

DECISION

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

FILE: B-208270
B-208315.2

DATE: February 16, 1983

MATTER OF: Marine Industries Northwest, Inc.; Marine
Power and Equipment Company

DIGEST:

1. Contracting officer reasonably determined that the public interest would best be served by canceling small business set-aside before bid opening in order to set aside the procurement for award to the Small Business Administration (SBA) under its 8(a) program for small, disadvantaged businesses (15 U.S.C. § 637(a) (Supp. III, 1979)) where determination was: (1) an attempt to effectuate Government's socio-economic interests; (2) necessary since contracting agency was unaware at time it issued small business set-aside that a viable 8(a) firm was capable of performing the work; and (3) concurred in by SBA.
2. The determination whether to set aside a procurement under section 8(a) of the Small Business Act (15 U.S.C. § 637(a) (Supp. III, 1979)) and issues concerning contractor eligibility for subcontract award are matters for the contracting agency and Small Business Administration and are not subject to review by GAO absent a showing of fraud or bad faith on the part of Government officials.
3. In protest involving 8(a) procurement, fraud or bad faith is not shown by: (1) fact that contracting agency originally considered sole-source award to large business; (2) fact that contracting agency initially issued total small business set-aside, then canceled it before bid opening in order to make 8(a) award to Small Business Administration (SBA); (3) allegation that SBA violated its own Standard Operating Procedures, since they may be waived.

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Marine Industries Northwest, Inc. (Marine Industries), and Marine Power and Equipment Company (Marine Power) protest against award of a contract for construction of a 140-foot icebreaking harbor tug to Bay City Marine, Inc. (Bay City), by the United States Coast Guard. The award was made under the auspices of the Small Business Administration's (SBA) 8(a) program pursuant to section 8(a) of the Small Business Act, 15 U.S.C. § 637(a) (Supp. III, 1979).

The requirement had originally been the subject of a 100-percent small business set-aside, but the Coast Guard canceled the solicitation in order to make award under the 8(a) program. The protesters charge that: (1) cancellation of the small business set-aside was improper; (2) the Coast Guard is illegally attempting to award the major portion of the work to a large business subcontractor under the guise of an 8(a) award to a small, disadvantaged business; and (3) the SBA violated its own Standard Operating Procedures by proceeding with an 8(a) procurement for this requirement.

We find no merit to the protests.

The present procurement is for the seventh icebreaking harbor tug purchased by the Coast Guard. The first six tugs were all procured from Tacoma Boatbuilding Company (Tacoma). The Coast Guard considered the possibility of making a sole-source award to Tacoma before deciding to set aside the procurement for exclusive small business participation and on June 16, 1982, the Coast Guard issued invitation for bids No. DTCG23-82-B-30002 as a total small business set-aside. On July 6, the contracting officer notified potential bidders that the set-aside was canceled and that the requirement was going to be fulfilled by award to a socially and economically disadvantaged firm under the SBA's 8(a) program.

The protesters contend that the contracting officer improperly canceled the small business set-aside. More specifically, Marine Power argues that, under section 1-1.706-3(b) of the Federal Procurement Regulations (FPR) (1964 ed., amend. 192), a small business set-aside may not be canceled unless the continuation of the small business set-aside "would be detrimental to the public interest." In response, the Coast Guard argues that the cancellation was

authorized under FPR § 1-2.208(a) (1964 ed., amend. 139), which allows a contracting officer to cancel any invitation before bid opening when doing so is "clearly in the public interest." The Coast Guard determined that cancellation was in the public interest "to effectuate the Government's legitimate socio-economic interests in awarding procurements to minority owned business firms under the 8(a) program."

We cannot find unreasonable the contracting officer's determination that the public interest would best be served by fulfilling the Government's socio-economic interests by canceling the total set-aside in favor of procuring under the 8(a) program. The notice of cancellation stated that the Coast Guard would have procured on an 8(a) basis initially, but the Coast Guard was unaware at the time the small business set-aside was issued that there was a viable 8(a) firm capable of performing the work required, and the cancellation and subsequent 8(a) award were undertaken with the concurrence of the SBA.

Where, through administrative error, a total small business set-aside was issued instead of an 8(a) set-aside, we have held that it is not unreasonable for the contracting officer to rectify the error by canceling the total set-aside and awarding to a socially and economically disadvantaged firm under the 8(a) program. A.R.&S. Enterprises, Inc., B-194622, June 18, 1979, 79-1 CPD 433; see also A.R.&S. Enterprises, Inc., B-189832, September 12, 1977, 77-2 CPD 186. Indeed, we have even found proper a post-bid-opening cancellation, in a somewhat similar situation where a portion of an invitation for bids was canceled when it was discovered that through administrative error items were included in the solicitation which should have been set aside under the "Buy Indian Act." See Hepper Oil Company, B-189196, November 16, 1977, 77-2 CPD 378. In the present case, the total set-aside was canceled well before bid opening, August 17, 1982.

We are not convinced by Marine Power's argument that cancellation could only be authorized in accord with FPR § 1-1.706-3(b), which allows withdrawal of a small business set-aside if the contracting officer considers procurement from a small business to be "detrimental to the public interest." While that provision of the FPR is certainly applicable to small business set-asides, small business set-asides which are formally advertised are also within

the purview of FPR § 1-2.208, which covers cancellation of an invitation for bids before bid opening and allows cancellation where it is "clearly in the public interest" to cancel. In other words, the two FPR provisions are not mutually exclusive, and we cannot find the contracting officer's reliance on FPR § 1-2.208 to be unreasonable in these circumstances.

The protesters contend that the Coast Guard is attempting to funnel the major portion of the work--75 to 85 percent--to Tacoma, a large business, under the guise of award to Bay City, an 8(a) firm. As evidence of wrongdoing on the part of the Coast Guard, the protesters point out that Tacoma received contracts to build the first six icebreaking tugs and that the Coast Guard gave serious consideration to awarding this contract to Tacoma on a sole-source basis. Marine Power also points out that the SBA, by letter of September 1, 1982, rejected the Coast Guard's offer to make an 8(a) award to Bay City through the SBA on the basis that it appeared that Tacoma, a large business, would benefit substantially more than Bay City. In its September 1 letter, the SBA stated that Bay City contemplated subcontracting 67 percent of the work and that the SBA's own standard operating procedure requires an 8(a) firm to perform a minimum of 50 percent of the work with its own labor force. The protesters point to the SBA's reversal of its decision to reject the proposed 8(a) award and acceptance of an 8(a) contract with subcontract awarded to Bay City (by letter of September 28) as further evidence of improprieties in the conduct of this procurement.

Section 8(a) of the Small Business Act authorizes the SBA to enter into contracts with any Government agency with procuring authority and to arrange the performance of such contracts by letting subcontracts to socially and economically disadvantaged small business concerns. The contracting officer is authorized "in his discretion" to let contracts to SBA upon such terms and conditions as may be agreed upon by the procuring agency and SBA. Microtech Industries, Inc., B-205077, October 26, 1981, 81-2 CPD 346. The selection of an 8(a) contractor is basically within the broad discretion of the SBA and the contracting agency, and we will not question such decisions unless fraud or bad faith on the part of the Government officials can be shown or it is alleged that the SBA did not follow its own regulations. J. R. Pope, Inc., B-204230, August 10, 1981, 81-2 CPD 114.

Here, the protesters have presented no evidence of fraud on the part of the Government officials. Moreover, the protesters bear a very heavy burden of proof when alleging bad faith on the part of the Government officials. Anigroeg Services, Inc., B-206362.2, March 15, 1982, 82-1 CPD 241. To show that the contracting officer or SBA officials have acted in bad faith, the protesters would have to present irrefutable proof that these officials had a specific and malicious intent to injure the protesters. Kalvar Corporation, Inc. v. United States, 543 F.2d 1295, 1301 (Ct. Cl. 1976).

In our view, the record is clear that there was no fraud or bad faith on the part of the Coast Guard or SBA personnel. We do not find any evidence of fraud or bad faith in the fact that the Coast Guard initially considered a sole-source award to Tacoma; such consideration was merely part of the many discretionary judgments a contracting officer must make before initiating a procurement action. As for the high percentage of work that Tacoma will allegedly perform as a subcontractor to Bay City, the record shows that Bay City's proposal was restructured after the initial SBA rejection so that Bay City would subcontract no more than 60 percent of the work. At the request of the Coast Guard, the SBA reconsidered its determination and decided to accept an 8(a) award on behalf of Bay City based on the increase in work to be performed by Bay City employees. We find no evidence of fraud or bad faith in this transaction. Certainly, the protesters have not carried their heavy burden of proof. In this regard, Marine Power requests our Office to independently investigate this matter to ascertain how Bay City suddenly acquired the capability to perform a larger portion of the work than it originally intended to perform. However, it is the protester that must bear the burden of proving its allegations; our Office does not investigate as part of our bid protest function to ascertain the validity of the protester's arguments. Fire & Technical Equipment Corp., B-191766, June 6, 1978, 78-1 CPD 415.

Marine Power alleges that the SBA failed to follow its own established procedures in proceeding with an 8(a) procurement in this case. More specifically, Marine Power argues that the SBA violated its own Standard Operating Procedure No. 80-05 (effective September 4, 1979), which

states, among other things, that 8(a) procurements will not be considered where: (1) a public solicitation has already been issued as a small business set-aside; or (2) it is determined by SBA that a small business might suffer a major hardship if the procurement is removed from competition. We note that SBA Standard Operating Procedure No. 80-05 also specifies that an 8(a) subcontractor shall be required to perform 50 percent of the work required under a manufacturing contract.

Fraud or bad faith in the making of a set-aside is not shown by the allegation that the SBA violated its own Standard Operating Procedure. A.R.&S. Enterprises, Inc., B-189832, supra. Such procedures may be waived by the SBA. A.R.&S. Enterprises, Inc., B-189832, supra. Here, both the paragraph in the Standard Operating Procedure concerning the situation in which a small business set-aside has already been issued and the paragraph requiring an 8(a) contractor to perform 50 percent of a manufacturing contract specifically include provision for waiver by the SBA. The manner in which the waivers are effected is a matter for SBA, not our Office, and does not affect the validity of award to Bay City. A.R.&S. Enterprises, Inc., B-189832, supra. Moreover, regarding hardship to a small business caused by removal of a set-aside from competition in favor of an 8(a) award, the SBA specifically determined on September 28 that no small business firm would suffer a major hardship as a result of the 8(a) award to Bay City.

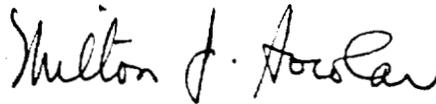
Finally, Marine Industries suggests that Bay City should be required under the terms of its contract to award the majority of its subcontracts to small business. However, we are unaware of any provision in statutes or regulations which requires inclusion of such restriction in an 8(a) contract for shipbuilding work, and the protesters have cited none. As previously discussed, the SBA--which is empowered by law to enter into contracts with other Government agencies and to negotiate the terms and conditions which are to be included in such contracts (15 U.S.C. § 637(a) (1976))--determined that an 8(a) contract should be awarded to Bay City even though it would perform only 40 percent of the work. The SBA recognized that Bay City "will benefit from the substantial management and technology transfer contemplated under this effort" and should be propelled to a "higher plane of development and competitive

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viability." Moreover, we have held that in the case of supply contracts which require a significant contribution to the manufacture of an end item by a small business contractor, a small business which will incur more than one-third of the contract costs has fulfilled the significant contribution requirement. See Chem-Teck Rubber, Inc., B-203374, September 21, 1981, 81-2 CPD 232. Accordingly, our Office will not overrule the SBA's judgment in these circumstances.

The protest is denied.

for 
Comptroller General
of the United States