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DECISION

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

FILE: B-195118 DATE: May 22, 1981

MATTER OF: Small Business Administration--Request for Advance Decision

DIGEST:

Walsh-Healey Public Contracts Act section 1(a), 41 U.S.C. § 35(a) (1976), which requires representations and stipulations in supply contracts of United States agencies exceeding $10,000 that contractor is manufacturer of or regular dealer in supplies used in performance of contract, applies to small disadvantaged business concerns awarded "subcontracts" by Small Business Administration (SBA) under SBA program pursuant to section 8(a) of Small Business Act, as amended, 15 U.S.C. § 637(a) (Supp. III, 1979).

The Small Business Administration (SBA) has requested an advance decision whether the Walsh-Healey Public Contracts Act section 1(a), 41 U.S.C. § 35(a) (1976), which limits Government contracting with firms which are brokers or are not regular dealers in the goods being procured, applies to the SBA program under section 8(a) of the Small Business Act, 15 U.S.C. § 637(a), as amended by Pub. L. No. 95-507, October 24, 1978, 92 Stat. 1757 (Supp. III, 1979).

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 negotiating or otherwise letting subcontracts to socially and economically disadvantaged small business concerns. 15 U.S.C. § 637(a)(1)(A) and (C) (Supp. III, 1979). SBA, in consultation and cooperation with other Government departments and agencies, selects proposed procurements suitable for performance by section 8(a) concerns.

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Section 1(a) of the Walsh-Healey Act essentially requires that all contracts by United States agencies for the manufacture or furnishing of supplies in any amount exceeding $10,000 include representations and stipulations that the contractor is the manufacturer of or regular dealer in the supplies used in performance of the contract and that the contractor will comply with established minimum wage, maximum hour, child labor, and convict labor standards and safe and sanitary working conditions. 41 U.S.C. § 35 (1976); DAR § 12-601 (1976 ed.); FPR § 1-12.601 (1964 ed. circ. 1). SBA contends that section 1(a) of the act by its terms applies only to prime contracts awarded by Government agencies and does not extend to subcontractors, citing United States v. Davison Fuel and Dock Company, 371 F.2d 705 (4th Cir. 1967), for the proposition that the act is expressly applicable only to primary contracts and does not purport to affect subcontractors. Id. at 710.

SBA asserts that the same principle should apply to the statute's "anti-brokering" provision. Section 1 of the act provides, in pertinent part, as follows:

> "In any contract made and entered into by any executive department, independent establishment, or other agency or instrumentality of the United States, or by the District of Columbia, or by any corporation all the stock of which is beneficially owned by the United States (all the foregoing being hereinafter designated as agencies of the United States), for the manufacture or furnishing of materials, supplies, articles, and equipment in any amount exceeding $10,000, there shall be included the following representations and stipulations:
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> > "(a) That the contractor is the manufacturer of or a regular dealer in the materials, supplies, articles, or equipment

> to be manufactured or used in the performance of the contract * * *" 41 U.S.C. § 35(a) (1976).

SBA argues that the contracts awarded to SBA by Federal contracting activities pursuant to section 8(a) of the Small Business Act, as amended, are prime contracts, that the "8(a)" concerns to which SBA subcontracts performance of the work on those contracts are subcontractors within the meaning of the Davison decision and that the "8(a)" firms are therefore not subject to the Walsh-Healey Act requirements that they be either manufacturers of or regular dealers in the supplies used in performance of the "8(a)" contracts. SBA therefore proposes to announce certain policies which would exempt "8(a)" subcontracts from section 1(a) of the Walsh-Healey Act.

We requested and received the Department of Labor's (DOL) comments concerning the applicability of the above-quoted Walsh-Healey Act provision to SBA "8(a)" contractors. DOL states that (contrary to SBA's interpretation) the court in the Davison case held that a contractor operating a Government plant was an agent of the Government and his contracts were entered into by the Government for purposes of the Walsh-Healey Act. DOL contends that "8(a)" firms are the type of subcontractors which the court envisioned as subject to all the requirements of the Walsh-Healey Act, including eligibility as manufacturers or regular dealers, in performing work that would normally be done by the prime contractor. In this regard, DOL emphasizes that SBA is a nonprofit Government entity which will not perform Government supply contracts with its own employees, need never demonstrate its own eligibility as a manufacturer or regular dealer, and will not be looked to as jointly and severally liable for any infractions of Walsh-Healey provisions by "8(a)" concerns in the performance of its contracts. DOL asserts that, in this respect, SBA is a conduit for what amounts to a contract between the procuring activity and the "8(a)" concern for the purposes of

the Walsh-Healey Act, notwithstanding the fact that the agreements are denominated "subcontracts" in the Small Business Act, 15 U.S.C. § 637(a)(1)(C) (Supp. III, 1979).

Finally, DOL states that it has always considered all requirements of the Walsh-Healey Act applicable to section "8(a)" program contractors, a position of which it believes SBA is aware, despite the fact that SBA has not requested DOL's opinion on the subject. DOL therefore suggests that because the Secretary of Labor has primary responsibility for administration and interpretation of the act, its views, unless clearly contrary to law, must prevail over those of SBA in accordance with our decision in Hewes Engineering Company, Incorporated, B-179501, February 28, 1974, 74-1 CPD 112. See Digital Equipment Corporation, B-194363, April 23, 1979, 79-1 CPD 283; Midwest Service and Supply Co., et al., B-191554, July 13, 1978, 78-2 CPD 34; B. B. Saxon Company, Inc., 57 Comp. Gen. 502 (1978), 78-1 CPD 410, aff'd, July 3, 1978, 78-2 CPD 3.

We agree with DOL that agreements with "8(a)" concerns to provide the supplies or equipment required on contracts set aside for the "8(a)" program are covered by the Walsh-Healey Act. The act is specific that it applies to "any contract made and entered into by any executive department." While the agreement between SBA and the "8(a)" contractor is denominated a subcontract because of its standing in the order of contracts, it is nonetheless a contract made and entered into by an executive department. The act has been construed to cover all regular and institutionalized Government methods of purchase which result in large-scale acquisitions of material and supplies without regard to the title given the agreement embodying the purchase arrangements or the accounting designation of the funds with which the goods are purchased. United States Biscuit Company of America v. Wirtz, 359 F.2d 206, 209-210 and Note 4 (D.C. Cir. 1965), cert. denied, 384 U.S. 971 (1965).

Assuming, arguendo, that the act applies only to Government prime contracts does not change our opinion

that the requirements of the act must be met by "8(a)" contractors. We find the Davison decision instructive in this regard. In that case, the Government sued on behalf of miners to recover the difference between their wages and the wages required in compliance with Walsh-Healey Act wage standards, 41 U.S.C. § 35(b) and (c) (1976). Davison unsuccessfully contended that its contracts with National Lead Company, which operated an Atomic Energy Commission (AEC) Feed Materials Production Center under contract with AEC, were contracts between private corporations and not subject to the Walsh-Healey provisions. The court found, however, that National Lead was acting as AEC's agent in buying from Davison supplies necessary to operate the AEC facility, and that, therefore, the contracts were "made and entered into" for the AEC and the purchases were Government purchases. United States v. Davison Fuel and Dock Company, id. at 708-709. In affirming the decision below, the court agreed with the Government:

> "* * * that Congress did not intend that Walsh-Healey provisions be circumvented by use of the prime contract as a means to insulate from the requirements of the Act the firms actually performing work that would normally be done by the prime contractor." Id. at 710.

Similarly, we have held that nothing in the 1978 amendments to the Small Business Act exempts SBA from the constraints of other special legislation prescribing a procurement selection procedure for architect and engineering services which is not inconsistent with the 8(a) program and concluded that such a determination recognized SBA's independent statutory authority to establish the "8(a)" program, while remaining consistent and harmonious with the basic policies established in the Brooks Bill, 40 U.S.C. § 541, et seq. (1976). Vector Engineering, Inc., 59 Comp. Gen. 20, 23-24 (1979), 79-2 CPD 247. In the absence of any intent to the contrary in the legislative history of the establishment

of the 8(a) program, we conclude that this rationale applies to SBA's responsibility under the Walsh-Healey Public Contracts Act.

Milton J. Socolar

Acting Comptroller General
of the United States