

Mr. Lebowitz



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Information Dynamics, Inc.

File: B-239893; B-239894

Date: October 1, 1990

Lawrence M. Farrell, Esq., McKenna, Conner & Cuneo, for the protester.
S.J. Evans, National Aeronautics and Space Administration, and David R. Kohler, Esq., and Mona K. Mitnick, Esq., Small Business Administration, for the agencies.
Linda S. Lebowitz, Esq., Andrew T. Pogany, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. A challenge to the placement of procurements under the Small Business Administration's 8(a) program based on alleged bad faith on the part of the contracting agency will be upheld only if the facts indicate that the government actions complained of were improperly motivated.
2. The Small Business Administration was not required to conduct an adverse impact analysis before accepting proposed procurements for 8(a) awards where requirements were previously accepted for the 8(a) program and would continue to be performed by 8(a) firms within the 8(a) program.
3. Contracting agency which previously included multiple requirements under a single 8(a) contract may subsequently break out these same requirements for separate 8(a) firms to perform if a valid reason exists to do so.

DECISION

Information Dynamics, Inc. (IDI) protests the award of contracts to Futron Corporation and Advanced Computer Systems, Inc. (ACS) for support services for the National Aeronautics and Space Administration (NASA) under section 8(a) of the Small Business Act, 15 U.S.C. § 637(a) (1988). Section 8(a) authorizes the Small Business Administration (SBA) to enter into contracts with government agencies and to arrange for the performance of such contracts by letting

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subcontracts to socially and economically disadvantaged businesses.

We deny the protests.

In July 1989, IDI was awarded an 8(a) contract (No. NASW-4421) for 1 base year (August 17, 1989 until July 16, 1990), plus four 1-year options. Under this 8(a) contract, IDI was to perform various task orders related to management, technical, administrative, and information resources management services for NASA's Quality and Productivity Improvement Programs Division (Code QB) and at NASA's Associate Administrator's Office for Safety, Reliability, Maintainability, and Quality Assurance (Code Q).

During the base year, NASA allegedly experienced a number of problems with IDI's performance of two task orders under its 8(a) contract. By offering letters dated February 8, 1990 and March 7, 1990, NASA advised the SBA that it intended to terminate for the convenience of the government IDI's 8(a) contract. In its letter of February 8, NASA expressed its intention to use Futron to perform management services, including administrative support for the quality awards program, conference support, technical writing and research, and general office support for NASA's Quality and Productivity Improvement Division. In its letter of March 7, NASA expressed its intention to use ACS to perform computer-related services, including maintenance of the local area network, database creation and operation, and other software support at NASA's Office of Safety, Reliability, Maintainability, and Quality Assurance.

The SBA evaluated NASA's offerings of Futron and ACS in light of the fact that NASA expressed its intention to terminate for convenience IDI's 8(a) contract. Finding that no adverse impact on other small businesses existed because the contract requirements for Futron and ACS, both 8(a) firms, were replacing the same requirements previously performed by IDI under an 8(a) contract, the SBA authorized NASA to initiate negotiations with Futron and ACS for the respective requirements.

On May 4, NASA ordered IDI to cease performance. NASA did not formally terminate for convenience IDI's 8(a) contract; instead, NASA stopped all funding of IDI's 8(a) contract. On May 21, Futron was awarded an 8(a) contract (No. NASW-4525) for 1 base year plus two 1-year options and on May 24, ACS was awarded an 8(a) contract (No. NASW-4524) for 1 base year plus two 1-year options. These protests followed on May 31.

IDI argues that NASA's contracting officer in bad faith misrepresented the status of its 8(a) contract performance to the SBA, thereby inducing the SBA to agree to allow NASA to negotiate new 8(a) contracts with other 8(a) firms to perform the same requirements as those performed by IDI under its 8(a) contract. IDI maintains that its 8(a) contract was never terminated for the convenience of the government as stated by NASA's contracting officer to the SBA, and IDI disagrees with NASA's characterization of alleged performance problems, which included the submission of allegedly improper invoices for work performed by a subcontractor and the improper purchase of equipment by IDI without NASA's pre-approval (subsequently cured).

Since contracts are let under section 8(a) of the Small Business Act to the SBA at the contracting officer's discretion and on such terms as agreed upon by the procuring agency and the SBA, the decision to place a procurement under the 8(a) program and the award of an 8(a) subcontract are not subject to objection absent a showing of fraud or bad faith on the part of government officials or that regulations have been violated. A conclusion of fraud or bad faith must be predicated on facts indicating that the government actions complained of were improperly motivated. See Buck, Allmond & Co., B-236382, Nov. 6, 1989, 89-2 CPD ¶ 431.

The record does not permit that conclusion here. Contrary to IDI's assertion, we find that NASA did not misrepresent the status of IDI's contract to the SBA. The record shows that while NASA did not formally terminate for the convenience of the government IDI's 8(a) contract, NASA, by its decision to stop all funding of IDI's 8(a) contract, effectively did terminate IDI's 8(a) contract before the minimum level of effort guaranteed by the contract had been performed by IDI. See generally Navajo Community College, Interior Board of Contract Appeals No. 1834, Aug. 27, 1986, reprinted in 87-2 BCA ¶ 19,825.

Both IDI and NASA also vigorously argue their respective positions regarding the adequacy of IDI's performance under its 8(a) contract. For example, the contracting officer asserts that IDI attempted to charge the government for 159 hours of labor services performed by a particular individual when that individual allegedly performed only 40 hours of services. IDI explains that the services in question were part of a task order requirement transferred from the predecessor contract to IDI's 8(a) contract. IDI determined, however, in the interest of good client relations to accept NASA's assessment that this individual

performed only 40 hours of services.^{1/} Similarly, IDI asserts that there are reasonable explanations for the other performance problems. The record shows that there is a bona fide difference of opinion as to IDI's performance under the contract. Based on the record, however, we have no reason to question the good faith and reasonableness of the contracting officer in asserting his opinion as to the nature and extent of IDI's performance deficiencies experienced by NASA.

IDI also challenges the SBA's failure to conduct an adverse impact analysis pursuant to 13 C.F.R. § 124.309(c) (1990) prior to accepting NASA's requirements on behalf of Futron and ACS.

As relevant here, the adverse impact provision states that:

"SBA will not accept for 8(a) award proposed procurements not previously in the 8(a) program if any of the circumstances identified [below] . . . exist.

. . . .

"(c) Adverse impact. SBA has made a written determination that acceptance of the procurement for 8(a) award would have an adverse impact on other small business programs or on an individual small business, whether or not the affected small business is in the 8(a) program. The adverse impact concept is designed to protect small business concerns which are performing Government contracts awarded outside the 8(a) program." [Emphasis added.]

13 C.F.R. § 124.309.

The SBA states that the adverse impact concept is designed to protect those small business concerns which are performing requirements pursuant to other small business programs from having these requirements taken away and placed into the 8(a) program for performance by 8(a) firms only. The SBA further states that the adverse impact concept does not apply to requirements previously accepted for the

^{1/} We note that NASA currently is negotiating with IDI a settlement of any claims IDI may have under its terminated 8(a) contract.

8(a) program where the requirements are currently being performed by 8(a) firms within the 8(a) program.

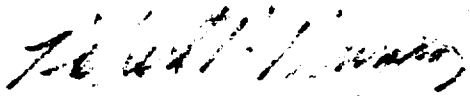
Here, IDI admits that the requirements now being separately performed by Futron and ACS are unchanged from those task order requirements which it previously performed under its 8(a) contract. Because NASA's requirements were previously procured under the SBA's 8(a) program, and these existing requirements have remained in the 8(a) program, we find, based on the explicit terms of the regulation and the SBA's reasonable interpretation of its own regulation, that the SBA was not required to perform an adverse impact analysis before accepting NASA's requirements on behalf of Futron and ACS. Therefore, the SBA did not violate its regulations by failing to conduct an adverse impact analysis for these requirements.

Finally, IDI argues that in lieu of keeping the task order requirements together under a single 8(a) contract, NASA awarded a separate 8(a) contract to Futron for management services (anticipated award price of \$1.9 million) and a separate 8(a) contract to ACS for computer-related services (anticipated award price of \$1.5 million) in order to circumvent the 8(a) competition requirements. Effective October 1, 1989, 8(a) contracts with an anticipated award price exceeding \$3 million are to be awarded based on a competition among eligible 8(a) program participants. 15 U.S.C. § 637(a)(1)(D); 13 C.F.R. § 124.311.

Although NASA previously included multiple requirements under IDI's single 8(a) contract, it was not, in our view, bound by its previous procurement and could, if a reasonable basis existed, subsequently break out these same requirements for separate 8(a) firms to perform. The work for NASA's Quality and Productivity Improvement Programs Division involves administrative support for the quality awards program, conference support, technical writing and research, and general office support, while the work for NASA's Office of Safety, Reliability, Maintainability, and Quality Assurance involves data processing support, maintenance of the local area network, database creation, and software support. These obviously are divisible requirements to be performed for different offices at NASA, and we fail to see why NASA could not reasonably request

separate 8(a) firms to perform these requirements. We find no evidence on this record of an intent by NASA in breaking out these requirements to circumvent the 8(a) competition threshold.

Accordingly, the protests are denied.



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General Counsel