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DECISION



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

FILE: B-202358.2

DATE: December 15, 1981

MATTER OF: AMF Wyott, Inc. -- Reconsideration

DIGEST:

Whether management agreement between 8(a) firm and large business removes management and control over daily operations from 8(a) firm so that firm would not be eligible for 8(a) assistance under statutory criteria is matter within reasonable discretion of Small Business Administration (SBA).

AMF Wyott, Inc. requests reconsideration of our decision, B-202358, March 17, 1981, 81-1 CPD 205, concerning the Small Business Administration's (SBA) proposed award of a subcontract to A&S Tribal Industries under the 8(a) program. We dismissed AMF's contention that A&S was ineligible for award under the 8(a) program without requesting an agency report on the basis that this Office will not question SBA's eligibility determinations absent a showing of fraud or bad faith.

The basis for protest is that A&S does not meet the statutory criterion that an eligible 8(a) firm's management and daily operations be controlled by socially and economically disadvantaged individuals. In this regard, AMF notes that the top management officials of A&S have been obtained from the Brunswick Corporation through a management agreement between Brunswick and A&S. Consequently, the protester believes that the SBA's inclusion of A&S in the 8(a) program is inconsistent with the law and therefore "amounts to bad faith and suggests fraud."

SBA reports that in 1974 it determined A&S eligible for the 8(a) program and approved the management agreement between A&S and the Brunswick Corporation. At that time eligibility for the 8(a) program was governed by SBA Standard Operating Procedure 60-41 which provided that 8(a)-eligible firms "must be owned and controlled by a disadvantaged person." Subsequently, in October 1978, section 8(a)(4) of the Small Business Act, 15 U.S.C. § 637(a)(4) (Supp. III 1979), was enacted. This section

authorizes 8(a) awards to firms which are at least 51 percent owned by socially and economically disadvantaged individuals and whose "management and daily business operations" are controlled by such disadvantaged persons.

SBA states that it is currently reviewing all its 8(a) firms approved prior to October 1978 to determine whether they meet the new stricter eligibility requirement and that it has not yet completed its review of A&S. The agency argues that until A&S is determined ineligible it is entitled to receive awards under the 8(a) program. Further, SBA notes that A&S cannot be formally terminated from the 8(a) program until that firm is afforded a hearing on the record pursuant to 15 U.S.C. § 637(a)(9), which provides that no firm previously deemed eligible for 8(a) assistance shall be removed without such a hearing.

While AMF may be convinced that the management agreement entered into between A&S and Brunswick transferred the control and day-to-day management of A&S' business to Brunswick, SBA has not indicated it shares AMF's view. On the other hand, SBA has yet to determine that A&S is an eligible 8(a) firm under the 1978 statutory criteria. Even though AMF characterizes the issue as concerning SBA's authority to subcontract with a firm that does not meet the statutory requirements for inclusion in the 8(a) program, it is our view that it is still within SBA's reasonable discretion to determine whether the management agreement disqualifies A&S from the 8(a) program or from the award of this particular subcontract. We do not believe that our Office should become involved in the substance of such determinations merely because the protester contends that the agency's action "suggests fraud." The protester must submit proof that agency officials had a malicious and specific intent to injure it. JWM Corporation, B-200070.2, May 29, 1981, 81-1 CPD 422. We see no such proof here.

Nonetheless, by separate letter of today to the Administrator of SBA, we are recommending that SBA determine as quickly as possible A&S's eligibility to participate in the 8(a) program in view of the 1978 law so that SBA

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will not run the risk of going beyond the mandate of the Act should it make any award to A&S. See Computer Data Systems, Inc., B-203301, November 6, 1981, 81-2 CPD _____.

for *Milton J. Fowler*
Comptroller General
of the United States