

**DECISION**



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

**FILE:** B-220387 **DATE:** November 14, 1985  
**MATTER OF:** Harris Corporation, RF Communications  
Division  
**DIGEST:**

GAO will not review a contracting agency's decision to satisfy its requirement through a section 8(a) subcontract when a protester, arguing that the agency is acting in bad faith, fails to provide sufficient evidence indicating that agency may be acting in bad faith.

The Harris Corporation, RF Communications Group, protests the Federal Aviation Administration's decision to conduct a procurement under section 8(a) of the Small Business Act, 15 U.S.C. § 637(a) (1982). Harris alleges that in issuing request for technical proposals (RFTP) No. DTFA01-86-R-06409, the FAA is acting in bad faith and using the 8(a) program "to limit competition for major sub-contracted items valued in the millions of dollars."

We dismiss the protest.

The FAA issued the RFTP on September 24, 1985, to five 8(a) firms, advising them that this procurement is part of the FAA's efforts to fulfill the requirements of the National Radio Communications System--a voice and data high frequency radio system that, upon completion, will be installed at 45 sites around the world. The system will provide essential communications for the National Airspace System during emergencies when normal telecommunications may be interrupted. Among other things, the solicitation requires that the successful 8(a) firm supply such items as radio transceivers, voice encryptors, and adaptive processors.

According to Harris, the FAA's main purpose in limiting this procurement to 8(a) firms is to see that the radio equipment is purchased from the Collins Communications Systems Division of Rockwell International. In

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Harris' opinion, the specifications that the successful 8(a) firm must use to subcontract for the required equipment will restrict that firm to Collins-produced equipment. Although Harris admits that the specifications state that the equipment can be Collins "or equal,"<sup>1/</sup> it argues that the use of the term "or equal" is merely pro forma, because the specifications are written in such a way that only Collins can meet them. Harris further points out that it has approached a number of the 8(a) firms involved in the project about being their subcontractor for the equipment, but has found that none of them are prepared to consider any supplier other than Collins.

In further support of its allegation of bad faith, Harris argues that this is not the first time that the FAA has tried to restrict the procurement of these particular items to just Collins. According to Harris, the FAA issued a solicitation in July 1984 for identical radio equipment, and the specifications were written to favor Collins. Harris states that it requested the FAA either to delete certain Collins-produced items from the requirement or supply them as government-furnished-equipment because Collins refused to sell those items to any other offeror. In addition, Harris states that it was forced to ask the FAA to furnish technical details on seven major specification areas so that it could submit a compliant offer. Apparently as a result of these requests, the FAA decided to cancel the solicitation, but not without also promising to send Harris a copy of any solicitation that it might issue in the future for identical or similar equipment. However, Harris notes that it was in fact never resolicited or even advised of the FAA decision to use the 8(a) program to satisfy the requirement now being protested.

Under section 8(a) of the Small Business Act and implementing regulations, 13 C.F.R. § 124.1-1 (1985), the Small Business Administration (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. In the past, we have recognized that section 8(a) authorizes a contracting

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<sup>1/</sup> The specifications actually require equipment that is interoperable, compatible, and/or equal with existing Rockwell equipment.

approach that in general is not subject to the competitive and procedural requirements of the procurement regulations and the statutory provisions they implement. Advance, Inc., B-213002, Feb. 22, 1984, 84-1 CPD ¶ 218.

Recently, we held that the Competition in Contracting Act of 1984 (CICA), Pub. L. No. 98-369, 98 Stat. 1175 (1984), did not change the established rules in this area. See, for example, Cassidy Cleaning, Inc., B-218641, June 24, 1985, 85-1 CPD ¶ 717.2/ Therefore, as in the past, our Office will not review the award of 8(a) subcontracts absent a showing of possible fraud or bad faith on the part of government officials or that regulations may have been violated. 4 C.F.R. § 21.3(f)(4) (1985); Advance, Inc., supra.

Harris has alleged bad faith on the part of FAA contracting officials and specifically points to what it believes to be a pattern of favoring Collins over other possible suppliers. However, the protester bears a very heavy burden of proof when alleging bad faith by government officials. A finding of bad faith requires irrefutable proof that the contracting officer had a specific and malicious intent to injure the protester. Prior procurement practices, inefficiency, or negligence do not suffice to meet this high standard. Calplant Engineering Services, Inc., et al. B-212734 et al., Sept. 29, 1983, 83-2 CPD ¶ 391.

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2/ This decision interprets those sections of CICA which amended the Armed Services Procurement Act of 1947, 10 U.S.C.A. § 2301 et seq. (West Supp. 1985). We found that Congress did not intend section 8(a) program awards to be affected by CICA. We reached this conclusion by examining the relevant CICA language, the relevant language of the Small Business and Federal Procurement Competition Enhancement Act of 1984, Pub. L. No. 98-577, 98 Stat. 3086 (1984)--which amended the original CICA amendments--and the legislative history of those two acts. The FAA is subject to the Federal Property and Administrative Services Act of 1949, 41 U.S.C.A. § 253 et seq. (West Supp. 1985), but the CICA amendments to title 41, as well as the subsequent amendments made by Pub. L. No. 98-577 to the CICA amendments affecting title 41, are identical to those made to title 10. Therefore, our finding in Cassidy Cleaning that CICA has no impact on the 8(a) program is applicable here as well.

Harris has not furnished us with the degree of proof needed to invoke our review on the basis of possible bad faith. In effect, Harris asks us to infer bad faith from the FAA's past and present actions; however, inference and supposition is not sufficient to meet the heavy burden of proof in this area. See, for example, Prospect Associates, Ltd., B-218602, June 17, 1985, 85-1 CPD ¶ 693.

Moreover, it does not appear from the solicitation that the 8(a) subcontractor is merely to procure the Collins radio equipment for FAA use, serving, in effect, as a "pass through." Rather, the successful 8(a) firm must install communications units at 45 sites in the nine FAA regions, furnishing control consoles, antennas, and protection devices. In addition, it must provide logistical support, i.e., training, maintenance, and spare parts.

Under the circumstances, then, we have no grounds for reviewing the decision to award under the 8(a) program. The protest is dismissed.

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