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**DECISION**



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

10,797

FILE: B-194053

July 19, 1979

MATTER OF: Orincon Corporation

DL602180

DIGEST:

1. Question of whether firm is eligible for assistance under section 8(a) of Small Business Act is basically matter for determination by Small Business Administration and is not subject to legal review by GAO.
2. GAO review of Small Business Administration (SBA) action under 8(a) program is limited to determining whether SBA has followed its regulations. Where firm was determined eligible and accepted into 8(a) program based on social disadvantage alone and law and regulations were subsequently changed to require both social and economic disadvantage, recommendation is made to SBA to review firm's eligibility to determine if it should be allowed to continue to participate in 8(a) program or if participation should be terminated in accordance with present law and regulations.

Orincon Corporation (Orincon) protests the award of a subcontract by the Small Business Administration (SBA) to Scientific Systems, Inc. (Scientific), under request for proposals F33615-79-R-3014 issued by Wright-Patterson Air Force Base, Ohio. The solicitation, which calls for a study to develop optimization techniques applicable to flight performance analysis methods, was set aside by the Air Force for minority business enterprises pursuant to section 8(a) of the Small Business Act, 15 U.S.C. § 637(a)(1) (1976).

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Orincon contends that Scientific does not qualify as a section 8(a) minority business enterprise. In support of this contention, Orincon alleges that the principals of Scientific are not economically and socially deprived and that they are aliens, being citizens of India. In addition, Orincon claims that Scientific has become a self-sustaining, competitive entity and, therefore, does not need procurement assistance from the Government.

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ALLEGATION THAT Awardee ~~IS~~ IS Not MINORITY FIRM

Scientific asserts that it is entitled to treatment as a disadvantaged small business. Scientific argues that it is in fact socially disadvantaged because its president is Asian in origin. Also, Scientific alleges that it is quite small, having net liquid assets of less than \$60,000. Consequently, Scientific believes that its resources, capital, and credit opportunities are more limited than its competitors'. According to Scientific, the economic disadvantage of a small business should be evaluated on the basis of its position compared to its competitors and on the basis of its liquid net assets.

A sources-sought synopsis of the procurement was publicized in the July 12, 1978, issue of the Commerce Business Daily. All except one of the 24 firms that responded to the solicitation were considered qualified to perform the proposed contract. Scientific, one of the qualified firms, identified itself as a minority business enterprise. Therefore, the Air Force offered the contract to the SBA with Scientific listed as a technically qualified company indicating minority business status. The SBA agreed to accept the contract. The Air Force emphasizes, however, that it had no voice in determining whether Scientific was eligible to be a section 8(a) subcontractor.

The question of whether a firm is eligible for the 8(a) program is basically a matter for determination by the SBA and not this Office. Steamatic by M & S Tolcser, B-190799, December 22, 1977, 77-2 CPD 496. Furthermore, we have consistently stated that the question of how much aid a minority business needs to become self-sustaining is also a judgmental one for the SBA and not this Office. Jets Services, Inc., B-186066, May 4, 1976, 76-1 CPD 300, and decisions cited therein.

Our review of the SBA action under the 8(a) program is limited to determining whether the SBA has followed its regulations. Tidewater Protective Services, Inc., B-190957, January 13, 1978, 78-1 CPD 33. Because of the broad discretion afforded the SBA under the applicable statute, judgmental decisions under section 8(a), absent a showing of fraud or bad faith on the part of Government officials, will not be questioned. Id. Fraud or bad faith is not shown


by the mere allegation of a violation of standard operating procedures since they may be waived or revoked. Id.

Orincon contends that the law presently requires that the principals of a concern be both economically and socially deprived in order for that concern to qualify as a minority small business under section 8(a). However, we note that Orincon also protested Scientific's section 8(a) status to the Air Force contracting officer. Because the SBA designates which eligible minority business is to perform its 8(a) contracts, the Air Force forwarded the protest to the SBA for resolution. By letter dated January 19, 1979, the SBA verified Scientific's eligibility and reaffirmed its intent to perform the contract entered into with the Air Force. In verifying Scientific's eligibility, the SBA specifically stated that the question of economic disadvantage was a "moot point" since the owner was found to be socially disadvantaged under the SBA's then existing eligibility criteria as set forth in the applicable standard operating procedure. The SBA verification letter further stated that persons were determined to be eligible who were either socially or economically disadvantaged.

The determination of whether Scientific's owner is socially disadvantaged is not reviewable by us. See Wallace and Wallace Fuel Oil Company, Inc., B-182625, July 18, 1975, 75-2 CPD 48. As to Orincon's contention that both economic and social disadvantage is required for 8(a) eligibility, the SBA regulations at the time Scientific was determined eligible and accepted with the 8(a) program (March 6, 1978) provided instead that the concern must be owned and controlled by one or more persons who have been deprived of the opportunity to develop and maintain a competitive position in the economy because of social or economic disadvantage. See 13 C.F.R. § 124.8-1(c) (1978). Therefore, we find no indication that the SBA failed to follow its regulations in determining Scientific's eligibility as an 8(a) concern.

We note that under P.L. 95-507, enacted October 24, 1978, 92 Stat. 1757, the standard for 8(a) eligibility was changed to require both economic and social disadvantage. See sec. 201(e)(2)(A). However, a firm previously granted 8(a) eligibility cannot be denied participation in the program for not meeting current eligibility requirements without first being afforded a hearing on the record in accordance with chapter 5 of title 5 of the United States Code. See sec. 202(a) of P.L. 95-507 and implementing regulations, 44 Fed. Reg. 30672, May 29, 1979, sec. 124. 1-1(e)(1)(i), (ii) and (2). In the absence of Scientific's eligibility being terminated by SBA in accordance with the law and implementing regulations, Scientific is eligible to participate in the 8(a) program. We understand that no contract has been entered into between the Air Force and the SBA. Therefore, by letter of today to the SBA, we are recommending that it review Scientific's eligibility based on social disadvantage alone to determine if it should be allowed to continue to participate in the 8(a) program in view of present law and regulations or if its participation should be terminated in accordance with the law and regulations.

Accordingly, the protest is denied in part and dismissed in part.

  
Deputy Comptroller General  
of the United States