

# DECISION



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

FILE: B-185473

DATE: May 6, 1976

MATTER OF: Technical Services Corporation

## DIGEST:

Protest against prospective award of contract to Small Business Administration (SBA) under section 8(a) of Small Business Act, on basis that procuring activity failed to properly evaluate SBA request for 8(a) award and therefore failed to exercise "meaningful" discretion as required by 15 U.S.C. 637(a), is without merit since record indicates the evaluation required by ASPR 1-705.5(c)(1)(B) was essentially performed and therefore was not devoid of legal sufficiency notwithstanding any possible procedural aberrations from the strict literal instructions of the ASPR.

The subject protest has been filed against the prospective award by the Naval Regional Procurement Office (NRPO), Philadelphia, Pennsylvania, of a contract to the Small Business Administration (SBA) to be subsequently subcontracted to a minority business enterprise under the section 8(a) provisions of the Small Business Act (15 U.S.C. 637(a)(1970 ed.)).

The essential contention of the protest is that the contracting agency failed to make an independent evaluation, prior to award, of the potential negative impact of the prospective award upon the protester, from whom the Navy is currently receiving the services at issue on an interim basis through an indefinite quantities contract which the protester holds with the Army. It is alleged that the failure to make this impact determination, as set out in Armed Services Procurement Regulation (ASPR) § 1-705(c)(1)(B)(vi), as well as the failure to otherwise perform the evaluation set forth in ASPR § 1-705.5(c)(1)(B), constitutes an abdication, and therefore an abuse, of the discretion which the contracting officer is required by 15 U.S.C. § 637(a) to exercise in setting aside a requirement for subcontracting under the 8(a) program. It is further charged that the protester was improperly directed to make available its personnel currently employed under the Army contract to be interviewed for potential employment by the prospective recipient of the 8(a) subcontract.

Essential to an understanding of the protest is a brief history of the procurement requirement at issue, the protester's relation thereto, and the steps undertaken by the Navy preparatory to the anticipated award to the SBA under the 8(a) program.

Solicitation N00140-76-Q-0387 was issued November 12, 1975, by NRPO for an indefinite quantity labor-hour type contract for technical engineering services with delivery as required for a 12-month period beginning with the date of award to SBA. The contract has yet to be awarded.

According to the record, the Navy's need was first identified in October 1974, but relief was then precluded by funding ceiling controls. It was determined in the Spring of 1975 that long-term relief necessitated the procurement of a suitable contract specifically tailored to the Navy's requirements. In the meantime, to fulfill its interim needs, it was determined that temporary relief had to be obtained under an existing Department of Defense contract pending the development and award of the contested Navy solicitation. Inasmuch as several basic ordering agreements and service contracts were in existence for services similar to the type required, the Navy conducted a cost comparison among them and determined that an existing contract between the Army and the protester (DAAK02-74-D-0340), awarded June 27, 1974, could be utilized for interim relief.

The SBA advises that the prospective 8(a) subcontractor, Unified Industries (UI), was initially determined eligible for participation in the 8(a) program in 1971, and that on the basis of an updated business plan submitted by UI in April 1975, it was determined by SBA that UI continued to qualify for the 8(a) program. By letter of September 26, 1975, the Director of SBA's Office of Business Development advised the cognizant official for Small Business and Economic Utilization in the Office of the Assistant Secretary of the Navy (Installations and Logistics) that in support of UI's most recent business plan, the SBA desired to enter into a contract for the Navy's requirement pursuant to ASPR § 1-705.5. The letter stated that all information set out in the business plan indicated that the company was well qualified to perform the subject services. By letter of September 29, 1975, the Navy's Special Assistant for Small Business and Economic Utilization replied that he concurred with the request.

Counsel for the protester charges that the Navy failed to exercise the discretion called for in 15 U.S.C. 637(a), and failed to perform the evaluation of SBA's request specified in

ASPR § 1-705.5(c)(1)(B), but merely "rubber-stamped" the request without considering it in light of the seven criteria listed in the referenced ASPR section, which defines the consideration which shall be given in determining the extent to which the departments can support an SBA request. Most of these criteria are directed to the question whether the magnitude and complexity of the Department's needs are within the capability of the proposed 8(a) contractor, and the protester has not suggested that UI is unsuitable under these criteria. However, ASPR § 1-705.5(c)(1)(B)(vi) requires consideration of the impact if the services were "procured historically by small business or labor surplus area set-aside." In this regard, the Navy is charged with failing to take into account that the abatement of Navy orders under the protester's Army contract would result in a significant loss of future sales and would impose a major hardship upon the protester, an apparent small business.

With regard to the evaluation required by ASPR § 1-705.5(c)(1)(B), the Navy's Special Assistant for Small Business and Economic Utilization states that upon receipt on September 26, 1975, of SBA's written request of the same date, he telephoned the Small Business Specialist at the NRPO, Philadelphia to determine whether, in light of the factors listed in ASPR § 1-705.5(c)(1)(B), it would be contrary to the Navy's interest to set the requirement aside for 8(a) subcontracting. Based on that discussion, he concluded there were no known significant factors which militated against the set-aside, and therefore he concurred in the SBA request.

With regard to the impact of an 8(a) award, NRPO indicates the following information has been developed:

- (1) the services covered by the prospective 8(a) award are not currently under any contract between the Government and the protester.
- (2) "Similar" services are being performed for the Navy by the protester pursuant to task orders issued against the protester's Army contract.

- (3) The Army contract was selected by the Navy for task orders on the basis of a price comparison of existing contracts, and such a selection is to be distinguished from the selection of a contractor on the basis of technical proposals in response to a solicitation clearly describing the services and establishing appropriate evaluation factors.
- (4) Even if the Navy requirement is not let through the 8(a) procedures, it will be procured under competitive procedures and, inasmuch as there are several known contractors performing similar services under other contracts, it is at best speculative whether the protester would be the successful offeror under a competitive procurement.
- (5) The protester first received the Army contract on June 27, 1974, and this contract was to be re-procured on a competitive basis and not set-aside under the 8(a) program.
- (6) The award of the Navy requirement to SBA would not result in the reduction, revision, or change to any existing task order to the protester under the Army contract.

In view thereof, and of the determination by the Navy that the services contemplated by its solicitation were never covered by any previous solicitation but were merely within the general scope of the work of the protester's Army contract and several other existing contracts for indefinite quantities of technical services, the Navy concluded in the February 5 memo that the particular services covered by the SBA request were not "historically produced by small business or labor surplus set-aside" and therefore (implicitly) the impact consideration contemplated by ASPR § 1-705.5(c)(1)(B)(vi) was not applicable to the circumstances of the proposed procurement.

With regard to counsel's argument that in submitting its request of September 26, 1975, to the Navy for consideration for possible award, because the entirety of the information called for in ASPR § 1-705.5(c)(1)(A) was not transmitted, the Navy was without a factual basis to exercise its discretion, and counsel's contention that the evaluation called for in ASPR § 1-705.5(c)(1)(B) was not performed, but rather the SBA request was merely "rubber-stamped," attention is directed to our decision Kings Point Manufacturing Company, Inc., April 29, 1975, 54 Comp. Gen. 913, 75-1 CPD 264.

That case involved, inter alia, a similar contention that the contracting agency could not have properly exercised its discretion because of a failure to comply with the letter of ASPR § 1-705.5(c)(1)(A) and (B). There the information set forth in ASPR § 1-705.5(c)(1)(A) was not furnished by SBA to the Air Force, and the evaluation contemplated by section 1-705.5(c)(1)(B) was performed through "informal contacts" between the Air Force and SBA.

We concluded that the validity of the ensuing 8(a) award would not be affected merely because the procedures followed may not have been precisely those set forth in ASPR § 1-705.5. We held that the cited section does not, for the most part, impose regulatory requirements on the DOD activity but rather sets forth, primarily as a matter of information and guidance, how SBA and the military departments will initiate section 8(a) negotiations. Moreover, to the extent that ASPR § 1-705.5(c)(1)(B) imposes a requirement for evaluation of SBA's request for commitment, we held that even though the Air Force was not provided by SBA with the information listed in section 1-705.5(c)(1)(A), it in effect complied with the intent of the evaluation requirement, when, "in accordance with the standards set forth in ASPR § 1-705.5(c)(1)(B)," it performed a "limited review" to determine that its needs could be satisfied by means of a section 8(a) award.

In the instant case, the SBA letter of September 26, 1975, provided the Navy with some, if not all, of the information set forth in ASPR § 1-705.5(c)(1)(A). The record states (as noted previously) that upon receipt thereof, the Navy's Special Assistant for Small Business conducted telephone discussions with the Small Business Specialist at NRPO to determine whether in the light of the factors listed in ASPR § 1-705.5(c)(1)(B), it would be contrary to the Navy's interests to set the procurement aside.

In view thereof, we are satisfied that at least the "limited review" contemplated in the cited decision was performed, and there was similar compliance with the intent of the ASPR evaluation requirement, albeit in a likewise informal manner. Contrary to the contention of counsel, ASPR § 1-705.5(c)(1)(B) does not require that the evaluation be reduced to writing with documented findings.

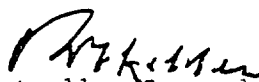
While counsel disagrees with our holding in Kings Point that ASPR § 1-705.5 does not, for the most part, impose regulatory requirements on military agencies, we have carefully reviewed that decision and find no basis upon which to modify the conclusions reached therein.

Concerning the matter of the impact determination referenced in ASPR § 1-705.5(c)(1)(B)(vi), it has been established that the Navy's requirement under the subject solicitation is an initial, distinct requirement that has never been procured at all under prior Navy contracts, let alone "historically by small business or labor surplus area set-aside " within the meaning of ASPR § 1-705.5 (c)(1)(B)(vi). In view thereof, it is evident that an impact consideration was not required in the first instance, and therefore the protester cannot be considered to have been prejudiced by its initial omission.

We have stated that under 15 U.S.C. 637 (a), the determination to initiate a set-aside under the section 8(a) program is within the sound discretion of the SBA and the contracting agency. Sanitor Building Maintenance, B-182765, April 8, 1975, 75-1 CPD 213; Eastern Tunneling Corporation, B-183613, October 9, 1975, 75-2 CPD 218; U.S. Eagle, Inc., B-184958, January 27, 1976, 76-1 CPD 50. In this regard, the protester has cited Sunshine Peninsula, Inc. v. Fennell and Associates, Inc. (M.D. Fla., Sept. 4, 1975) "for the well-established principle that a procurement agency is bound by its own regulations when it is engaged in procurement functions; that is, that the Navy is obliged to adhere to ASPR 1-705.5 (c)(1)(B) when presented with Section 8(a) requests from SBA." In view of our conclusion that the evaluation required by ASPR § 1-705.5(c)(1)(B) was essentially performed, we do not believe a discussion of Sunshine Peninsula is necessary, and we will not interpose legal objection to an award by Navy to SBA in this instance.

With regard to the allegation that the protester was directed by the Navy to make available its personnel for pre-employment interviews with the potential 8(a) subcontractor, the Navy has replied that some of the protester's employees did meet with a representative of UI on November 20, 1975; however, there was no requirement imposed by the Navy upon the protester or any of its employees. Rather, the Navy is led to understand that these employees obtained the protester's permission to meet with the UI representative, and the time involved was charged to the employees and was not recompensed by either the Navy or the protester. The protester has submitted nothing in rebuttal to the Navy's account of this latter matter.

Accordingly, the protest is denied.

  
Deputy Comptroller General  
of the United States