

DECISION

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

Fitzmaurice
24795

FILE: B-209992

DATE: April 11, 1983

MATTER OF: Gallegos Research Group

DIGEST:

1. In view of the broad discretion afforded SBA and the contracting agency under the Small Business Act in the selection of 8(a) contractors, GAO has no basis to question the proposed selection of the protester's competitor where the record indicates that SBA has followed its own regulations in determining the competitor's 8(a) eligibility and there has been no showing of fraud or bad faith on the part of Government officials.
2. Since the proposed 8(a) contractor's eligibility under the 8(a) program is scheduled to expire shortly unless extended by SBA, GAO recommends that the solicitation be amended to provide that the option provisions will only be exercised if the contractor continues to be an eligible 8(a) firm.

Gallegos Research Group (GRG) protests the proposed selection of OAO Corporation (OAO) by the Small Business Administration (SBA) for the award of a contract under section 8(a) of the Small Business Act, 15 U.S.C. § 637(a) (Supp. III, 1979). GRG argues that SBA is applying the wrong Standard Industrial Classification (SIC) in determining OAO's 8(a) eligibility. According to GRG, if the correct SIC was used, OAO would not be eligible for the award.

We deny the protest.

OAO is the incumbent contractor at Peterson Air Force Base, Colorado, where it provides ADP software development and maintenance services. The current contract is due to expire in May 1983. The Air Force identified the requirement as suitable for the 8(a) program and offered it to SBA. In making this offer, the Air Force informed SBA that it would be in the best interests of the Air Force if the award went to OAO since this would mean that the agency

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would retain a knowledgeable work force as well as avoid any unproductive time due to a change in contractors. SBA accepted the offer and request for proposals No. F05604-82-R0043 was issued.

Several months before this procurement action began, OAO's status as a small business under the 8(a) program had been challenged, and the SBA Philadelphia Regional Office had determined that, for purposes of 8(a) eligibility, OAO's primary business activity was under SIC 7372 (computer services). The applicable size standard for SIC 7372 is \$4 million average annual receipts. Since OAO's average annual receipts exceed that standard, the regional office found that OAO was "other than small" for 8(a) eligibility purposes.

On appeal to the SBA Size Appeals Board, OAO argued that its primary business activity is under SIC 3761 (guided missiles and space vehicles), which has a 1,000-employee size standard. After examining the evidence OAO presented, the board agreed that OAO's primary business activity is in SIC 3761 and further held that, at the time of the regional office decision, OAO's employment was within the 1,000-employee size standard. The board therefore reversed the regional office decision and found OAO to be a small business for 8(a) eligibility purposes.

In a letter to our Office, SBA has informed us that OAO's present average annual employment is approximately 950 employees. Thus, OAO continues to be within the size standard for SIC 3761. However, SBA also notes that OAO's fixed program participation term--in other words, its 8(a) eligibility--is due to expire April 23, 1983. Although OAO has requested an extension, SBA states that no decision has been made on this request.

When other 8(a) firms learned that the Air Force intended to negotiate an 8(a) contract with OAO for ADP services, they questioned OAO's eligibility for such an award. The Air Force therefore requested that SBA confirm that OAO is a small business and that it is eligible to receive the ADP contract.

In response, SBA noted that under its primary business activity--SIC 3761--OAO is an eligible 8(a) firm. Moreover, SBA explained that it was SBA policy to match contract awards to an eligible 8(a) firm on the basis of the firm's business plan and not just on the basis of the primary area of business which had established the firm's 8(a) eligibility. SBA then went on to state that contract opportunities classified under SIC 7372 would be consistent with OAO's business plan.

According to GRG, it is not challenging OAO's eligibility as an 8(a) firm. Rather, the key point to its protest is that, even if OAO is an eligible 8(a) firm under SIC 3761, OAO should not be allowed to perform a contract for computer services since this type of work clearly falls under SIC 7372, which size standard would bar an award to OAO. In GRG's opinion, to allow OAO to perform ADP services under a SIC for guided missiles and space vehicles is contrary to the spirit of the 8(a) program and gives the impression that OAO is receiving preferential treatment.

Under section 8(a) of the Small Business Act, SBA is authorized to enter into contracts with any Government agency with procuring authority and to arrange the performance of such contracts by letting subcontracts to socially and economically disadvantaged small business concerns. 15 U.S.C. § 637(a); 13 C.F.R. part 124 (1982). The contracting officer is authorized "in his discretion" to let contracts to SBA upon such terms and conditions as may be agreed upon by the procuring agency and SBA. Therefore, since the selection of an 8(a) contractor is basically within the broad discretion of SBA and the contracting agency, our Office will not question such decisions unless fraud or bad faith on the part of Government officials can be shown or it is alleged that SBA has not followed its own regulations. International Business Services, Inc., B-209279, October 20, 1982, 82-2 CPD 354.

In addition, under 15 U.S.C. § 637(b)(6), SBA has exclusive authority to determine matters of small business size status for procurement purposes. If a business wishes to challenge the size status of another concern, it must do so in accordance with SBA regulations and not through a bid protest to our Office. Tombs & Sons, Inc., B-206810.3, July 20, 1982, 82-2 CPD 62; 13 C.F.R. § 121.3-5. As to eligibility for the 8(a) program, a firm need only meet the small business size standard that applies to its principal business activity. 13 C.F.R. § 124.1-1(c)(1); see also Microtech Industries, Inc.--Reconsideration, B-206501.2, July 30, 1982, 82-2 CPD 95. Once accepted into the program, the 8(a) concerns size status is governed by its principal business activity regardless of the size standard which would be applied for a competitive procurement. Microtech Industries, Inc.--Reconsideration, supra.

Here, OAO's size status was challenged, and the appeals process was then followed in accordance with SBA regulations. Out of this appeals process, the SBA Size Appeal Board concluded that the proper size standard to be applied to OAO was that of SIC 3761 (OAO's principal business activity), that OAO satisfies this standard, and that OAO is, therefore, a small business for 8(a) eligibility purposes.

Since it is clear from the foregoing that SBA followed its own regulations and since there is no showing of fraud or bad faith on the part of Government officials, our Office has no basis to question SBA's determination that OAO is an eligible 8(a) firm. International Business Services, Inc., supra.

Once a firm is determined to be eligible for the 8(a) program, SBA and the firm develop a business plan which contains specific business targets, objectives, and goals for the purpose of eliminating impairments to the firm's ability to compete in the marketplace. 15 U.S.C. § 636(j)(10) (Supp. IV, 1980); 13 C.F.R. § 124.3-1. As noted above, SBA has informed the Air Force that its policy is to match contract awards to an eligible 8(a) firm on the basis of the firm's business plan and not merely the principal business activity which established the firm's 8(a) eligibility. In light of this, SBA has concluded that a contract under SIC 7372 would be consistent with OAO's business plan.

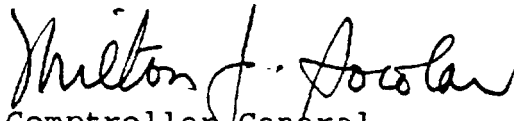
Obviously, GRG disagrees with this policy and would limit OAO's contract opportunities to those within its principal business activity. However, we have already noted that SBA and the contracting agency have broad discretion under the Small Business Act in selecting 8(a) contractors. GRG, on the other hand, has not shown that either SBA or the Air Force has acted illegally or improperly here, but only that it can be argued that SBA's policy decision in this area is wrong. We have held that mere disagreement with an agency's discretionary decision is not grounds to disturb it. James G. Biddle Company, B-196394, February 13, 1980, 80-1 CPD 129. Consequently, GRG has not presented us with any basis to question SBA's determination that OAO may receive a contract under SIC 7372.

GRG informs us that it recently filed a size protest with SBA based on the same arguments it has raised here. In view of SBA's authority in this area, GRG has chosen the proper forum for resolution of this matter.

Protest denied.

The proposed contract with OAO is for a base period ending September 30, 1983, with three 1-year options. SBA, however, has informed us that OAO's eligibility under the 8(a) program is scheduled to expire on April 23, 1983. Thus, as presently planned, OAO could be allowed to perform an 8(a) contract for more than 3 years after its 8(a) eligibility had ended. In our opinion, this would be contrary to the purposes of the 8(a) program.

We recommend that the solicitation be amended to provide that the option provisions will be exercised only if, at the time the options are scheduled to be exercised, OAO continues to be an eligible 8(a) firm. Thus, if OAO is awarded the contract prior to April 23, but then SBA refuses to extend its 8(a) eligibility, the Air Force would not exercise the option for the period October 1, 1983, through September 30, 1984, and a new procurement would be required. Likewise, if, at any other time during the life of the contract, OAO should cease to be an 8(a) firm, the next option period would not be exercised and the requirement would be reprocured. We believe that this change in the solicitation is in keeping with the purposes of the 8(a) program and will also protect the rights of other 8(a) firms, such as GRG, which are interested in obtaining the contract for the Air Force's ADP requirement.

for 
Comptroller General
of the United States