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Susan Serling

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**DECISION**

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

**FILE:** B-187359

**DATE:** October 26, 1977

**MATTER OF:** Associated General Contractors of Massachusetts,  
Inc. and Construction Industries of Massachusetts,  
Inc.; Perini Corporation and King Erectors, Inc.,  
**DIGEST:** A Joint Venture

GAO will not consider complaints filed against contract award action by grantee pursuant to Urban Mass Transportation Administration grant where matter is before court of competent jurisdiction and court has not expressed particular interest in GAO's views.

In April 1977, the Massachusetts Bay Transportation Authority (MBTA) issued an invitation for bids for MBTA Contract No. SW-101(R) for general transit construction of the South Cove Tunnel in Boston. The construction is being conducted pursuant to an 80 percent grant awarded by the Urban Mass Transit Administration (UMTA), United States Department of Transportation, under the Urban Mass Transportation Act, 49 U.S.C. § 1601-1611 (1970 Supp. 7). The contract for the project contains a special "Minority Contractor Participation Provision" (special provision) setting forth a 30 percent goal for subcontracting to minority-owned businesses.

On May 31, 1977, Associated General Contractors of Massachusetts, Inc. and Construction Industries of Massachusetts, Inc. (AGC/CIM) reinstated an earlier complaint filed in this Office regarding the affirmative action requirements for minority contractor participation contained in the MBTA contract. AGC/CIM asserts that the special provision is inconsistent with basic principles of Federal procurement law because a bidder cannot objectively determine whether he has complied with the provision and because the provision unduly restricts competition.

Bids were opened on June 14, 1977; the low bid was submitted by Perini Corporation and King Erectors, Inc., A Joint Venture (Perini-King). However, Perini-King's bid was rejected by the MBTA as nonresponsive and, on July 27, 1977, MBTA awarded the contract to Peter Kiewit Sons' Company, the second low bidder, subject to UMTA approval. UMTA granted its approval on July 28, 1977. On

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July 28, 1977, Perini-King filed a complaint in this Office against MBTA's action, alleging that its bid was rejected for unsound subjective reasons, that the special provision was applied unfairly, and that the award to Peter Kiewit Sons' Company was pre-determined.

AGC/CIM and Perini-King filed separate civil actions, C.A. Nos. 76-2992-M and 77-2340-F, respectively, in the United States District Court for the District of Massachusetts requesting that the court declare the special provision to be unconstitutional. Perini-King's action also requests that the court determine that the special provision is unreasonably restrictive of competition and that award of the contract to the second low bidder violated the standards of competitive bidding.

It has long been the policy of our Office not to decide matters where the material issues are before a court of competent jurisdiction unless the court expresses an interest in receiving our views. 52 Comp. Gen. 706 (1973); Cubic Western Data, Inc., B-189578, August 3, 1977, 77-2 CPD 78; Sovereign Construction Company, Ltd; City of Philadelphia, B-185874, March 8, 1977, 77-1 CPD 168. We believe the court action filed by Perini-King encompasses the material issues raised by the complaints. Moreover, although we have been advised by letter dated August 23, 1977, that the court has "no objection to this investigation /by our Office/ continuing while this case is active in \* \* \* court," we do not think this indicates any particular interest by the court in receiving our views.

Accordingly, we will take no further action on the matter.

  
Paul G. Dambling  
General Counsel