

DECISION



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

FILE: B-213501

DATE: December 15, 1983

MATTER OF: Koba Associates

DIGEST:

1. Absent showing of possible fraud or bad faith, GAO will not consider protest that procuring agency should have awarded renewal contract to protester under section 8(a) of the Small Business Act, because decision to award contract under section 8(a) is within the discretion of contracting officials.
2. In protest involving 8(a) procurement, possible fraud or bad faith is not shown by the fact that procuring agency conducted protracted negotiations with protester, with repeated emphasis on obtaining cost concessions, and then abandoned those negotiations in order to procure through other means.

Koba Associates protests the failure of the U.S. Agency for International Development (USAID) to agree to renew under the section 8(a) program its contract for furnishing technical assistance and training services to the Government of Indonesia under a Health Training Research and Development Project administered by USAID.

We dismiss the protest.

In September 1980, Koba was awarded cost-plus-fixed-fee contract No. AID-497-80-100.72 under the Small Business Administration (SBA) 8(a) program for the furnishing of technical assistance and health services to the Indonesia Ministry of Health. Koba contacted USAID approximately 4 months before this contract expired and there ensued a series of negotiations on renewing the contract. However, USAID broke off negotiations with Koba and funded the follow-on work through a host country agreement, under which Indonesia will procure these services directly.

Koba contends that USAID did not negotiate fairly or in good faith, complaining that USAID failed to give reasonable notice of negotiation dates; refused to accept

Koba's audited contract rates; reneged on oral agreements; and repeatedly forced Koba to accept unreasonable cost concessions. Then, Koba states, despite its acceptance of these cost concessions, USAID belatedly broke off negotiations and switched to the host country agreement, taking the work out of the 8(a) program. Koba argues that these and other problems encountered during contract negotiations show that USAID never really intended to enter into a contract renewal with Koba nor to continue to retain the contract in the 8(a) program after September 1983. In short, Koba suggests that USAID's decision not to award it a follow-on 8(a) contract resulted from a lack of good faith.

Section 8(a) of the Small Business Act, 15 U.S.C. § 637(a) (1982), authorizes the SBA to enter into contracts with any government agency with procuring authority and to then subcontract performance of the contracts to socially and economically disadvantaged small business firms. The statute also authorizes the procuring agency's contracting officer to award contracts to SBA "in his discretion." In light of this broad discretion given contracting officers, we do not review an agency decision to award or not award a contract under the 8(a) program unless there is a showing of possible fraud or bad faith on the part of government officials. Welbilt Electronic Die Corporation, B-210239, February 1, 1983, 83-1 CPD 114.

The protester bears a very heavy burden of proof when alleging bad faith on the part of government officials. Anigroeg Services, Inc., B-206362.2, March 15, 1982, 82-1 CPD 241. To show that the contracting officer and the other agency officials acted in bad faith, the protester would have to present irrefutable proof that these officials had a specific and malicious intent to injure the protester. Kalvar Corporation, Inc. v. United States, 543 F.2d 1295, 1301 (Ct. Cl. 1976). Prior procurement practices, inefficiency or negligence does not suffice to meet the high standard of proof required to show bad faith. Arlandria Construction Co., Inc.--Reconsideration, B-195044, B-195510, July 9, 1980, 80-2 CPD 21. Moreover, we will not find a discretionary action to be arbitrary, capricious or biased if the record indicates a reasonable basis for such determination. Decision Sciences Corporation, B-183773, September 21, 1976, 76-2 CPD 260. Thus, even if animosity by the contracting officer is assumed, it must be shown that it was translated into action for which there was no reasonable basis and which was prejudicial to the protester. Boone, Young & Associates, Inc., B-199540.3, November 16, 1982, 82-2 CPD 443.

We have carefully reviewed the protester's detailed account of the events that occurred during the 4 months of negotiations, and we do not agree that these events, either singly or in toto, show bad faith under the standard of review enunciated above. Rather, we believe that the protester has shown only that USAID and Koba engaged in difficult and protracted negotiations, with particular emphasis on obtaining cost reductions, which negotiations did not culminate in an award under the 8(a) program. The fact that USAID repeatedly explored various methods of reducing proposed contract costs, by eliminating a subcontract, by eliminating items from the scope of work, and by challenging Koba's direct and indirect costs, is to be expected in contract negotiations and does not show bad faith on USAID's part. Further, we see no reason to question USAID's refusal to pay the travel costs of Koba's chosen negotiator, and the protester cites no authority for that proposition. Given the noncompetitive nature of these negotiations and the substantial increase in Koba's proposed costs over those under its prior contract, we fail to see any impropriety in USAID's repeated efforts to obtain meaningful cost concessions.

As to the other aspects of negotiations, the mere fact the new statement of work was not prepared until shortly before negotiations commenced, or that it may have contained deficiencies, or that Koba was given short notice of negotiating sessions on certain occasions, does not, in our opinion, establish a prima facie case of bad faith negotiations. Moreover, in the give-and-take of contract negotiations, the contracting officer's assertive techniques, such as threatening to break off negotiations and procure the services through other means, are not improper or even unusual techniques and hardly demonstrate bad faith. And while we would agree that it is unusual for an agency to reach oral agreement on the terms of a contract and then seek better terms despite that oral agreement, if that is what happened here, the protester's own submission provides an adequate explanation for the contracting officer's action, i.e., that the Government of Indonesia overruled the contemplated contract terms due to excessive costs. See Decision Sciences Corporation, supra.

Accordingly, we find that the protester has not made the requisite showing of possible bad faith here to warrant

our detailed review of the matter. We note, however, that under 15 U.S.C. § 637(a), whenever the SBA and contracting officials do not agree on the terms and conditions of a potential 8(a) contract, the SBA is empowered to submit the matter to the head of the procuring agency for resolution. Thus, if SBA believes that USAID contracting officials did not act properly here, it may bring the matter to the attention of the USAID Administrator. In this regard, we have been informally advised by the protester that it has been in touch with SBA about the matter and is seeking resolution through SBA channels also.

The protest is dismissed.

Harry R. Van Cleve
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Acting General Counsel