

# DECISION



THE COMPTROLLER GENERAL  
OF THE UNITED STATES  
WASHINGTON, D. C. 20548

60070

FILE: B-182533

DATE: October 21, 1975

MATTER OF: ABC Management Services, Inc.

97806

## DIGEST:

1. Requirement that party be "interested" in order to lodge formal protest serves to ensure party's diligent participation in protest process so as to sharpen issues and provide complete record on which correctness of challenged procurement may be decided.
2. Generally, in determining whether protester satisfies "interested party" requirement, consideration should be given to nature of issues raised by protest and direct or indirect benefit or relief sought by protester.
3. Non-8(a), non-small business concern is considered interested party so long as it contends that concern proposed for 8(a) award does not belong in 8(a) category whose application prevents protester from competing; test of interested party for 8(a) protests clarifies prior discussion in Kleen-Rite Janitorial Services, Inc., B-178752, March 21, 1974, 74-1 CPD 139; City Moving and Storage Company, Inc., B-181167, August 16, 1974, 74-2 CPD 104; and Kings Point Manufacturing Company, Inc., B-181221, April 29, 1975, 75-1 CPD 264.
4. Examination of "social disadvantage" determination made of owner of firm proposed for 8(a) award shows that SBA did consider factors regarding disadvantage other than racial identity of owner or owner's alleged inability to obtain bonding. Determination is considered rationally supported, given broad guidelines conveyed in SBA policy and regulation concerning what constitutes "disadvantage."
5. Because other issues raised by non-small business, non-8(a) concern in protest against 8(a) award are indirectly related to basic eligibility determination of firm proposed for 8(a) award, it is considered that concern is interested party as to other issues.

6. Because Department of Army states it is aware of requirement that SBA must fund any costs of 8(a) services in excess of what Department considers current fair market price for services, it appears that Department will charge SBA any excess costs involved in subject 8(a) procurement contrary to protester's suggestion that Department will not.
7. Since it is Department of Army's policy to enter into contracts with SBA to foster small business (including 8(a) growth), it is not considered improper for Department to have advised SBA of availability of proposed procurement of KP services for 8(a) program or fact that proposed 8(a) concern was currently providing similar services at one of facilities involved in proposed procurement.
8. Review does not suggest that SBA has arbitrarily decided that proposed 8(a) concern is still in need of further assistance through proposed 8(a) award.

For the last year or more, ABC Management Services, Inc. (ABC), has been performing KP (mess attendant) services for the Department of the Army at Fort Ord, California, and at a nearby installation, Hunter Liggett.

Harris Management Company (Harris) is currently a subcontractor to the Small Business Administration (SBA) under the "8(a) program" (a program to assist small business concerns owned and controlled by socially or economically disadvantaged persons) and is performing KP services at another installation (the Presidio of Monterey) nearby the Fort Ord complex.

ABC alleges that in April 1974 the Fort Ord procurement office proposed to the San Francisco regional office of SBA that the mess attendant requirements at Fort Ord be consolidated with those at the Presidio of Monterey; that the Department further requested SBA to propose a contractor capable of performing the combined services under the 8(a) program; and that SBA answered that it would perform the services at an estimated cost of \$1,650,551 and subcontract the work to Harris under the 8(a) program.

Once the Department's proposed course of action became known, ABC submitted a protest in October 1974 to our Office against the decision to award the KP requirements at both installations to Harris. Although ABC's protest contains several grounds, the chief complaints raised are that Harris is not owned by socially or economically disadvantaged persons and therefore Harris is not eligible for an 8(a) award.

In reply, both SBA and Harris assert, in effect, that ABC is not sufficiently interested in the award in question to properly raise the specific issue of Harris' eligibility under the 8(a) program, or any other issue relating to the propriety of the Harris award, in the context of a formal bid protest. The lack of sufficient interest is based on ABC's recent admissions that it is not currently a small business and that it would not be entitled to "bid on the Ft. Ord procurement at the present time" even if the services in question were resolicited under a total small business set-aside procurement should the 8(a) award to Harris not be upheld. ABC's admission that it would not currently be entitled to "bid on the Ft. Ord procurement" is apparently based on its assumptions (which have not been contradicted by the Army) that if the subject 8(a) award were to be terminated there would still be a need for the KP services involved and that the needed services would be procured only through competition limited to small business concerns--thereby preventing ABC from competing.

The threshold question for decision, then, is whether ABC is an "interested party" so as to permit consideration of its protest under GAO's Interim Bid Protest Procedures and Standards (4 C.F.R. § 20 (1974)) which were in effect when the protest was filed. In order for a protest to be heard, the party filing the protest must be "interested." 4 C.F.R. § 20.1(a). (The requirement that a party filing a protest must be "interested" is also found in § 20.1(a) of the current Bid Protest Procedures which were published in the Federal Register on April 24, 1975.)

The requirement that a party be "interested" serves to ensure a party's diligent participation in the protest process so as to sharpen the issues and provide a complete record on which the correctness of the challenged procurement may be decided. We do not equate, however, the concept of "standing to sue" as developed by the courts with the concept of "interested party" as used in our Procedures. A protester may well be viewed as possessing a sufficient interest in the award selection in question even though the protester may not or does not choose to bid on the procurement. For example, protests have been considered by our Office which were filed by a labor union, a contractors' association and a Chamber of Commerce. See District 2, Marine Engineers Beneficial Association-Associated Maritime Officers, AFL-CIO, B-181265, November 27, 1974,

74-2 CPD 298; B-177042, January 23, 1973, and 49 Comp. Gen. 9 (1969). Generally, in determining whether a protester satisfies the "interested party" requirement, consideration should be given to the nature of the issues raised by the protest and the direct or indirect benefit or relief sought by the protester.

Having these factors in mind, it is our further view that a protester should be considered an interested party under our Procedures if it contends that the apparently successful bidder does not belong in the category whose application prevents the protester from competing. Notwithstanding ABC's status as a non-small business, non-8(a) concern, we consider ABC to be an interested party to the extent it contends that Harris does not properly belong in the 8(a) category whose application prevents ABC from competing.

The fact that historically, in the absence of an 8(a) classification, the services in question have been procured through competition limited only to small business concerns, does not bar ABC's protest. The protest should not be barred because whether the current purchase would be set-aside for small business in the absence of an 8(a) designation is conjectural.

This test of interested party in protests involving 8(a) award clarifies prior discussion of the issue in Kleen-Rite Janitorial Service, Inc., B-178752, March 21, 1974, 74-1 CPD 139; City Moving and Storage Company, Inc., B-181167, August 16, 1974, 74-2 CPD 104; Kings Point Manufacturing Company, Inc., B-181221, April 29, 1975, 75-1 CPD 264.

ABC's argument that the controlling owner of Harris is not "socially or economically disadvantaged" is based on the owner's current status as a retired officer (Lieutenant Colonel) of the United States Army. This current status, ABC further alleges, suggests that the owner had the "benefit of a college education plus training at an officer candidate school or military academy," and shows, therefore, that the owner was not then, or now, a disadvantaged person. Because of these circumstances, ABC asserts that the owner was found to be disadvantaged solely because he is a black American. Additionally, ABC asserts that the alleged inability of Harris' owner to obtain bonding commitments does not support a finding of disadvantage here.

SBA has furnished us with a copy of its determination that Harris' owner is "socially disadvantaged." SBA considers the information detailed in that determination to be confidential and not subject to disclosure. To our knowledge, ABC has not contested this restriction in an appropriate forum.

Our examination of the "social disadvantage" determination shows that SBA did consider factors other than the racial identity of the owner or the owner's alleged inability to obtain bonding. It is our further opinion that the factors listed show that SBA's determination is rationally supported, given the broad guidelines conveyed in SBA policy and regulation concerning what constitutes "disadvantage." See, for example, 13 C.F.R. § 124.8-1(c)(1975).

ABC raises three other issues relating to the propriety of the 8(a) award to Harris:

(1) The proposed procurement is illegal unless the Army agrees to charge SBA the excess costs (relating to the difference between the market cost and the higher 8(a) cost of the required KP service) of the procurement;

(2) The proposed procurement is illegal because it was initiated by the Army; and

(3) The proposed 8(a) subcontract is illegal because it is not necessary to make Harris a self-sustaining competitive entity.

Because these issues are indirectly related to the basic eligibility determination questioned by ABC, we also consider ABC to be an interested party as to these issues.

As to issue (1), the Department advises that its "Contracting Officer is aware of the provisions of ASPR § 1-705.5(b)(2) [1974 ed.] whereby the SBA must fund any costs in excess of what DOD considers to be the current fair market price for these services." Thus it appears that the Department will charge SBA any excess costs involved in the subsidy of the subject 8(a) procurement contrary to ABC's suggestion that it will not.

The Department also denies that there was any impropriety in its decision to offer the combined requirements of KP services for the installations in question to SBA for a possible 8(a) award.

The Department insists that it did not have any preference for Harris or any other proposed 8(a) concern so long as the concern in question was capable of performing the service. Further, the Department believes that its offer to SBA was entirely consistent with ASPR § 1-705.5(b)(1) which provides:

"\* \* \* It is the [general] policy of the Department of Defense (DoD) to enter into contracts with the SBA to foster or assist in the establishment or the growth of small business concerns as designated by the SBA so that these concerns may become self-sustaining, competitive entities within a reasonable period of time \* \* \*."

Since it is the Department's policy to enter into contracts with SBA to foster small business (including 8(a) growth), we do not consider it improper for the Department to have advised SBA of the availability of the subject procurement for the 8(a) program or the fact that Harris was currently providing KP services at one of the facilities in question. This view is not inconsistent, as has been suggested by ABC, with the SBA's ultimate authority (described in 13 C.F.R. § 124.8-2) to select a proposed procurement and subcontractor for performance of an 8(a) award. Indeed, we read the Department's written offer of the availability of the subject procurement for the 8(a) program (as set forth in a April 15, 1974, letter from the contracting officer to the SBA) as implicitly acknowledging SBA's ultimate selection authority.

Finally, SBA has insisted that the proposed award to Harris is consistent with a comprehensive business plan submitted by Harris which was approved on March 30, 1973, for a 3-year period of assistance. SBA further insists that the proposed award will provide Harris with an "opportunity to continue its progression toward viability."

There is obvious conflict between SBA and ABC as to whether Harris needs the present 8(a) assistance to become a self-sustaining firm. There are no fixed "dollars and cents" criteria that can be applied to resolve this conflict. As in the case of eligibility questions involving social or economic disadvantage, the question

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of how much aid a concern needs to become self-sustaining is largely a judgmental one for SBA. See Kings Point Manufacturing Company, Inc., supra. Our review of the record does not suggest that SBA has arbitrarily decided that Harris is not yet a self-sustaining entity (even though it may have already secured a non-8(a) award as alleged by ABC) and that Harris is, therefore, still in need of further assistance through the subject 8(a) award.

Protest denied.



Deputy Comptroller General  
of the United States