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DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**

WASHINGTON, D.C. 20548

FILE: B-204083

DATE: August 13, 1981

MATTER OF: Rowe Contracting Service, Inc.

DIGEST:

Determination whether to set aside procurement under section 8(a) of Small Business Act is matter for contracting agency and Small Business Administration, and will not be reviewed by GAO absent showing of fraud or bad faith on part of Government officials.

Rowe Contracting Service, Inc., protests the Army Corps of Engineers and the Small Business Administration (SBA) decisions to set aside certain custodial service contracts under the SBA's 8(a) program. Rowe, the incumbent small business contractor in many of these cases, alleges that these decisions were made in bad faith and not in compliance with SBA Standard Operating Procedures. For the following reasons, these matters are not reviewable by our Office.

Section 8(a) of the Small Business Act, 15 U.S.C. § 637(a) (Supp. III 1979), authorizes 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 the contract to the SBA upon such terms and conditions as may be agreed upon by the procuring agency and SBA. In light of this broad discretion, we do not review agency determinations to set aside procurements under section 8(a) unless there is a showing of bad faith or fraud on the part of Government officials. See Maintenance, Inc., B-199854, August 27, 1980, 80-2 CPD 155.

Rowe alleges the following three reasons for its belief that SBA has acted in bad faith:

- 1) The SBA has awarded 8(a) contracts to socially and economically disadvantaged small businesses which are larger than incumbent non-8(a) small business contractors.

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2) Only two local (New Orleans, Louisiana) contractors have received 8(a) contracts of any consequence in the custodial service field.

3) Although SBA conducted impact studies on the 8(a) program's removal of contracts from the small business market place, these studies were unreasonable and lacked depth.

Assuming, for the sake of argument, that all of the above circumstances exist, we do not believe that they individually or cumulatively constitute a showing of bad faith. With regard to the first reason, the fact that an 8(a) small business is larger than a non-8(a) small business does not prohibit the SBA, in its discretion, from awarding a contract to the larger 8(a) small business. The qualifying factor is not the relative sizes of small businesses, but rather the socially and economically disadvantaged status of one of the small businesses.

Regarding the last two reasons advanced by Rowe as indications of bad faith, the number of New Orleans area contractors receiving 8(a) custodial contracts and the depth of impact studies conducted by SBA do not indicate bad faith on the part of SBA or the contracting agency. (However, in a recent Report to the Congress, our Office recommended that the SBA revise its Standard Operating Procedures to require more in-depth impact studies on the effect of 8(a) program contracting on non-8(a) small businesses. CED-81-55, April 8, 1981.)

The Court of Claims has held that in order to support a finding of bad faith the record must show "well-nigh irrefragable proof" that the agency has a specific and malicious intent to injure the party alleging bad faith. Kalvar Corporation, Inc. v. United States. 543 F. 2d 1298, 1301 (Ct. Cl. 1976). We do not believe that Rowe has advanced any irrefutable proof of the agencies' specific and malicious intent to injure Rowe.

The protest is dismissed.

F. H. Barclay, Jr.
for Harry R. Van Cleve
Acting General Counsel