The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: PECO Enterprises, Inc.

File: B-232413

Date: December 6, 1988

DIGEST

1. Determination whether to set aside a procurement under section 8(a) of the Small Business Act, and the propriety of the 8(a) award itself, are matters within the discretion of the contracting agency and the Small Business Administration. Such an award will not be reviewed by the General Accounting Office absent a showing of possible fraud or bad faith on the part of government officials or that regulations have not been followed.

2. Allegation of bad faith on the part of government officials in deciding to retain the sample data collection services within the Small Business Administration 8(a) program is denied where protester fails to offer irrefutable proof that the government officials had a specific, malicious intent to cause it harm.

3. Where award is made under a set-aside pursuant to section 8(a) of the Small Business Act, a protester which is a non-8(a) firm and is questioning the propriety of the award to a particular 8(a) eligible firm is not an interested party under the General Accounting Office Bid Protest Regulations. The protester lacks the requisite direct economic interest since it would not be eligible to compete for the contract even if the protest were sustained.

DECISION

PECO Enterprises, Inc., protests the decision of the Department of the Army to award a contract to the Small Business Administration (SBA) and the proposed award of a subsequent subcontract to Automation Research Systems, Inc. (ARS) pursuant to section 8(a) of the Small Business Act, 15 U.S.C. § 637(a) (1982), to provide the Army sample data collection services (SDC).1/ PECO contends that the Army's and SBA's decision to retain the SDC services within the 8(a) program was an abuse of discretion and was made in bad faith.2/ PECO further contends that the award to ARS would create an impermissible appearance of impropriety.

We deny the protest in part and dismiss it in part.

PECO, the incumbent 8(a) contractor, was a participant in the 8(a) program from October 1974 to March 1986 and performed the SDC services for the Army. In March 1986, PECO graduated from the 8(a) program, and thereby become ineligible for new awards under this program. On September 25, 1985, PECO, while still a participant in the 8(a) program, was awarded an 8(a) subcontract by the SBA for SDC services which, after two renewal options, expired on September 25, 1988. This contract was partially performed for two and one half years after PECO graduated from the 8(a) program in March 1986.

Before the expiration of this contract in January 1988, PECO was advised of the Army's intent to continue to procure the SDC services under the 8(a) program. Through correspondence and meetings with the Army and SBA, PECO stated that it would be adversely affected by the Army's retention of the SDC requirements in the 8(a) program. It therefore requested that this procurement not be restricted to current participants in the 8(a) program, and that it instead be released for either a small business or a small disadvantaged business set-aside, or if need be, unrestricted competition. The SBA's Kansas City Regional Office, on behalf of PECO, also requested the Army to release a portion of its SDC requirements for small disadvantaged business competition. The Army denied these requests and responded that Department of Defense (DOD) policy required keeping SDC as an 8(a) set-aside so long as a responsible 8(a) contractor is available. The SBA also concluded that there was no basis for releasing any portion of the Army's SDC requirements for small disadvantaged business competition. The SBA chiefly based its decision on its conclusion that

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1/ SDC is a program whose objective is to develop, implement, and manage an integrated logistic maintenance data system in support of selected field equipment, training requirements, and other logistics.

2/ While Peco initially alleged violations of law and regulation, it has not pursued these alleged violations and we deem them abandoned.

the agency had fulfilled its obligation to PECO to assist it in its transition to an 8(a) program graduate through the exercise of options under the prior contract.

Section 8(a) of the Small Business Act authorizes the SBA to enter into contracts with government agencies and to arrange for the performance of such contracts by letting subcontracts to socially and economically disadvantaged small business concerns. The thrust of section 8(a) program is to insulate participants from open price competition with established firms until the section 8(a) firms are capable of so competing. See Winfield Mfg. Co., Inc., B-218537, June 12, 1985, 85-1 CPD ¶ 679. SBA and contracting agencies enjoy broad discretion in arriving at section 8(a) contracting arrangements and, therefore, our review of actions under the section 8(a) program is limited to determining whether applicable regulations have been followed and whether there has been fraud or bad faith on the part of government officials. Id.

PECO asserts that the SBA abused its discretion here because the SBA failed to properly follow SBA's Standard Operating Procedures (SOPs) when making the decision to not release the SDC requirements from the 8(a) program. In this regard, SBA's SOP 46(e) simply lists a number of factors that may be considered in determining whether to release a requirement for competitive bidding. PECO contends that the SBA failed to take into consideration all of the elements of SOP 46(e). PECO also disagrees with the conclusions reached by the SBA that the primary objective of SOP 46(e) is to assist firms nearing 8(a) program graduation and that it had met its obligation to PECO in preparing PECO for graduation from the 8(a) program.

SBA's SOPs represent internal SBA policies and guidelines rather than regulations having the force and effect of law. SBA's compliance with its SOPs concern executive branch management decisions which our Office generally will not review under our bid protest function. Accordingly, PECO's challenge to the SBA's compliance with SOP 46(e) in deciding to continue the requirement under the 8(a) program involves a discretionary management decision which our Office will not review. See A.R.E. Mfg. Co., Inc., B-218116, May 17, 1985, 85-1 CPD ¶ 564.

PECO also argues that the SBA's and Army's alleged disregard of the fact that PECO will be irreparably harmed if not given an opportunity to compete for the SDC requirement is an abuse of discretion and an act of bad faith. PECO further argues that the selection of ARS as the 8(a) contractor also suggests bad faith on the part of the Army and SBA since ARS is owned by a retired Colonel who once served as the deputy director of the Army's Small and Disadvantaged Business Utilization Office and possesses extensive inside knowledge of the various Army procurement commands' 8(a) programs. In this regard, PECO contends that award to ARS would create an impermissible appearance of impropriety because of ARS' alleged employment practice of recruiting individuals from the Army procurement commands.

The Army's decision to retain the requirement under the 8(a) program was made in compliance with DOD policy memorandum of September 25, 1987, which states that "as a matter of Department policy requirements currently in the 8(a) program are to remain in the 8(a) program if a responsible 8(a) firm is available to perform the requirement." The Army accordingly offered the requirement to SBA for the 8(a) program.

Under SBA procedures, the Director of the Office of Program Development for 8(a) has the authority to make the determination to release or not to release a procurement from the 8(a) program. The record is clear that the SBA official reviewed PECO's financial standing before making his decision and the facts before him were that PECO in the 2 years after graduation from the 8(a) program had received two renewal options under the SDC contract totalling over $21 million. This amount was considered to be more than enough to aid PECO's transition to competitive status. Additionally, PECO's current net worth was determined to be $1.8 million dollars. Further, SBA regional officials submitted documentation in support of PECO and sought to have at least part of the SDC requirement released for competition. The record indicates that this documentation was fully reviewed prior to the SBA final decision. While we recognize the decision to continue to reserve the requirement for the 8(a) program undoubtedly has an adverse impact on PECO since it is no longer eligible for this requirement, there is simply no evidence that the decision was made with any intent to harm PECO. To the contrary, the record indicates that the determination reflects a decision by the SBA to give other 8(a) firms the opportunity to perform the SDC requirement.

Finally, to the extent that PECO is questioning the propriety of the award to ARS because ARS is owned by a former Army official with knowledge of the Army's 8(a) programs and who recruits individuals from the Army commands, it is not an interested party. Under our Bid Protest Regulations, 4 C.F.R. § 21.1(a) (1988), a protester must have a direct economic interest which is affected by the award of a contract in order to be considered an interested party. We have found the 8(a) set-aside to be proper, and the record reflects that there are other 8(a) firms capable of performing the SDC requirement if ARS is determined to be ineligible. Thus, even if PECO's protest of the award to ARS were sustained, it would not be eligible to compete for the contract in question. We have explicitly held that a non-8(a) firm is not an interested party to protest the qualifications of a particular 8(a)-eligible firm. Washington Patrol Service, Inc.--Reconsideration, B-214568.2, July 17, 1984, 84-2 CPD ¶ 57. Of course, PECO's allegation concerning ARS' conflict of interest has been brought before the Army and SBA for their consideration.

The protest is denied in part and dismissed in part.

Seymour Efros
for James F. Hinchman
General Counsel