

Mr. Cohen



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

B-202268

September 24, 1981

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The Honorable Edward R. Roybal
House of Representatives

Dear Mr. Roybal:

We refer to your letter dated February 11, 1981, concerning contract DACW57-80-C-0030 awarded by the Corps of Engineers. You suggest that the contract fails to meet the requirements of section 8(d) of the Small Business Act as amended by section 211 of Pub. L. No. 95-507, October 24, 1978, 92 Stat. 1757, 15 U.S.C. § 637(d) (Supp. III 1979), which states the Federal Government's policy that small and small disadvantaged business concerns will have the maximum practicable opportunity to participate in the performance of Federal contracts. You also ask our opinion on whether the subcontracting provisions set out in section 8(d) are mandatory or voluntary, i.e., even if subcontracting possibilities exist, does the prime contractor still have the discretion not to subcontract.

We believe the law does not require a prime contractor to subcontract and that the contract in question does not violate section 8(d).

To implement the policy expressed in section 8(d), the statute requires that before the award of either an advertised or negotiated contract which may exceed \$1,000,000 in the case of construction of a public facility or \$500,000 in other cases, and which "offers subcontracting possibilities," the prospective awardee must submit a subcontracting plan as described in section 8(d) (6). The subcontracting plan essentially is to provide the maximum practicable subcontracting opportunity for small and small disadvantaged business. When approved by the

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contracting officer, the plan becomes a material part of the contract, and the contractor's failure to comply in good faith with it is a breach of contract. Section 8(d)(3) prescribes a clause for inclusion in contracts subject to section 8(d). The clause states the contractor's agreement to carry out the Federal policy "in the awarding of subcontracts to the fullest extent consistent with the efficient performance of this contract."

The statute itself is not clear on the issue of whether a prime contractor must subcontract. We recognize that the requirement in section 8(d)(6) for a subcontracting plan to be included in a contract as a material element might be viewed as an indication that subcontracting is required. On the other hand, the same section of the statute requires a prospective contractor's subcontracting plan to describe

"* * * the efforts the offeror or bidder will take to assure that small business concerns and small business concerns owned and controlled by the socially and economically disadvantaged individuals will have an equitable opportunity to compete for subcontracts."

This provision suggests that Congress intended to insure that small and small disadvantaged businesses have a fair chance to compete for subcontracts when subcontracting opportunities would be made available by the prime contractor, not that firms have a right to subcontracts notwithstanding the prime contractor's intention not to subcontract.

We also find the legislative history inconclusive. The history generally discusses the fact of the requirement for a subcontracting plan as a material part of the contract. We do note, however, that the Senate Committee on Governmental Affairs, in considering the bill that resulted in Public Law No. 95-507 (H.R. 11318), commented that the clause in section 8(d)(3) which states the Federal Government's policy, and is to be included in contracts subject to section 8(d), "is a 'best efforts' clause, which requires the contractor to adhere to federal policy if it awards subcontracts * * *" (Emphasis added.) We think the words "in the awarding of subcontracts" as prescribed in section 8(d)(3), when read

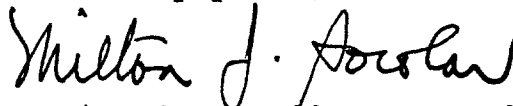
in light of the Committee's comment, suggest that the contractor must plan for use of small business subcontractors only if the firm is awarding subcontracts.

Compelling a prime contractor to subcontract for portions of the work required by a contract would drastically change the prime contractor's traditional discretion in that respect. We think it is reasonable to believe that if Congress had intended to compel subcontracting, it would have been more explicit in indicating that intention. Accordingly, we do not believe that the statute should be read as requiring subcontracting by a prime contractor with the Federal Government.

We note here that the Office of Federal Procurement Policy, in its implementing instructions under the statute, explains that the "percentage goals" for use of small and small disadvantaged subcontractors that are required to be in the subcontracting plan are to be "expressed in terms of percentage of the total planned subcontracting dollars." Policy Letter 80-2, 44 Fed. Reg. 31028, 31029 (May 9, 1980). We think the use of the word "planned" recognizes that the contractor need subcontract with small and small disadvantaged business only if the firm plans to subcontract.

For your information, we point out that in a negotiated procurement the statute gives the contracting activity the authority to determine in the first instance whether a proposed plan is satisfactory so that the firm can be awarded the contract. In contrast, in an advertised procurement a low bidder may not be deprived of an award even if it submits an unsatisfactory plan; the plan submitted, however, still must contain the information prescribed in section 8(d)(6), i.e., percentage goals for the use of small and small disadvantaged business as subcontractors, etc. A copy of our letter to the Department of Agriculture, B-199899, October 21, 1980, which explains this further, is enclosed.

Sincerely yours,



Acting Comptroller General
of the United States

Enclosures



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

B-202268

September 24, 1981

Lt. General J. K. Bratton
Chief of Engineers
Department of the Army
Washington, D.C. 20314

Dear General Bratton:

We refer to our letter of March 3, 1981, requesting a report in response to a request by a Member of Congress that we review contract DACW57-80-C-0030 with respect to whether it complies with the small and small disadvantaged business subcontracting provisions of section 8(d) of the Small Business Act, as amended by section 211 of Pub. L. No. 95-507, October 24, 1978, 92 Stat. 1757, 15 U.S.C. § 637(d) (Supp. III 1979). Section 8(d) states the Federal Government's policy that small and small disadvantaged business concerns will have the maximum practicable opportunity to participate in the performance of Federal contracts.

The April 17 report from your Chief Counsel indicated that the prospective contractor for the auditing services involved evidently does not intend to subcontract any of the work, but since subcontracting possibilities do exist the firm submitted to your agency a plan to use small business concerns as subcontractors. The report also stated your agency's position that section 8(d) does not require a prime contractor to subcontract, but rather only requires that if the prime contractor intends to do so the firm implement its small business subcontracting plan. We are advising the Member of Congress that we agree with that view.

Sincerely yours,

A handwritten signature in cursive script that reads "Milton J. Arosow".

Acting Comptroller General
of the United States

DIGEST

Under section 8(d) of Small Business Act, 15 U.S.C. § 637(d) (Supp. III 1979), if contract exceeds specified dollar amount and offers subcontracting possibilities prospective prime contractor must submit plan to provide maximum practicable subcontracting opportunity for small and small disadvantaged business. Statute does not require prime contractor to subcontract, but only requires that if the prime contractor intends to do so it implement the plan.