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The Comptroller General  
of the United States

Washington, D.C. 20548

# Decision

Matter of: Salazar Construction Company

File: B-228071

Date: December 3, 1987

## DIGEST

Contracting officer's determination not to agree to award of a section 8(a) contract to a firm proposed for debarment by the Department of Labor is within the agency's broad discretion in section 8(a) contracting and, therefore, is legally unobjectionable, where the agency did not violate applicable regulations, and there is no showing of fraud or bad faith on the part of government officials.

## DECISION

Salazar Construction Company protests the Department of the Navy's refusal to award the firm a contract under invitation for bids (IFB) No. N62467-87-B-9018, which was set aside for award under section 8(a) of the Small Business Act, 15 U.S.C. § 637(a) (1982 and Supp. III 1985).<sup>1/</sup> The IFB covered the relocation of the installation post office at the Naval Air Station, Corpus Christi, Texas. We deny the protest.

The Small Business Administration (SBA) originally proposed Salazar for negotiations as the 8(a) contractor for this procurement. Before award was made, however, the Navy learned that Salazar had been proposed for debarment by the Department of Labor (DOL) for violations of the labor provisions of the Davis-Bacon Act, 40 U.S.C. §§ 276a to 276a-5 (1982). Upon receiving this information, the Navy became concerned about Salazar and informed the SBA that it was rejecting Salazar as the 8(a) contractor and would withdraw the procurement from the 8(a) program unless the SBA nominated a different firm. The Navy also apparently expressed the view that it was precluded by the Federal

<sup>1/</sup> Under the 8(a) program, the Small Business Administration enters into contracts with government agencies and arranges for performance by awarding subcontracts to socially and economically disadvantaged small business concerns.

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Acquisition Regulation (FAR), 48 C.F.R. § 9.406-3(c)(7) (1986), from awarding Salazar a contract while its debarment was pending. Without objection, the SBA proposed another 8(a) subcontractor, L&L Construction, for negotiations under the 8(a) program.

Contracting officers, in their discretion, are authorized to award section 8(a) contracts to the SBA based upon mutually agreeable terms and conditions. FAR, 48 C.F.R. § 19.801(b)(1); Universal Canvas, Inc., B-226996, June 5, 1987, 87-1 CPD ¶ 576. It is clear from the Small Business Act that whether any particular contract should be awarded under section 8(a), at least insofar as we are concerned here, is solely within the discretion of the procurement officers of the government. No firm has a right to have the government satisfy a specific procurement need through the section 8(a) program or to receive the award of a contract through the section 8(a) program. Sam Gonzales, Inc.-- Reconsideration, B-225542.2, Mar. 18, 1987, 87-1 CPD ¶ 306. Accordingly, absent a showing of possible fraud or bad faith or a failure to comply with regulations, we have always viewed contracting agency decisions to award or not to award a contract through the section 8(a) program as legally unobjectionable and therefore not subject to review under our bid protest function. RAI, Inc., B-222610, Aug. 5, 1986, 86-2 CPD ¶ 156.

Salazar protests that the Navy acted in bad faith by threatening to withdraw the procurement from the 8(a) program if SBA did not nominate another 8(a) concern, and that the Navy incorrectly interpreted (and thus failed to comply with) the FAR as precluding award to Salazar based on its pending debarment. Salazar argues that, since it had appealed the proposed debarment, the recommendation for debarment should not have been considered at all by the Navy in deciding whether to contract with Salazar for this 8(a) contract. We reject these arguments.

Section 9.406-3(c)(7) of the FAR provides that where an agency takes action to debar a firm, the agency will not contract with the firm pending a final debarment decision. We agree with the protester that this provision did not apply here to preclude contracting with Salazar, since a debarment under the Davis-Bacon Act renders a firm ineligible for government contracts only after inclusion of its name on the Comptroller General's debarred bidders list, not while the debarment is merely pending, as was the case here. See FAR, 48 C.F.R. §§ 9.403 and 9.405(b). While we agree, however, that the Navy was not precluded by regulation from contracting with Salazar, the Navy also was not required--by this or any other regulation--to contract with Salazar merely because the firm had been nominated by

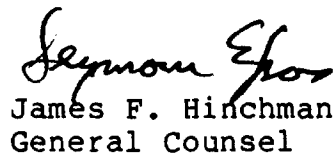
the SBA. Thus, the Navy's refusal to contract with Salazar under the section 8(a) program did not constitute a violation of regulations.

To show that contracting agency officials acted in bad faith, the protester has the heavy burden of presenting irrefutable proof that these officials had a specific and malicious intent to injure the protester. See Ernie Green Industries, Inc., B-222517, July 10, 1986, 86-2 CPD ¶ 54. Salazar has not met this burden. The record shows that the Navy's refusal to contract with Salazar was based on its interpretation of the FAR and an underlying unwillingness to contract with Salazar while its debarment was still pending. We see nothing improper in this motivation; we think it is well within the contracting agency's broad discretion not to contract under the 8(a) program with a firm that has been proposed for debarment.

Salazar has presented letter affidavits from a subcontractor stating that the contracting officer at the Naval Air Station has expressed personal animosity for Salazar; has stated that he will not contract with Salazar in the future; and has threatened to delay the subcontractor's professional engineering approval in the state if the firm continues performing work for Salazar. The contracting officer, in a responding affidavit, has categorically denied all of the subcontractor's allegations, asserting that he never stated he would not contract with Salazar, and explaining that, while he did withdraw his recommendation of the subcontractor for professional approval, he did so based on his view that a principal of the firm had been involved in an improper conflict-of-interest, not because of any involvement of the firm with Salazar.

The subcontractor's statements are unsupported by documentation in the record, and appear to have been solicited by Salazar for the purpose of this protest. Under these circumstances, the statements do not constitute the virtually irrefutable proof necessary to establish fraud or bad faith on the part of contracting officials.

The protest is denied.

  
James F. Hinchman  
General Counsel