

A. Perry



Comptroller General  
of the United States  
Washington, D.C. 20548

# Decision

Matter of: Tri-Way Security & Escort Service, Inc.--  
Request for Reconsideration  
File: B-238115.2  
Date: April 10, 1990

Katharine R. Boyce, Esq., Patton, Boggs & Blow, for the protester.  
David R. Kohler, Esq., Small Business Administration, for the agency.  
Roger E. Fregeau, for Immigration and Naturalization Service.  
Anne B. Perry, Esq., Paul Lieberman, Esq., and John F. Mitchell, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

## DIGEST

1. Challenge of agency's selected Standard Industrial Classification code is not for consideration by the General Accounting Office, since conclusive authority over this matter is vested in the Small Business Administration.
2. Protest alleging bad faith must present convincing evidence that government officials had a specific and malicious intent to injure the protester.

## DECISION

Tri-Way Security & Escort Service, Inc., requests reconsideration of our dismissal of Tri-Way's protest that the Immigration and Naturalization Service (INS) assigned an improper Standard Industrial Classification (SIC) code under solicitation No. ERO-0-0001, which eliminated Tri-Way from consideration for an award which was being made as a set-aside pursuant to Section 8(a) of the Small Business Act, 15 U.S.C. § 637(a) (1988). We dismissed the protest because decisions concerning eligibility for an 8(a) award generally are not reviewable by our Office. 4 C.F.R. § 21.3(m)(2) (1989).

We affirm the dismissal.

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The solicitation was issued to obtain guard services at the INS detention facility located at 201 Varick Street, New York, New York. INS assigned the solicitation SIC code 7381, "Detective, Guard, and Armored Car Services," with a size standard that average annual receipts for the preceding three fiscal years not exceed \$6 million. Tri-Way contends that the SIC code should be changed to 8744, "Facilities Support Management," with a size standard that average annual receipts for the preceding three fiscal years not exceed \$13.5 million.

This requirement has been assigned SIC code 7381 since 1983, and Tri-Way, as the incumbent contractor, previously qualified as small under the \$6 million size standard. In March 1989, the INS notified Tri-Way that it was no longer small under the \$6 million size standard and, therefore, would not be eligible for the follow-on procurement. Tri-Way then contacted the Small Business Administration (SBA) and requested that it appeal to the INS to change the SIC code to 8744, under which Tri-Way would be eligible for award. Tri-Way also "protested" this issue to the INS, but the INS refused to make the change.

SBA regulations state that "[s]o long as the SIC code assigned to the requirement by the procuring agency is reasonable, the SIC code will be accepted by SBA." 54 Fed. Reg. 34732 (1989) (to be codified at 13 C.F.R. § 124.308(b)(1)). In the event the SBA finds the assignment unreasonable, and the contracting activity disagrees, SBA may (1) refuse to accept the requirement for the 8(a) program, (2) appeal the contracting officer's determination to the head of the agency, or (3) file a SIC code appeal to SBA's Office of Hearings and Appeals. 54 Fed. Reg. 34732 (1989) (to be codified at 13 C.F.R. § 124.308(b)(2)).

Pursuant to these regulations, SBA officials examined the assigned SIC code, the statement of work in the solicitation, and the past SIC code for the requirement and concluded that since substantially more than 50 percent of the work was guard services, the assignment of SIC code 7381 was reasonable. Accordingly, SBA determined not to pursue the matter further. Tri-Way filed a protest with our Office on December 21, after it had been notified that the SBA and the INS had concluded negotiations with an 8(a) contractor who qualified under SIC code 7381. By a notice of December 22, we dismissed Tri-Way's protest.

In its request for reconsideration, Tri-Way argues that our Office should consider the merits of this SIC code classification because the SBA's Office of Hearings and Appeals allegedly will not do so, and because our jurisdiction does

extend to 8(a) contracts in the event of bad faith on the part of government officials. The protester alleges that the INS's "sharp practices and unfair dealings with the protester over a series of contracts" is evidence of bad faith on the part of INS.

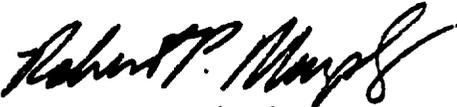
As previously noted, the initial determination of the appropriate SIC code for a contract in the 8(a) program is to be made by the contracting officer, and the right to appeal this determination rests exclusively with the SBA. The SBA's determination in this regard is conclusive. See 4 C.F.R. § 21.3(m)(2); Swan Indus., B-217199; B-217210, Mar. 20, 1985, 85-1 CPD ¶ 346. Moreover, even if, as here, the SBA Office of Hearings and Appeals does not rule on the SIC code issue, our Office is still precluded from considering the matter because of SBA's exclusive authority. See 15 U.S.C. § 637(b)(6) (1988); Staffall, B-233205, Feb. 23, 1989, 89-1 CPD ¶ 195; Swan Indus., B-217199; B-217210, supra.

Tri-Way is correct that if a protesting party presents convincing evidence that government officials had a specific and malicious intent to injure the protester, we will recommend corrective action with respect to matters even though they are exclusively the responsibility of other agencies. EG&G Pressure Science--Request for Reconsideration, B-236049.2, Aug. 25, 1989, 89-2 CPD ¶ 179. These occasions are rare since where a protester has such evidence, we expect that the cognizant agency almost always will act on the matter directly. Also, we will not attribute unfair or prejudicial motives to the contracting agency on the basis of a protester's inference or supposition. Id.

The crux of Tri-Way's bad faith allegation is its contention, based "on information and belief," that INS is seeking to avoid contracting with Tri-Way because Tri-Way is under reorganization after having filed for bankruptcy. The only evidence submitted by Tri-Way consists of two newspaper clippings which allege that the INS has management problems, and Tri-Way's own experience with the INS on a different contract, under which, according to the protester, the INS was behind schedule in paying Tri-Way's invoices, and INS determined to compete the successor contract rather than continue the 8(a) set-aside. Since Tri-Way's evidence essentially is based upon unsubstantiated inferences, there

is no basis to conclude that the agency acted in bad faith in reaching its decision not to change the SIC code for this solicitation.

The prior dismissal of the protest is affirmed.

  
James F. Hinchman  
General Counsel