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

B-178321

AUG 31 1973

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New York Funeral Services Company, Inc.
362 Van Brunt Street
Brooklyn, New York 11231

Attention: Mr. Richard A. Santore
President

Gentlemen:

This is in reply to your letter of June 7, 1973, and prior correspondence, protesting the proposed award of a contract for mortuary services by Fort Hamilton, New York, to the Small Business Administration (SBA) under Section 8(a) of the Small Business Act (15 U.S.C. 637(a)).

The SBA intends to subcontract all of the services under this contract to an eligible disadvantaged company pursuant to the provisions of Section 8(a) of the Act. Your protest is based on the allegation that such action would discriminate against the small business concerns which have performed the contract in the past and, secondly, that no impact study was performed prior to the determination to set aside the contract for purposes of 8(a) subcontracting. You are the present contractor under the expiring contract and desire an opportunity to compete for the pending contract.

Section 8(a) of the Small Business Act empowers SBA to enter into contracts with any Government agency having procurement powers, and the contracting officer of such agency is authorized "in his discretion" to let the contract to SBA "upon such terms and conditions" as may be agreed upon between SBA and the procuring agency. Because the statute is couched in general terms, the SBA, pursuant to the above-referenced statute, has promulgated standards and regulations to implement the 8(a) program, which regulations are contained in Title 13, Chapter 1, Part 124 of the Code of Federal Regulations. Under these regulations, the SBA has determined that concerns owned and controlled by socially or economically disadvantaged persons should be the beneficiaries of the 8(a) program in order for such firms to achieve a competitive position in the market place. 13 CFR 124.8-1(b).

As regards your contention that the action taken by SBA will discriminate against other small business firms, your attention is directed to the holding of the United States Court of Appeals, Fifth

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Circuit, on April 18, 1973, sustaining the legality of the 8(a) program. (Ray Baillie Trash Hauling Inc. v. Klappe, No. 72-1163). In that case, the Court of Appeals hold that section 8(a) "clearly constitutes specific authority to dispense with competition." Moreover, our Office held in B-174293, February 16, 1973, that the determination to initiate a set-aside under Section 8(a) is a matter within the jurisdiction of the SBA and the contracting agency under the statute. Therefore, in the circumstances, our Office is unable to object to the present determination.

Secondly, you contend that no impact statement was prepared for the instant solicitation and furthermore, the report dated June 1, 1973, from SBA concerning your protest makes no reference to the financial position of the eligible 8(a) subcontractor while discussing your firm's financial state in terms of sales instead of net profit.

Contrary to your contention, SBA did prepare an impact statement for the subject contract. Further, the SBA has furnished our Office the financial statement of the 8(a) subcontractor. However, our Office is precluded from disclosing the contents to you under Comptroller General's Order No. 1.3, January 4, 1968, which exempts from disclosure commercial or financial information which is privileged or confidential. The order states that this exemption pertains to information which would not customarily be made public by the person from whom it was obtained by the Government. The business plan and financial information of the subcontractor is the type of information encompassed by the exemption and therefore not available for release.

With respect to the SBA reliance upon sales instead of net profit in determining whether small business concerns are dependent upon recurring Government contracts, the SBA regulation in effect at the time the impact statement was prepared provided that procurements will not be selected under the 8(a) program "where small business concerns are dependent in whole or in significant part on recurring Government contracts." SBA decided to use sales rather than profit as the measuring standard for this determination. In Allen N. Campbell Co. v. Lloyd Wood Construction Co., 446 F. 2d 261, 265 (1971), the Court stated:

> "* * * The specific determination of which businesses are to be the beneficiaries of the /Small Business/ Act is thus primarily committed by the legislative branch to the administrative agency.
>
> "Of course, once having exercised this broad rulemaking authority, the agency cannot thereafter arbitrarily construe or apply its rules in a manner inconsistent with fundamental procedural fairness. Greene v. McElroy, 360 U. S. 474, 507-

308, 79 S.Ct. 1400,____, 3 L.Ed.2d 1377, 1397. But it is an axiom of judicial review that an administrative agency's interpretation of its own regulations must be accorded the greatest deference. Udall v. Tallman, 1965, 380 U.S. 1, 16-17, 85 S.Ct. 792, reh. denied, 380 U.S. 999, 85 S.Ct. 1325, 14 L.Ed.2d 283; ____, 13 L.Ed.2d 616, 625, Bowles v. Seminole Rock & Sand Co., 1945, 325 U.S. 410, 413-14, 65 S.Ct. 1215,____, 89 L.Ed. 1700, 1702. When, as here, that interpretation obviously incorporates quasi-Technical administrative expertise and a familiarity with the situation acquired by long experience with the intricacies inherent in a comprehensive regulatory scheme, judges should be particularly reluctant to substitute their personal assessment of the meaning of a regulation for the considered judgment of the agency. If the agency interpretation is merely one of several reasonable alternatives, it must stand even though it may not appear as reasonable as some other."

As the quoted portion of the Campbell case holds, where the agency interpretation is merely one of several reasonable alternatives, it must stand even though it may not appear as reasonable as some other. Therefore, our Office will raise no objection to the use of sales as the selection criteria. Moreover, we note that effective May 25, 1973, the above-cited regulation was modified to specifically include sales as the standard:

> "* * * and the extent to which other small concerns have historically been dependant upon the contract in question for a significant percentage of their sales." 13 CFR 124.6-2(b).

For the foregoing reasons, your protest is denied.

Sincerely yours,

Paul G. Dembling
For the Comptroller General
of the United States