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Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Digital Equipment Corporation

File: B-245910

Date: January 13, 1992

James A. Dobkin, Esq., and Karen I. Meyer, Esq., Arnold & Porter, and Jeffrey H. Schneider, Esq., for the protester.
John W. Klein, Esq., Small Business Administration, and Jonathan H. Kosarin, Esq., and Benjamin M. Plotkin, Esq., Department of the Navy, for the agencies.
Anne B. Perry, Esq., and Paul Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Since agency may properly award contract under section 8(a) of the Small Business Act, 15 U.S.C. § 637(a) (1991), for a base year and four options to a firm scheduled to graduate from the 8(a) program shortly after award, such an award does not constitute an act of bad faith.

2. Protester which is a large business is not an interested party to challenge Small Business Administration's actions in a procurement that has been set aside for small disadvantaged business concerns under section 8(a) of the Small Business Act.

DECISION

Digital Equipment Corporation (DEC) protests the Department of the Navy's exercise of an option under Optimum Services & Systems, Inc. (OSS) contract No. N60921-91-C-0053. DEC argues that the Navy's option exercise constitutes a new procurement essentially because DEC believes that the Small Business Administration's (SBA) initial award to OSS under section 8(a) of the Small Business Act, 15 U.S.C. § 637(a) (1991), was made in bad faith because the firm was not an eligible section 8(a) participant.

We dismiss the protest.

In 1989, the Navy set aside the procurement at issue for automatic data processing data (ADPE) maintenance and repair for a section 8(a) firm, and began negotiations with OSS.

During negotiations, the Navy believed that OSS was not qualified to perform the required tasks, and requested the SBA to rescind the 8(a) set-aside on July 5, 1990. On July 13, the SBA granted the request and the set-aside was rescinded. On July 16, the Navy synopsized the procurement in the Commerce Business Daily as an unrestricted procurement. On July 20, OSS filed a protest with the General Services Administration Board of Contract Appeals (GSBCA) challenging the withdrawal of the set-aside. Prior to resolution of that protest, on September 17, the SBA, Navy and OSS submitted a settlement agreement to the GSBCA, and on September 20, GSBCA dismissed the protest.

Under the settlement agreement, OSS agreed not to compete for the procurement currently underway; SBA and the Navy agreed to enter into a contract with OSS for a base year for a nominal amount of work, with two options for the same quantity of work originally procured. The agreement further provided that the Navy would have an unrestricted right to evaluate OSS' performance during the base year on all its comparable government contracts, and that if OSS performed poorly, then the Navy would have no obligation to exercise the options, and OSS would not challenge this action.

On October 12, the Navy awarded a contract under the unrestricted procurement to DEC for a base period with 1 option year for the ADPE services. On October 19, the SBA entered into the contract with OSS pursuant to the settlement agreement. On October 21, OSS graduated from the 8(a) program. On September 2, 1991, because OSS had fulfilled all terms and conditions of the settlement agreement and had performed adequately during the past year, the Navy decided to exercise its option with OSS and not to exercise its option under DEC's contract. DEC protests this determination.

Section 8(a) of the Small Business Act, 15 U.S.C. § 637(a) (1991), 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. Because of the broad discretion afforded to SBA and the contracting agencies under the applicable statute and regulations, our review of actions under the section 8(a) program generally is limited to determining whether government officials have violated regulations or engaged in fraud or bad faith. See 4 C.F.R. § 21.3(m)(4) (1991); Lecher Contr. Co.--Request for Recon., B-237964.2, Jan. 29, 1990, 90-1 CPD ¶ 127. To show bad faith, the protester must present undeniable proof that the procuring agency had a malicious and specific intent to injure the protester. Ernie Green Indus., Inc., B-224347, Aug. 11, 1986, 86-2 CPD ¶ 178.

DEC alleges that SBA's action in contracting with OSS for a base period and two options just 2 days prior to OSS' scheduled graduation from the section 8(a) program demonstrates bad faith. We do not agree that these actions constitute bad faith, nor do we find that any applicable regulations were violated. The determination of program eligibility is vested with the SBA, 15 U.S.C. § 636(j)(10)(H), and the SBA informs us that it has consistently held that in order to be awarded a contract under the section 8(a) program, a firm must be an eligible, active participant on the date of award. We see no reason to find this determination improper or unreasonable. Since there is no dispute that OSS was eligible on October 19 to receive a section 8(a) contract, the SBA's actions were not improper.[1]

Since the original award to OSS was properly made under section 8(a) of the Small Business Act, DEC, a large business, is not an interested party to challenge the Navy's or the SBA's actions with respect to the exercise of OSS' option, or to challenge whether the option exercise was in the government's best interest. See ARO Corp., B-231438, July 22, 1988, 88-2 CPD ¶ 74.

The protest is dismissed.

Robert M. Strong
Associate General Counsel

[1]Under the applicable regulations, it is not improper to award a contract with options to a firm which will graduate prior to the exercise of the options, nor is it improper to later exercise the options with an ineligible 8(a) firm, provided the options are priced. See 13 C.F.R. §§ 124.208(d) and 124.318(b) (1991).