

DECISION



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

[Protest of IFB Cancellation]

10,486

FILE: B-194622

DATE: June 13, 1979

MATTER OF: A.R.&S. Enterprises, Inc.

CNG 01731

DIGEST:

- 1. Determination to set aside procurement under section 8(a) of Small Business Act is matter for contracting agency and SBA, and is not subject to review by GAO ~~in absence of~~ showing of fraud or bad faith on part of Government officials.
- 2. In protest involving "8(a)" procurement, fraud or bad faith is not shown merely by allegation that SBA is violating its Standard Operating Procedures, since they may be waived or revoked.
- 3. Contracting officer could reasonably conclude that it was in the public interest to cancel IFB prior to bid opening in order to correct administrative error which resulted in failure to place procurement under socio-economic program.

A.R.&S. Enterprises, Inc. (AR&S), protests the cancellation of invitation for bids (IFB) DABT31-79-B-0071 which was issued as a 100 percent small business set-aside by Fort Leonard Wood, Missouri, for hospital custodial services. The cancellation was undertaken by the Army at the request of the Small Business Administration (SBA) so that the requirement could be awarded to an "8(a)" business concern, Tombs Janitorial Services, Inc., under the provisions of the 8(a) program (15 U.S.C. § 637(a) (1976), as amended by Pub. L. No. 95-507, § 202, 92 Stat. 1761).

The Army reports that the services had previously been performed by Tombs under the 8(a) program, but were solicited competitively under the IFB after SBA advised that Tombs had graduated from the program in

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Fiscal Year 1978. Subsequent to issuance of the IFB, however, SBA requested the Army to cancel the set-aside and reserve the requirement for Tombs, who had been re-admitted to the program. SBA explained that its Kansas City Regional Office had inadvertently returned the requirement to Fort Leonard Wood. The Army acquiesced in SBA's request by canceling the solicitation and forwarding a new solicitation to the SBA Regional Office for award under the 8(a) program.

AR&S contends that the cancellation violated one of SBA's Standard Operating Procedures (SOP) for the "8(a)" program which provides that proposed procurements will not be accepted for 8(a) concerns when, inter alia, a public solicitation has already been issued under a small business set-aside for the procurement in question.


This identical issue was addressed in a prior protest by AR&S in which we stated that in view of the broad discretion accorded SBA under the cited statute to enter into contracts with procuring agencies for the purpose of letting subcontracts to 8(a) firms, we will not review protests against 8(a) set-asides unless the protester shows fraud on the part of the Government or such willful disregard of the facts by Government officials as to necessarily imply bad faith. See A.R.&S. Enterprises, Inc., B-189832, September 12, 1977, 77-2 CPD 186 and citations therein. Fraud or bad faith in the making of a set-aside is not shown by the allegation that SBA is violating its SOP, which may be waived or revoked. A.R.&S. Enterprises, Inc., supra; Tidewater Protective Services, Inc., B-190957, January 13, 1978, 78-1 CPD 33. Thus, even where SBA is required to properly waive its SOP, the manner in which that waiver is effected is for SBA, not GAO, to decide.

AR&S further argues that the cancellation contravenes Defense Acquisition Regulation (DAR) § 2-209 (1976 ed.) which acknowledges that cancellation of an invitation for bids usually involves the loss of time, effort and money by both the Government and bidders, and therefore provides that invitations should

not be canceled prior to bid opening unless clearly in the public interest. AR&S questions whether the public interest is served by the cancellation in this instance.

A somewhat similar situation existed in Hepper Oil Company, B-189196, November 16, 1977, 77-2 CPD 378, where a portion of an invitation for bids was canceled after bid opening when it was discovered that through administrative error items were included in the solicitation which should have been set aside for Indian firms under the "Buy Indian Act." Under these circumstances, we did not object to the cancellation of the solicitation. Here, it also appears that an administrative error led to the failure to reserve a procurement for award under a socio-economic program. We believe the contracting officer reasonably could conclude that the rectification of this error was in the "public interest."

Protest denied.


Acting Comptroller General
of the United States