Pro. Law I
J. Cohen

DECISION

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

9003

FILE: B-193212 DATE: January 30, 1979

MATTER OF: DLG00120
Delphi Industries Inc. - request for reconsideration

DIGEST:

Although [GAO will not review determination to enter into contract under section 8(a) of Small Business Act absent fraud or bad faith] on part of procuring officials, GAO will consider whether procuring officials have followed relevant rules and regulations in arriving at such determination.

In our decision in Delphi Industries Inc., B-193212, November 9, 1978, 78-2 CPD 336, we dismissed a protest by Delphi Industries Inc. (Delphi), against the proposed noncompetitive award by the Department of the Air Force under AGC00035 section 8(a) of the Small Business Act, 15 U.S.C. § 637(a)(1) (1976), of a contract for reusable metal containers. Delphi had argued that setting aside the requirement for minority businesses under the statute would result in excessive cost to the Government and would cause a major economic hardship to Delphi. We stated our position that, in view of the powers afforded to the SBA and the discretion vested in the contracting officer by section 8(a) of the act, we do not review a determination to enter into an 8(a) contract unless the protester shows fraud on the part of procuring officials or such willful disregard of the facts as to necessarily imply bad faith. We found that Delphi had made no such showing. We also pointed out that the fact that the section 8(a) program operates to the monetary detriment of a particular nonminority firm does not affect the validity of the program or a specific set-aside.

Delphi has requested that we reconsider our November 9 decision. The basis for the request is Delphi's view that the following two Small Business Administration (SBA) guidelines for selecting contracts for the 8(a) program, published in the SBA's Standard Operating Procedures (SOP), must have been violated by the contracting parties: ABC00002

ABC

~~003382~~

"Contracting Opportunities Not Acceptable for 8(a) Contracting. Because of SBA's obligation to protect the interests of all small business, contracting opportunities will not be accepted by SBA for 8(a) contracting where one or more of the following circumstances exists:

"(1) The percentage of procurements considered for 8(a) contracting in the judgment of SBA is excessive in relation to the total purchases of like or similar products, or services procured by the Federal Government.

* * * * *

"(4) It is determined by the SBA that a small business concern may suffer a major hardship if the procurement is removed from competition, thereby denying the concern, otherwise historically dependent on such recurring procurement(s), the opportunity to compete. In establishing this determination, the affected firm should be a regular producer receiving one or more awards within the past year, and be dependent upon such recurring award(s) for a significant part of its overall sales."

Delphi argues that had those guidelines been considered in the present case, the contract would not have been selected for the 8(a) program. Delphi urges that failure to follow those SOP provisions in effect constitutes a willful disregard

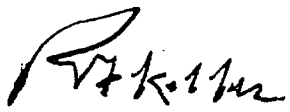
of the facts by the contracting agencies to bring the matter within the scope of our limited review as stated in our November 9 decision. In addition, in view of guideline (4) Delphi disputes our advice that the validity of an 8(a) contract is not affected by the fact that a nonminority firm is adversely affected thereby.

We agree with Delphi to the extent that a review by our Office whether relevant rules and regulations have been followed by the SBA and the Air Force in this type of situation is appropriate. See Chemical Technology, Inc., B-190165, January 18, 1978, 78-1 CPD 46. However, we have been advised by the SBA that before selecting this procurement for the 8(a) program the impact of such action was in fact analyzed in view of the cited SOP considerations. We have also been informally advised by the Air Force that the limited review by the contracting officer contemplated by Defense Acquisition Regulation (DAR) § 1-705.5 (1976 ed.) of the propriety of contracting with the SBA under the 8(a) program before exercising his discretion in that regard was in fact performed in the present case. See in this connection Technical Services Corporation, B-185473, May 6, 1976, 76-1 CPD 304.

To the extent that Delphi's protest and request for reconsideration reflect its disagreement with the results of the SBA's impact analysis and the contracting officer's review under DAR § 1-705.5 (1976 ed.), that is a matter for consideration by those parties, and is not sufficient reason for us to question the 8(a) contract. Maintenance Incorporated, B-193237, November 30, 1978, 78-2 CPD 379; Maritime Maintenance & Labor Supplies, Inc., B-189352, July 13, 1977, 77-2 CPD 22; Automation Information Data Systems, Inc., B-185055, June 15, 1976, 76-1 CPD 377.

Regarding the effect of an 8(a) contract on nonminority firms, the courts in recognizing the validity of the 8(a) program have specifically noted that it necessarily operates to the disadvantage of other small business concerns to some extent. Ray Baillie Trash Hauling, Inc. v. Kleppe, 477 F.2d 696 (5th Cir. 1973). We do recognize that as a matter of policy the SBA may find a procurement unsuitable for the 8(a) program based on SOP guideline (4). In this connection, the SOP was promulgated by the SBA as a further definition of the criteria for the selection of 8(a) contracts set out at section 124.8-2(b) of title 13 of the Code of Federal Regulations (1978). However, as we indicated above, this Office will not review SBA's determination under the SOP.

The request for reconsideration is denied.



Deputy Comptroller General
of the United States