction reports regarding Kinross' practice cartridges. Moreover, AMCCOM states that Kinross has been delinquent in performing the MK41 contract even though a new first article date was established which took into account its technical difficulties. Further, AMCCOM reports that Kinross currently is under criminal investigation by the Army for alleged improprieties under other contracts and that the previously accepted cartridges are being suspended from use pending the outcome of the investigation.

Accordingly, we find that AMCCOM's experience with Kinross's unsatisfactory performance provided a reasonable basis for AMCCOM's determination to withdraw the requirement from the 8(a) program, rather than continue with Kinross as its 8(a) supplier and such determination was not motivated by bad faith.

The protest is denied.



James F. Hinchman
General Counsel