



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Moore's Cafeteria Services, Inc.

File: B-243507.3

Date: August 15, 1991

Theodore M. Bailey, Esq., Law Office of Ronald J. Shaw, P.C., for the protester.
Herbert F. Kelley, Jr., Esq., and Jack B. Patrick, Esq., Department of the Army; John W. Klein, Esq., Small Business Administration, for the agencies.
Paula A. Williams, Esq., Office of General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that the decision to set aside procurement under Section 8(a) of the Small Business Act violates the Small Business Administration's (SBA) regulations is dismissed as untimely when filed in the General Accounting Office approximately 1 month after the SBA denied the initial agency-level protest of its decision to place the procurement under the 8(a) program.

DECISION

Moore's Cafeteria Services, Inc., a small business concern, protests the decision to satisfy an Army requirement for food and mess attendant services 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 awarding subcontracts to socially and economically disadvantaged businesses. Moore's Cafeteria contends that SBA's inclusion of this requirement in the 8(a) program without first conducting an adverse impact analysis violates SBA's regulations.

We dismiss the protest as untimely.

The requirement was synopsisized in the March 21, 1991, issue of the Commerce Business Daily (CBD) as an 8(a) set-aside. In response to this announcement, the protester wrote the SBA by letter dated April 10, protesting the decision to place the Army's current requirements in the 8(a) program, alleging that the requirement had been previously set aside for small

business concerns. By letter dated April 16, the SBA denied Moore's assertion that SBA had failed to follow its own regulations, and explained the reasons for its decision to accept the procurement under its 8(a) program. Moore's Cafeteria filed its protest with our Office on May 16.

The Army requests that we summarily dismiss Moore's protest as untimely. The agency points out that the protest was filed almost 2 months after the CBD notice was published and approximately 1 month after the SBA's April 16 response to the protester. Moore's Cafeteria argues that it did not view its April 10 letter to the SBA as "a complaint to the procurement authorities" because it was unaware that the SBA was the procuring agency. In any event, the protester requests that we consider its protest under the significant issue exception to our timeliness rules.

Our Bid Protest Regulations require that where a protest has been filed initially with the contracting agency, any subsequent protest to our Office must be filed within 10 working days after the protester receives notice of initial adverse agency action. 56 Fed. Reg. 3,759 (1991) (to be codified at 4 C.F.R. § 21.2(a)(3)). In this case, the record indicates that the decision to set aside the procurement was a joint determination of the SBA representative and the contracting officer under the authority of Federal Acquisition Regulation § 19.501(b). Moore's Cafeteria was made aware of this decision, by the March 21 CBD notice, and the protester's April 10 "complaint" to the SBA expressing dissatisfaction and seeking corrective action constituted an agency-level protest. See MacKay Communications, B-238926.2, Apr. 25, 1990, 90-1 CPD ¶ 426. Allowing 1 business week for normal mail delivery of SBA's April 16 letter denying this initial protest, Moore's was required to file its subsequent protest with our Office within 10 working days after April 23, thus, its protest filed on May 16 is untimely.

The protester argues that its protest should be considered under the significant issue exception to our timeliness requirements. 56 Fed. Reg. 3,759, supra (to be codified at 4 C.F.R. § 21.2(c)). The significant issue exception to our timeliness rules is strictly construed and sparingly used to prevent the timeliness rules from being meaningless. We will invoke it where the protest raises issues of widespread interest to the procurement community which have not been considered on the merits in prior decisions. DynCorp, B-240980.2, Oct. 17, 1990, 70 Comp. Gen. _____, 90-2 CPD ¶ 310. The question of whether an "adverse impact" analysis was required in order to include a procurement such as this in the 8(a) program has been addressed in previous decisions of this

Office. See Information Dynamics, Inc., B-239893; B-239894,
Oct. 1, 1990, 90-2 CPD ¶ 262; Ignacio Sanchez Constr.,
B-238492, May 11, 1990, 90-1 CPD ¶ 467.

The protest is dismissed.

A handwritten signature in cursive script, reading "Paul Lieberman". The signature is written in dark ink and is positioned above the printed name and title.

Paul Lieberman
Assistant General Counsel