DECISION

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

60035

FILE: B-183613 DATE: October 9, 1975

MATTER OF: Eastern Tunneling Corporation 97841

DIGEST:

1. Protest against award of contract to Small Business Administration (SBA) under section 8(a) of Small Business Act on basis that contract of such magnitude should have been open for competition is denied, since there is no legal limitation on dollar amount of contract that can be awarded to SBA under 8(a) program.

2. Where 8(a) contract price was based on cost estimates prepared by agency's technical personnel, fact that protester, a non 8(a) contractor, submitted an unsolicited price proposal after award of 8(a) subcontract which was $1 million lower than 2.9 million price negotiated under 8(a) contract, does not establish that contract price was unreasonable.

3. Proposed contractor's eligibility for award under 8(a) program will not be questioned where SBA advises that firm has been previously determined to be owned or controlled by disadvantaged individuals and has performed other 8(a) construction contracts, and record includes divestiture agreement which evidences that minority individuals owned 68 percent of capital stock at time SBA awarded 8(a) contract.

4. Where SBA certifies to procuring activity that its proposed 8(a) contractor is competent to perform specific contract and activity concurs in such determination, GAO will not review affirmative determination of contractor's responsibility.

Eastern Tunneling Corporation (Eastern) has protested the award of a contract by the District of Columbia Redevelopment Land Agency (RLA) to the Small Business Administration (SBA) under section 8(a) of the Small Business Act (Act), 15 USC 637(a) (1970), and the award of a subcontract by SBA to the Jones and Artis Construction Company, Inc. (Jones and Artis). The protest

arises out of DC-RLA contract No. 2022 for the construction of a storm sewer on South Dakota Avenue, NE, near the Fort Lincoln site in the District of Columbia.

Eastern contends that the subject award to Jones and Artis was improperly set-aside under the SBA's 8(a) program on the basis that other known tunneling firms should have been afforded the opportunity to compete for the award. Furthermore, Eastern contends that RLA is paying an excessive price for the project (the protester proposed to construct the sewer line for a million dollars less than the awarded contract price). In addition, the protester questions Jones and Artis' status as an eligible minority firm and also, asserts that it does not have the requisite experience or personnel to perform the contract or sufficient liability insurance (bodily injury coverage) for its employees.

The record indicates that upon completion and receipt of the plans, specifications, and preliminary cost estimate for the project, the Director, Office of Social and Economic Programs of RLA, contacted the SBA regarding the availability of a 8(a) contractor for the construction of the required sewer line. On September 12, 1974, SBA recommended Jones and Artis for the contract. It appears that shortly after receipt of SBA's recommendation, RLA determined that Jones and Artis had the financial capacity and technical capability to perform the work and that award would be made to the firm under the SBA 8(a) program upon negotiation of an acceptable price. On October 30, 1974, Jones and Artis submitted an initial price proposal of $2,913,940. However, after a negotiation session with representatives of RLA and SBA, the firm revised its price to $2,895,910, which RLA considered reasonable and within the cost estimate prepared for the project. The prime contract was awarded to SBA by RLA on December 20, 1974. On January 20, 1975, the SBA, pursuant to section 8(a)(2) of the Act, entered into a contract for the sewer line with Jones and Artis. The contract was formally executed on January 28, 1975, and a Notice to Proceed was issued effective March 3, 1975. This protest was then filed with RLA upon public announcement of the intention to start work on the project. Thereafter, the protest was filed with this Office.

Section 8(a) of the Act empowers the SBA to enter into contracts with any Government agency having procurement powers, and the contracting officer of such agency is authorized "in his discretion" to let the contract to SBA "upon such terms and conditions" as may be agreed upon between SBA and the procuring agency. See 53 Comp. Gen. 143(1973). Under regulations issued pursuant to the above statutory authority, the SBA has determined that firms which are owned or controlled by economically or socially disadvantaged persons should be the beneficiaries of the 8(a) program. Section 124.8-1(b) of title 13 of the Code of Federal

Regulations (CFR). It is clear, therefore, that the determination to initiate a set-aside under section 8(a) and to dispense with competition is a matter within the sound discretion of the SBA and the contracting agency. Alpine Aircraft Charters, Inc., B-179669, March 13, 1974, 74-1 CPD 135; B-174911, April 6, 1972; see also Ray Baillie Trash Hauling, Inc. v. Kleppe, 477 F.2d 696, (5th Cir. 1973). Moreover, the Federal Procurement Regulations (FPR) used by RLA to govern this procurement require the procuring agency to inform SBA of the construction work projects which it "deems to be suitable for subcontracting by SBA under the section 8(a) program" (FPR 1-1.713-4(c)(1964 ed.)) and that upon certification by SBA that it is competent to perform the specific contract, "the contracting officer is authorized, in his discretion, to award the contract to SBA * * *" so as to implement the policy of the Government to increase the participation of small business concerns in Government procurements. (FPR 1-1.713-(1)(2)(1964 ed.)) Neither the statute, the FPR or SBA regulations set a maximum or minimum dollar amount on any contract that can be awarded under the 8(a) program. From our examination of the record, it appears that RLA's decision to set aside the procurement was a reasonable exercise of administrative discretion and we find no basis to object to RLA's determination to award the subject contract under the SBA's 8(a) program.

Eastern also challenges the award because of the allegedly excessive contract price paid to Jones and Artis. The determination of whether a price is reasonable or whether such price is in excess of the amount for which the Government should be able to obtain the items or services sought is the responsibility of the contracting agency and will not be disturbed unless it is arbitrary or made in bad faith. Norris Industries, B-182921, July 11, 1975, 75-2 CPD 31; Southern Space, Inc., B-179962, March 29, 1974, 74-1 CPD 155. Moreover, SBA, in the administration of the 8(a) program, has determined that while contracts will be awarded at prices which are fair and reasonable both to the Government and the 8(a) contractor (13 CFR 124.8-2(d)), prices may include an amount over and above competitive market prices if such an amount is needed to permit the 8(a) contractor to perform profitably. See Kings Point Manufacturing Company, 54 Comp. Gen. 913 (1975), 75-1 CPD 264. This additional amount is referred to as a business development expense. SBA determines how much, if any, business development expense is necessary to allow a proposed subcontractor to perform at a profitable level. Thus, it is clearly recognized that higher procurement costs may be incurred in order to attain the goal of the 8(a) program "to assist small business concerns * * * to achieve a competitive position in the market place."

In the instant case the contract price was based on estimates prepared by the D.C. Department of Environmental Services (DES) in early 1973, when the project design was prepared. DES estimated a total price of approximately $2 million at that time. Subsequently, in July 1974, DES updated its estimate by adding a factor of 30 percent to the earlier estimate to reflect almost 2 years of inflation. DES's revised estimate was $2,569,317.50. In November 1974, RLA further adjusted the DES estimate upward by 16 percent to reflect 10 months of inflation (from November 1974, to the projected midpoint of the 12 month contract, assuming a starting date in February 1975. As noted, work was started in March 1975). The final RLA estimate of $2.9 million was approved by engineers in the area office of the Department of Housing and Urban Development and by SBA. In this connection, RLA notes that estimates of tunneling work are difficult to evaluate. Based on the record and notwithstanding the protester's price proposal submitted after the contract was awarded to perform the work for a million dollars less than the price negotiated with Jones and Artis, we do not find that the RLA/SBA determination of contract price reasonableness was arbitrary.

The remaining aspects of the protest involve the qualifications of Jones and Artis and its liability insurance. Eastern questions whether Jones and Artis is in fact an eligible 8(a) contractor and contends that the firm does not have the necessary qualifications and responsibility to perform a construction contract of the magnitude of the instant project. Both SBA and RLA advise that Jones and Artis has been previously determined to be owned and controlled by disadvantaged individuals within the criteria set forth in 13 CFR 124.8-1(c) and has, in fact, performed other construction contracts under the 8(a) program. In support of the above, the record included a divestiture agreement entered into by Corson and Gruman Construction Company (a large firm) and Jones and Artis, which evidences that at the time the instant 8(a) subcontract was awarded by SBA, Mr. Jones and Mr. Artis, both minority individuals, owned 68 percent of the capital stock of the company. See 13 CFR 124.8-1(c)(iv). Eastern has not presented any evidence to controvert the agency's position, other than its own unsupported suspicions, and accordingly, we have no reason to conclude that Jones and Artis is not eligible for award of the 8(a) subcontract.

Regarding Jones and Artis' qualifications and responsibility, it is SBA's as well as RLA's position that Jones and Artis is qualified to perform the contract. Essentially, Eastern is questioning the agency's affirmative determination of the contractor's responsibility. In this regard, while we will undertake to review a negative determination by an agency of a firm's

responsibility to perform a contract, our Office does not review affirmative determinations of responsibility, except for actions by procuring officials which are tantamount to fraud or where there is a question concerning whether an offeror meets definitive responsibility guidelines or requirements listed in the solicitation. Central Metal Products, Inc., 54 Comp. Gen. 66 (1974), 74-2 CPD 64; Datatest Corporation, 54 Comp. Gen. 499 (1974), 74-2 CPD 365. In the instant case, there is no basis for our Office to take issue with the determination that Jones and Artis was qualified for the 8(a) award.

Finally, while Eastern initially questioned the extent of Jones and Artis' bodily injury insurance coverage, it appears that from the absence of any further comment in the record regarding the matter, Eastern is satisfied with RLA's response that confirmed the sufficiency of the contractor's coverage.

Accordingly, the protest is denied.

Thomas D. Morris

Acting Comptroller General
of the United States