



Comptroller General  
of the United States

Washington, D.C. 20548

2411210

## Decision

**Matter of:** JWA Security Services

**File:** B-253836

**Date:** October 12, 1993

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Jon William Wroten for the protester.  
Paul Brundage, Esq., and Walker L. Evey, National  
Aeronautics and Space Administration, for the agency.  
Behn Miller, Esq., Office of the General Counsel, GAO,  
participated in the preparation of the decision.

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### DIGEST

Absent clear judicial precedent, General Accounting Office will not consider protester's challenge to the constitutionality of agency's small disadvantaged business set-aside program since issues involved are more appropriate for resolution by the courts.

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### DECISION

JWA Security Services protests the small disadvantaged business (SDB) set-aside restriction contained in request for proposals (RFP) No. 2-35693, issued by the National Aeronautics and Space Administration (NASA) for security and law enforcement functions at the Ames Research Center (ARC) located in Moffett Field, California. JWA claims that the solicitation's SDB set-aside restriction is unconstitutional because it precludes JWA--as a firm which does not fall within the SDB classification--from competing.

We dismiss the protest.

As a general rule, the Competition in Contracting Act of 1984 (CICA) requires contracting agencies to obtain full and open competition through the use of competitive procedures when conducting a procurement for property or services. 10 U.S.C. § 2304(a)(1)(A) (1988). However, CICA permits agencies to restrict competition where the head of the agency determines that "it is necessary in the public interest to use other than competitive procedures," and provides Congress with written notice of this determination not less than 30 days before contract award. 10 U.S.C. § 2304(c)(7).

On December 2, 1992, by means of a determination and finding and accompanying cover letter dated that same day, the NASA Administrator advised Congress that in order to further an agency SDB contracting goal,<sup>1</sup> the Administrator had determined that it was in the public's interest to reserve 26 procurements--including the challenged RFP--for exclusive SDB participation.

On March 11, 1993, NASA solicited sources for the RFP by means of a synopsis published in the Commerce Business Daily (CBD); the synopsis notice advised contractors that the class of offerors eligible to compete under the RFP was limited to SDB firms. On June 21, 1993, JWA filed this protest challenging the SDB set-aside restriction as unconstitutional; specifically, JWA contends that the solicitation "unlawfully discriminates against me and my firm because I am a white male" and that this exclusion is contrary to the United States Constitution, public interest, and public policy.

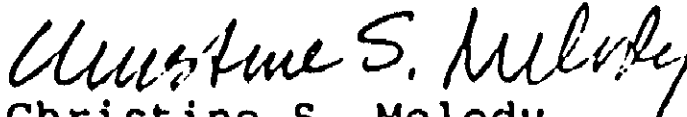
In the absence of a clear judicial precedent determining the constitutionality of small disadvantaged or minority set-aside programs on the federal level, we decline to consider the protest since this issue is a matter for the courts, not our Office, to decide. See Sletager, Inc., B-241149, Jan. 25, 1991, 91-1 CPD ¶ 74; Stanford U., B-241125, Sept. 20, 1990, 90-2 CPD ¶ 246; Seyforth Roofing Co., Inc., B-235703, June 19, 1989, 89-1 CPD ¶ 574. While JWA contends that a recent Supreme Court decision, Northeastern FL Contractors v. Jacksonville, 113 S. Ct. 2297 (1992), "denounced" a similar set-aside program, in fact the Court's decision in Northeastern was limited to addressing the

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<sup>1</sup>By means of 2-year appropriations legislation enacted on November 9, 1989, see Pub. L. No. 101-144, 103 Stat. 863-864 (1989), Congress directed NASA to establish an 8 percent SDB contract award goal; Congress identified SDB concerns as those firms falling within the definition set forth in the Small Business Act, 15 U.S.C. §§ 637(a)(5) and (a)(6) (1988), which generally pertains to those individuals who have been subjected to racial or ethnic prejudice or cultural bias. See also 13 C.F.R. §§ 124.105 et seq. (1993). On November 9, 1990, again by means of 2-year appropriations legislation, see Pub. L. No. 101-507, 104 Stat. 1380 (1990), Congress reiterated the 8 percent SDB award goal and expanded the definition of SDB concerns "to include women." The current requirement for NASA to award 8 percent of its contract dollars to SDB concerns--including women-owned firms--is contained in Pub. L. No. 102-389, 106 Stat. 1610 (1992).

procedural question of standing--that is, the requirements a party must meet in order to properly invoke a federal court's jurisdiction. Further, the Northeastern case is not dispositive here since it involved a constitutional challenge to a municipal--as opposed to federal--minority set-aside program. See Seyforth Roofing Co., Inc., supra. Since JWA's protest concerns the constitutionality of a federal SDB set-aside and there is no clear judicial precedent pertaining to this issue, it is inappropriate for us to consider JWA's arguments here. Sletager, Inc., supra.

The protest is dismissed.

  
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Assistant General Counsel