

DOCUMENT RESUME

08127 - [C3388475]

[Protest against Award of Contract to Small Business Administration]. B-193237. November 30, 1978. 7 pp.

Decision re: Maintenance, Inc.; by Robert F. Keller, Deputy Comptroller General.

Contact: Office of the General Counsel; Procurement Law I. Organization Concerned: Department of the Army; Small Business Administration.

Authority: Small Business Act (15 U.S.C. 637(a)). -13 C.F.R. 124. 54 Comp. Gen 913. 54 Comp. Gen. 916. Defense Procurement Circular 76-5. Defense Acquisition Circular 76-15. Defense Acquisition Regulation 2-407.8. Defense Acquisition Regulation 1-705.5. B-190051 (1978). B-192342 (1978). B-185473 (1976). B-189352 (1977). E-186066 (1976). B-185055 (1976).

The U.S. District Court having jurisdiction in the case requested GAO determination of the propriety of the award of a contract for janitorial services to the Small Business Administration (SBA). The protest, based on the contention that the procuring activity failed to consider the impact of such an award, was without merit where the record shows that the contracting officer made a written determination of this regard. The determination to proceed with the award of the contract while the protest was pending was not subject to question by GAO since the agency determined that the award must be made promptly and proper procedures were followed. (Author/SC)

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DECISION



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

FILE: B-193237

DATE: November 30, 1978

MATTER OF: Maintenance Incorporated

DIGEST:

1. Protest of award of contract to Small Business Administration (SBA) under section 8(a) of Small Business Act on basis that procuring activity failed to consider impact of such award, as required by regulation, is without merit where record shows that contracting officer made written determination in this regard. Protest is considered in view of court's interest in our opinion.

2. Determination to proceed with award of contract while protest is pending is not subject to question by GAO where agency determined award must be made promptly and determination was approved at level above contracting officer as required by DAR § 2-407.8(b)(2).

On October 18, 1978, Maintenance Incorporated (MI) protested the award by the Department of the Army (Army) of a contract for janitorial services at Redstone Arsenal, Alabama, to the Small Business Administration (SBA) under the section 8(a) provisions of the Small Business Act, 15 U.S.C. § 637(a) (1976). While the protest was pending, the Army decided to proceed with the award to SBA and so notified our Office pursuant to Defense Acquisition Regulation (DAR) § 2-407.8(b)(3) (1976 ed.). Contract No. DAAH03-79-C-0008 was awarded to SBA Region IV on October 27, 1978, and subcontract No. SB430-8(a) 79-C-026 was awarded to Falls Janitorial Services, Inc. on the same date.

On October 30, 1978, MI filed suit in the United States District Court for the Northern District of Alabama (Maintenance Incorporated v. Brown, Civil Action No. 78-G-1181-S), seeking to enjoin implementation and administration of the contract. A temporary restraining order to that

effect, issued on October 31, 1978, was set aside on November 9, 1978; the court declined to issue a preliminary injunction, but retained jurisdiction to consider the matter on the plaintiff's request for permanent relief. By letter dated November 13, 1978, the court has requested our determination on the matter.

Section 8(a) empowers SBA to enter into contracts with any Government agency having procurement powers and to arrange for the performance of such contracts by letting subcontracts. 15 U.S.C. §§ 637(a)(1) and (2) (1976). In selecting proposed procurements suitable for performance by section 8(a) firms, SBA is to consider several factors, including the extent to which other small concerns have historically been dependent upon the contract for a significant portion of their sales. 13 C.F.R. § 124.8-2(b) (1978 ed.).

Similarly, in evaluating SBA requests for commitments to support an SBA approved business plan, the procuring activity must consider the impact of so doing if the supplies or services in question have been procured historically by small business set-aside. DAR § 1-705.5(c)(1)(B)(vi), Defense Procurement Circular (DPC) No. 76-5, October 15, 1976. When SBA certifies that it is competent to perform a specific contract, the procuring activity's contracting officer is authorized, in his discretion, to award the contract to SBA. 15 U.S.C. § 637(a)(1) (1976); DAR § 1-705.5(a), Defense Acquisition Circular (DAC) No. 76-15, June 1, 1978.

MI essentially contends that the Army failed to consider the impact of committing the procurement to the 8(a) program, that failure to do so necessarily infers that the contracting officer failed to properly exercise his discretion in deciding to make award to SBA, and that the contract was, therefore, awarded to SBA in violation of law and regulation.

More specifically, counsel for MI asserts that the janitorial services requirement has been historically procured by small business set-aside and that placing the requirement under the 8(a) program will significantly affect the small business community. MI, a small business concern and the incumbent contractor, states that it has held Redstone Arsenal janitorial service contracts for 9 of the last 16 years, that the contract has comprised between 70 and 88 percent of the firm's total annual receipts, and that the Arsenal contract represents approximately 50 percent of the Federal janitorial work available in the Huntsville, Alabama, area.

Initially, we point out that our Office no longer reviews decisions to effect procurements under the 8(a) program, and will not review protests of 8(a) awards absent a showing of fraud or such willful disregard of the facts as to necessarily imply bad faith by Government officials. Maritime Maintenance & Labor Suppliers, Inc., B-189352, July 13, 1977, 77-2 CPD 22; Automation Information Data Systems, Inc., B-185055, June 15, 1976, 76-1 CPD 377; see Jets Services, Inc., B-186066, May 4, 1976, 76-1 CPD 300. The impact considerations to which the protester refers are factors to be considered in evaluating an SBA request for commitment of a requirement to an 8(a) program; they are prerequisite to and a portion of the decision to effect a procurement under the 8(a) program. Moreover, mere disagreement with an SBA/procuring activity decision to place a requirement under the 8(a) program or with the agencies' impact determinations leading to that decision does not suffice to show fraud or bad faith on the part of agency personnel. See Automation Information Data Systems, Inc., supra. However, in view of the court's interest in our decision and insofar as the protester contends that the Army has not complied with provisions of the Defense Acquisition Regulations, we will consider the protest.

The Army, however, asserts that the factors enumerated in DAR § 1-705.5(c)(1)(B) were considered prior to deciding to commit the requirement to the 8(a) program, as evidenced by the contracting officer's written determination of September 27, 1978, which provides as follows:

"1. Small Business Administration's (SBA) request for commitment of the Custodial Services, Redstone Arsenal, Alabama, for Section 8(a) award to SBA has been evaluated in accordance with ASPR 1-705.5(c)(1)(B) and consideration given thereto.

"2. Historically, the subject services have been procured through either the Small Business Set-Aside or Section 8(a) program. Therefore, based on past experience, no problems have been encountered, no slippages in services have occurred, and no adverse impact is anticipated if this procurement is reserved for award to SBA under the Section 8(a) program.

"3. I, therefore, determine to enter into a contract with SBA for Custodial Services for the period 01 November 1978 through 31 October 1979 with provision for two one-year option periods."

The Army further states that the janitorial services requirement was committed to the 8(a) program for 5 of the 7 years since the introduction of the 8(a) procedures in 1971, and that a commitment to the 8(a) program is not a small business set-aside within the meaning of DAR § 1-705.5(c)(1)(B)(vi). The procurement of services for fiscal year 1978

(awarded to the protester) was conducted as a small business set-aside because the incumbent 8(a) subcontractor had "graduated" from the 8(a) program. See 13 C.F.R. § 124.8-2(e) (1978 ed.). The contracting officer also knew that SBA had investigated MI's August 1978 claim that an 8(a) commitment would result in a loss of 47 percent of the firm's annual sales and found the actual impact to be 29 percent. Finally, the contracting officer considered the potential effect of the 8(a) commitment on the Arsenal's overall small business program. The Army additionally states that in considering the impact on the protester it was aware at the time of the September 27 determination that MI was in contention for the custodial contract for the National Aeronautics and Space Administration (NASA) Marshall Space Flight Center at Redstone Arsenal.

The protester argues that if the matters mentioned by the Army were actually considered before deciding to commit the requirement to the 8(a) program, they would have been stated in the contracting officer's September 27 determination. DAR § 1-705.5(c)(1)(B) does not, however, require that evaluations of SBA requests be reduced to writing with documented findings. Technical Services Corporation, B-185473, May 6, 1976, 76-1 CPD 304. Contrary to the protester's underlying assumptions, DAR § 1-705.5 does not, for the most part, impose regulatory requirements on the procuring activity. The regulation provides, primarily as a matter of information and guidance, the manner in which SBA and military agencies will initiate section 8(a) contract negotiations. Kings Point Manufacturing Company, Inc., 54 Comp. Gen. 913, 916 (1975), 75-1 CPD 264; Technical Services Corporation, *supra*. To the extent that DAR § 1-705.5(c)(1)(B) imposes a requirement for evaluation of SBA's request for a commitment, that requirement may be met by conducting a limited review in accordance with the standards set forth in the regulation to determine that the procuring activity's needs can be satisfied by means of a section 8(a) award. Kings Point Manufacturing

Company, Inc., supra. Paragraph 1 of the Army's written determination, quoted above, states that the evaluation was conducted in accordance with these standards.

MI complains that the Army's September 27 determination considers the impact on the Army rather than on the protester or the small business community. The factors mentioned in the second paragraph of the determination are matters prescribed for consideration by DAR § 1-705.5(c)(1)(B)(iv) and (v), which pertain to whether the Army's requirements are within the 8(a) subcontractor's capability. Technical Services Corporation, supra. Moreover, the fact that the 8(a) program may operate to the monetary detriment of a particular nonminority firm does not affect the validity of the program or of a specific 8(a) commitment. Data Controls/North, Inc., B-192342, July 21, 1978, 78-2 CPD 62. We do, however, agree with the protester that consideration of the NASA procurement was inapposite to the Army's evaluation of the SBA request; the evaluation was limited to facts extant at the time of the evaluation, and we are advised that MI did not submit its bid on the NASA procurement until October 6, 1978, or 9 days after the contracting officer's September 27 determination to commit the requirement to the 8(a) program was issued.

Nevertheless, we do not find that the Army failed to comply with the requirements of DAR § 1-705.5(c)(1)(B)(vi), in view of its consideration of the factors enumerated in the regulation as pointed out above. Consequently, we find it neither necessary nor appropriate to consider the protester's inquiry concerning the effect of an absolute failure to comply with the regulatory requirement.

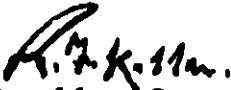
MI also takes exception to the Army's determination and findings pursuant to which the award was made to SBA prior to resolution of this protest. The decision to proceed with the award was approved

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at a level higher than the contracting officer, in accordance with DAR § 2-407.8(b)(3), on the bases that the services were urgently needed and that performance would be unduly delayed by failure to make award promptly. Where such actions have been undertaken, the determination to proceed with an award prior to protest resolution is not subject to question by our Office. LaBarge Incorporated, B-190051, January 5, 1978, 78-1 CPD 7.

The protest is denied.


Deputy Comptroller General
of the United States