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DECISION



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

FILE: B-206362.2

DATE: March 15, 1982

MATTER OF: Anigroeg Services, Inc.

DIGEST:

Determination whether to set aside a procurement under Section 8(a) of the Small Business Act is a matter for consideration by the procuring agency and SBA, and will not be reviewed by GAO absent a showing of fraud or bad faith on the part of Government officials. Agency decision to withdraw 8(a) set aside after conducting price negotiations with potential 8(a) contractor does not suggest bad faith where agency has valid reason for withdrawal.

Anigroeg Services, Inc. protests the Defense Logistics Agency's (DLA) withdrawal of request for proposals (RFP) No. DLA700-81-R-2955, which was set aside for award under the Small Business Administration's (SBA) Section 8(a) program. This requirement for 43 roller vibratory compactors was subsequently resolicited as a total small business set-aside under invitation for bids (IFB) No. DLA700-82-B-1008. Anigroeg contends that DLA's decision to withdraw the 8(a) set-aside was made solely to avoid procuring from an 8(a) contractor. We dismiss the protest for the reasons set forth below.

Section 8(a) of the Small Business Act, 15 U.S.C. § 637(a) (Supp. III 1979), authorizes SBA to enter into contracts with any Government agency with procuring authority and to arrange for performance of such contracts by letting subcontracts to socially and economically disadvantaged small business concerns. The contracting officer is authorized "in his discretion" to let the contract to SBA upon such terms and conditions as may be agreed upon by the procuring agency and SBA. In light of this broad discretion, we do not review agency determinations whether or not to

set aside procurements under section 8(a) unless there is a showing of bad faith or fraud on the part of Government officials. See Maintenance, Inc., B-199584, August 27, 1980, 80-2 CPD 155.

Anigroeg, while asserting that DLA's actions were "arbitrary, capricious, and an abuse of administrative discretion," does not allege fraud or bad faith, and its submission does not otherwise suggest that DLA personnel were motivated by fraud or bad faith in deciding to withdraw the procurement from the 8(a) program. The submission shows only that 1) DLA originally offered the procurement to the SBA for an 8(a) award because it believed that the equipment had to be manufactured by a particular company and could be acquired only through a dealer; 2) DLA subsequently learned that the using activity would accept the product of another manufacturer and that the manufacturers would deal directly with the Government and not only through their dealers; and 3) DLA, in the meantime negotiating with SBA and with Anigroeg, believed Anigroeg's price to be too high.

Given the broad discretion agencies possess in connection with including procurements in the 8(a) program, we fail to see how there is any suggestion of possible fraud or bad faith in this situation. First, although the protester asserts that it eventually lowered its price to meet SBA's target fair market price, the documents submitted indicate (and DLA confirms) that DLA withdrew the procurement from the 8(a) program on December 30, 1981, some three weeks prior to the date Anigroeg states DLA was told by SBA that Anigroeg could meet the target price. Second, regardless of how the price negotiations ultimately were resolved, DLA had the discretion to retain the procurement in the 8(a) program or to withdraw it and seek a larger field of competition. See, e.g., Arcata Associates, Inc., B-195449, September 27, 1979, 79-2 CPD 228, where we recognized that an agency can withdraw an 8(a) set-aside where negotiations with the 8(a) firm are unsuccessful. To show that DLA abused its discretion and acted in bad faith, the protester would have to present "well-nigh irrefragable proof" that the agency

had a specific and malicious intent to injure Anigroeg. Kalvar Corporation, Inc. v. United States, 543 F. 2d 1295, 1301 (Ct. Cl. 1976). The most that is involved here is a DLA decision that it ought not to be setting this procurement aside for the 8(a) program; there is no allegation or evidence that DLA was motivated by a specific and malicious intent to harm Anigroeg. Accordingly, this matter is not for consideration by our Office. Rowe Contracting Service, Inc., B-204083, August 13, 1981, 81-2 CPD 138.

Moreover, it appears the protest would be untimely. While Anigroeg does not indicate the date it first learned of the December 30 withdrawal, its submission indicates it was aware of the issuance of the competitive resolicitation on January 22, 1982. Anigroeg thus knew or should have known the 8(a) set-aside had been withdrawn as of that date at the latest, and was required to protest to our Office within 10 working days thereafter. See 4 C.F.R. § 21.2(b)(2) (1981). It did not file its protest, however, until February 18.

The protest is dismissed.

Harry R. Van Cleve
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Acting General Counsel