



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Mabuhay Building Maintenance Co., Inc.--
Reconsideration

File: B-235630.3

Date: October 10, 1989

DIGEST

Agency withdrawal of requirement from section 8(a), Small Business Act program, is unobjectionable where it considered and rejected a Small Business Administration (SBA) request that the requirement be set aside prior to issuing the solicitation and the SBA declined to appeal the matter.

DECISION

Mabuhay Building Maintenance Co., Inc., requests reconsideration of our prior dismissal of its protest in which it challenged the decision of the Army Support Command, Hawaii, to remove a requirement from the Small Business Administration (SBA) 8(a) program. 15 U.S.C. § 637(a) (1988). Mabuhay, an 8(a) contractor, alleges that the Army failed to consult with the SBA, in accordance with Federal Acquisition Regulation (FAR) § 19.804 (FAC 84-50), prior to combining the former 8(a) requirement with a similar non-8(a) requirement under solicitation No. DAHC77-89-B-0078, a total small business set aside. Based upon the Army's representation that it had consulted with the SBA prior to issuing the solicitation, we dismissed the protest since we will not review decisions whether to procure under the 8(a) program, absent an indication that specific regulations have been violated or a showing of possible fraud or bad faith on the part of government officials. Bid Protest Regulations, 4 C.F.R. § 21.3(m)(4) (1989).

On reconsideration, Mabuhay alleges that the consultation with SBA was misrepresented by the Army, which constitutes bad faith or fraud on its part. Mabuhay maintains that absent consultation, the requirement in question should be retained in the 8(a) program.

Upon review of the developed record, we deny the protest.

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The solicitation combines requirements for full food services at dining facilities at Schofield Barracks and Kunia, Hawaii. Prior to the issuance of this solicitation, the Schofield requirement had been the subject of a total small business set aside and the Kunia requirement had been procured under the 8(a) program. Both contracts were to expire in September 1989 and the current 8(a) contractor was to graduate from the program. In July 1988, the contracting officer contacted the SBA to offer the Schofield requirement for the 8(a) program. Since, at that time, Mabuhay was not certified for full food services, the SBA advised the contracting officer that there were no 8(a) contractors available. In August 1988, Mabuhay received full food service certification. In November 1988, the Army decided to combine the Schofield and Kunia requirements, based in part on the belief (apparently erroneous) that there were no available 8(a) contractors for the Kunia requirement.

By letter of March 1, 1989, prior to the issuance of the solicitation for the combined requirement, SBA requested that the Kunia requirement be reserved for the 8(a) program. On March 2, the contracting officer orally advised the SBA of the Army's decision not to reserve its requirements for the 8(a) program. On May 5, the Army issued the combined requirements solicitation.

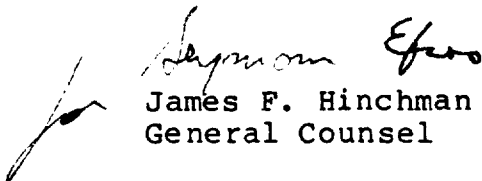
Under section 8(a) of the Small Business Act, a government contracting officer is authorized "in his discretion" to let the contract to SBA upon terms and conditions to which the SBA and the agency agree. FAR § 19.801(b)(1) (FAC 84-50). When they do not agree, the SBA may appeal to the agency head. FAR § 19.801(b)(2).

Mabuhay claims that the Army failed to follow the requirements of FAR § 19.804 because it did not consult with the SBA prior to deciding in November 1988 to withdraw the Kunia requirement from the 8(a) program. It further claims that the agency is guilty of bad faith or fraud in misrepresenting to our Office that it did consult with the SBA prior to making that decision.

Here, while there are some immaterial discrepancies about the details of the contacts between the Army and SBA regarding their consultations prior to November 1988, on setting aside this requirement for the 8(a) program, the record clearly shows that the SBA and the Army did consult prior to the issuance of the solicitation. The record shows that when the SBA requested the set-aside in March 1989, the

Army advised the SBA of its rationale for not withdrawing the Kunia requirement from the solicitation. See FAR § 19.804(a); Universal Canvas, Inc., B-226996, June 5, 1987, 87-1 CPD ¶ 576. The SBA, having received this response, declined to appeal to the agency head. Since the SBA considers the matter resolved, we find nothing objectionable in the Army's action, much less any showing of fraud or bad faith on the part of Army officials.

Accordingly, the protest is denied.



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General Counsel