**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Comint Systems Corporation

File: B-274853; B-274853.2

Date: January 8, 1997

Philip F. Hudock, Esq., for the protester.
Andrew N. Cook, Esq., and Joel S. Rubinstein, Esq., Bell, Boyd & Lloyd, for Digital Support Corporation, an intervenor.
Kenneth A. Lechter, Esq., Department of Commerce, for the agency.
Denise A. Benjamin, Esq., and David R. Kohler, Esq., for the Small Business Administration.
Tania L. Calhoun, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest is sustained where contracting agency's letter offering requirement to Small Business Administration (SBA) for acceptance into 8(a) program failed to comply with the regulatory requirement to provide SBA with complete and accurate information regarding the proposed offering, to the protester's prejudice.

2. Protest is sustained where contracting agency's letter offering requirement to Small Business Administration for acceptance into 8(a) program supported its request for a sole source award to a firm other than protester by estimating the anticipated award price to be below the threshold above which a competitive acquisition must generally be conducted; this estimated award price was unreasonably calculated; and a reasonable calculation yields an estimated award price in excess of the competitive acquisition threshold.

DECISION

Comint Systems Corporation (Comint) protests the decision of the Department of Commerce, Patent and Trademark Office (PTO), and the Small Business Administration (SBA) to place the work encompassed by its microcomputer hardware maintenance services contract with PTO under SBA's section 8(a) program for award of a sole source contract to Digital Support Corporation. Comint argues that PTO violated the applicable regulations in offering these requirements to SBA.

We sustain the protests.

PTO has a long-term strategy to consolidate existing contracts and establish fewer sources of supply for microcomputer-based office automation and support services. Consistent with that strategy, the agency's February 1996 requirements initiative set forth a plan to establish a consolidated interim contract for hardware and software maintenance and a consolidated interim contract for office automation support services. These interim contracts would be followed by a consolidated multi-year contract for all such services. The interim contract for hardware and software maintenance is at issue here.

At the time the requirements initiative was finalized, Digital was performing its third and final year of a section 8(a) contract with PTO for the provision of microcomputer maintenance services, as well as related software maintenance services. The 1993 contract stated that there were approximately 4,700 combined units of microcomputer hardware installed throughout PTO, but estimated that more than 7,650 units might be installed by the end of the contract's term. PTO states that Digital was maintaining approximately 10,000 units of equipment in its final contract year, at a price of approximately $1.7 million.

At this same time, Comint, a section 8(a) firm, was providing PTO with hardware maintenance services under the first year of a non-section 8(a) contract.[1] PTO states that Comint's contract required the firm to maintain 70 units of hardware at a price of approximately $64,000.

Each contract was administered by a separate office within PTO. Pursuant to the requirements initiative, the contracting officers' technical representatives for each contract discussed the possible consolidation of their requirements. To arrive at the requirement which was eventually offered to SBA, the contracting officer for Digital's contract--who also served as the contracting officer for this interim contract--added the requirements encompassed by Comint's contract to those encompassed by Digital's contract. The consolidated contract also included maintenance requirements necessitated by PTO's acquisition of additional equipment, as well as requirements that had been previously performed by agency employees.

By letter dated April 2, the contracting officer offered the consolidated requirement to the Small Business Administration (SBA) under the section 8(a) program. The letter described the requirement as being for hardware and software maintenance services, with a term of 1 year, and stated that it was a "follow-on" to Digital's prior contract. The letter valued the acquisition at $2.9 million and recommended Digital,

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[1]Comint had performed this contract as a subcontractor to a large corporation until December 1995, when the prime contractor assigned the contract to PTO.

as the incumbent, for a noncompetitive sole source acquisition.[2] The letter advised that no other 8(a) concerns were afforded an opportunity to review the requirement "since this [was] a follow-on." Neither Comint nor its portion of the requirement was mentioned. By letter dated April 24, SBA accepted the requirement, stating that a determination had been made that acceptance of the procurement would cause no adverse impact on another small business concern.

SBA signed the interim contract on September 11. The contract was scheduled to run for one 3-month base period, with up to three 3-month option periods, at a total price of $2,932,480. After Comint was told that the option under its contract would not be exercised, it filed this protest, arguing that PTO violated the regulations governing section 8(a) acquisitions by failing to provide SBA with complete and accurate information to make an informed decision regarding this section 8(a) acquisition. In a supplemental protest, Comint challenges the agency's $2.9 million estimated award price as unreasonable.

Section 8(a) of the Small Business Act authorizes SBA to contract with government agencies and to arrange for performance of such contracts by awarding subcontracts to socially and economically disadvantaged small businesses. 15 U.S.C. § 637(a) (1994). The Act affords SBA and contracting agencies broad discretion in selecting procurements for the 8(a) program; we will not consider a protest challenging a decision to procure under the 8(a) program absent a showing of possible fraud or bad faith on the part of government officials or that specific laws or regulations have been violated. Grace Indus., Inc., B-274378, Nov. 8, 1996, 96-2 CPD ¶178 ; Korean Maintenance Co., B-243957, Sept. 16, 1991, 91-2 CPD ¶ 246. Here, the issue raised in Comint's initial protest is whether PTO complied with the requirement in 13 C.F.R. § 124.308(c) to furnish SBA with complete and accurate information regarding the proposed offering, and, consequently, whether SBA had complete and accurate information upon which to base its decisions regarding this section 8(a) acquisition.

In making decisions regarding 8(a) acquisitions, SBA is entitled to rely on the contracting officer's representations regarding the offered requirement; in this regard, SBA regulations place the primary responsibility on the procuring agency to submit all relevant information necessary to SBA's decision-making process. See 13 C.F.R. § 124.308; Korean Maintenance Co., supra. Here, SBA reports, and we concur, that PTO's offering letter did not provide complete and accurate information as required under 13 C.F.R. § 124.308(c).

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[2]As discussed further below, SBA may accept an acquisition such as this one as a sole source requirement where, among other things, the anticipated award price is below $3 million. 13 C.F.R. § 124.311(a) (1996).

That section unambiguously mandates that an 8(a) offering letter include, among other things, the acquisition history, if any, of the offered requirement; the names and addresses of any small business contractors which have performed on the offered requirement during the previous 24 months; the identification of any particular 8(a) concern designated for consideration, including a brief justification, such as "[t]he acquisition is a follow-on or renewal contract and the nominated concern is the incumbent"; and the identification of all 8(a) concerns which have expressed an interest in being considered for the acquisition. 13 C.F.R. § 124.308(c)(9), (10), (12)(ii), (14).

We agree with SBA that PTO's offering letter fell short of providing this required information. As discussed above, the offered requirement included the requirements set forth in Digital's prior contract; the requirements set forth in Comint's prior contract; the requirements necessitated by the acquisition of additional equipment; and the requirements which had previously been performed by agency employees. PTO clearly did not apprise SBA of this history, but simply stated that the offered requirement was a "follow-on" to Digital's section 8(a) contract. This inaccuracy was repeated in both PTO's recommendation that a sole source contract be awarded to Digital as the "incumbent" on the "follow-on" contract, and in its statement that no other 8(a) firms were given the opportunity to review the requirement "since it was a follow-on." In addition, there is no question but that PTO improperly failed to give SBA the name and address of Comint, which was undisputedly a small business contractor which had performed on this requirement during the previous 24 months.

PTO states that it has "no specific comments" on SBA's conclusions, but blames its failure to provide the required information on a lack of communication between its two contracting offices.[3] However, PTO's internal shortcomings do not mitigate this regulatory violation; as SBA points out, its regulations explicitly charge PTO with responsibility for providing SBA with "any" acquisition history of the offered requirement and the names and addresses of "any" small business that performed on the requirement during the period in question. While the contracting officer states that he did not know Comint was providing support services similar to those being provided by Digital, he had the duty to ascertain and to fully and accurately disclose to SBA all of the specified information concerning the offered requirement. Under

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[3]While Comint alleges that bad faith was the "only motive" for the incomplete information that PTO provided to SBA, there is no evidence that this is the case. Government officials are presumed to act in good faith; we will not attribute unfair prejudicial motives to such officials on the basis of inference or supposition. Grace Indus., Inc., B-261020, July 10, 1995, 95-2 CPD ¶ 9.

the circumstances, we conclude that PTO's offering letter did not comply with the requirements of 13 C.F.R. § 124.308(c). PTO's failure to provide SBA with the complete history of this acquisition was, at a minimum, misleading, and effectively deprived SBA of the opportunity to make a fully informed decision with respect to this section 8(a) acquisition. See Korean Maintenance Co., supra.

The question remaining, then, is whether Comint was prejudiced by PTO's regulatory violation. Prejudice is an essential element of a viable protest, and we will not sustain a protest where no reasonable possibility of prejudice is evident from the record. Lithos Restoration, Ltd., 71 Comp. Gen. 367 (1992), 92-1 CPD ¶ 379.

With respect to prejudice, Comint contends that if SBA had known the actual acquisition history here, it would have had to determine whether its acceptance of the requirement would have an adverse impact on Comint pursuant to 13 C.F.R. § 124.309(c).[4] As relevant here, this provision states that:

> "SBA will not accept for 8(a) award proposed procurements not previously in the 8(a) program if . . .
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> . . . . .
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> "(c) Adverse impact. SBA has made a written determination that acceptance of the procurement for 8(a) award would have an adverse impact on other small business programs or on an individual small business, whether or not the affected small business is in the 8(a) program. The adverse impact concept is designed to protect small business concerns which are performing [g]overnment contracts awarded outside the 8(a) program."

As an initial matter, PTO and Digital have argued that since Digital's contract was previously in the 8(a) program, 13 C.F.R. § 124.309, which includes the adverse impact provisions, does not apply here. The parties are mistaken. Although this regulation does not apply to requirements previously accepted for the 8(a) program where the requirements are currently being performed by 8(a) firms within the 8(a)

[4]As for Comint's argument that PTO was required to give SBA the names of all of its hardware maintenance contractors in connection with this acquisition, the requirements of 13 C.F.R. § 124.308(c) are specific to small business concerns which have performed the "offered requirement," not all such requirements.

program, see Information Dynamics, Inc., B-239893; B-239894, Oct. 1, 1990, 90-2 CPD ¶ 262, that is not the case here; while Digital's portion of the requirements was currently being performed by an 8(a) firm within the 8(a) program, Comint's was not.

SBA reports, however, that an adverse impact determination would not have been made as to Comint because the concept of adverse impact does not apply to "new" requirements that previously have not been procured by the contracting agency. 13 C.F.R. § 124.309(c). SBA treats a requirement as "new" where a contract that previously was awarded to a small business is materially expanded or modified so that the ensuing requirement is not substantially similar to the original one due to the magnitude of the expansion or alteration. Id.; Support Management Servs., Inc., B-229583, Mar. 17, 1988, 88-1 CPD ¶ 277, recon. denied, B-229583.2, June 9, 1988, 88-1 CPD ¶ 547. In such a case, there is no incumbent for the expanded or modified requirement, and, thus, no small business incumbent to protect.

According to SBA, Comint cannot reasonably be viewed as a non-8(a) small business incumbent on this consolidated requirement since that requirement is materially different from the previous contract it performed. SBA states that the estimated $2.9 million consolidated acquisition here is substantially different, quantitatively and qualitatively, from the computer maintenance work that Comint performed under its prior contract. Quantitatively, Comint's prior contract involved the maintenance of only 70 units of equipment at an annual price of $64,000, and the consolidated contract involves the maintenance of approximately 8,000 units of equipment at an annual price of $2.9 million. Qualitatively, Comint's prior contract did not involve any software maintenance, and the consolidated contract contains a number of such requirements.

Comint does not challenge SBA's conclusions that the two contracts are materially different, or that it could not have been the incumbent contractor under the proposed procurement. Rather, Comint argues that the purpose of the adverse impact determination--to protect small business concerns which are performing government contracts awarded outside the 8(a) program--would be "emasculated" if there were no adverse impact determination in cases where, as here, requirements are consolidated. Comint's view notwithstanding, SBA's position is fully consistent with the applicable regulation. Considering SBA's determinative role as to whether a requirement offered to the 8(a) program is "new," see Korean Maintenance Co., supra, we have no basis to object to SBA's interpretation. The former requirement (that met by Comint's contract) clearly has been expanded, and the magnitude of the expansion on its face seems material. See Grace Indus., Inc., B-274378, supra. Under the circumstances, we have no basis to dispute SBA's view that an adverse impact determination would not have been made here. 13 C.F.R. § 124.309(c).

Digital asserts that the sole purpose for providing SBA with the name and address of Comint--and, implicitly, the acquisition history--was to obtain any necessary adverse impact determination. Since none was necessary, Digital argues that Comint was not prejudiced. However, a contracting agency is required to provide SBA with complete and accurate information regarding offered requirements so that SBA can make various informed decisions about an 8(a) acquisition, only one of which is whether to render an adverse impact determination.

PTO's offering letter required SBA to make several decisions, including whether to agree with PTO's recommendation that a sole source award be made to Digital. If SBA had known of Comint's existence and the actual acquisition history, it might have asked Comint if it had any interest in this requirement--Comint asserts that it would have answered in the affirmative. If this had occurred, SBA might have agreed to enter into the sole-source contract with Digital notwithstanding Comint's existence or interest. 13 C.F.R. § 124.308(e) (once a procurement is deemed suitable for acceptance as an 8(a) sole source contract, it will normally be accepted on behalf of the participant recommended by the procuring agency). However, SBA might also have agreed to enter into a sole source contract with Comint, or to have opted for a competitive acquisition. Since Comint would be prejudiced under both of these reasonably possible scenarios, we sustain its protest on this basis.

We also sustain Comint's protest that PTO's estimated award price of $2.9 million was unreasonable. In this regard, section 8(a) contract opportunities shall be awarded on the basis of a competition if "[t]here is a reasonable expectation that at least two eligible program participants will submit offers and that award can be made at a fair market price";[5] and "[t]he anticipated award price of the contract, including options, will exceed . . . $3,000,000 for [contracts such as the one at issue here]." 13 C.F.R. § 124.311(a).

PTO's acquisition manager for the requirements initiative established the $2.9 million estimate in early 1996. She explains that she arrived at then-current unit costs for each type of equipment to be maintained based upon figures from Digital's prior contract, historical data, telephone surveys of contractors performing this type of maintenance, price lists in General Services Administration schedules for the maintenance of similar equipment, and information about maintenance calls found in a PTO database. She also established then-current quantities of each type of equipment possessed by PTO, broken down by different offices within the agency.

[5]Given the obvious interest of both Digital and Comint in this acquisition, we have no basis to conclude that this condition would not have been met.

She placed these figures--quantities and unit costs--on a spreadsheet, multiplied the appropriate quantities by the appropriate unit costs, and arrived at a fiscal year 1996 total estimated cost of $2,802,585. The spreadsheet indicates that the agency intended to increase both the quantities and the unit costs to obtain a total cost for fiscal year 1997--the year during which most of the interim contract is scheduled to run. Specifically, notes on the spreadsheet indicate that PTO planned to increase the quantities of equipment by 5 percent to account for growth and to increase the unit costs by 4.5 percent to account for inflation. The spreadsheet shows a fiscal year 1997 total estimated cost of $2,955,388.

Both Comint's and our review of the spreadsheet showed that the agency had improperly calculated the estimated costs for fiscal year 1997.[6] Specifically, PTO had apparently failed to multiply the 1997 quantities by the 1997 inflated unit costs. Our calculations yielded a total estimated cost for fiscal year 1997 of $3,070,586, in excess of the $3 million competitive acquisition threshold. PTO confirmed that it made this arithmetical error and conceded that our calculations were correct.

Our Office will not question an agency's estimated award price unless it is not reasonably based or there is a showing that agency officials engaged in fraud or bad faith. Government Contracting Resources, B-243915, Aug. 15, 1991, 91-2 CPD ¶ 153. While Comint alleges that PTO arrived at its estimate to avoid a competitive acquisition, there is no evidence that this is the case, and we will not attribute unfair prejudicial motives to government officials on the basis of inference or supposition. Grace Indus., Inc., B-261020, supra. We conclude, however, based on the record before us, that the agency's estimated award price is not reasonably based.

PTO states that its estimate was made in good faith, and asks us to consider several factors in an apparent argument that its estimate would have been below $3 million notwithstanding its arithmetical error. We consider and reject each.

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[6]We have reviewed Comint's remaining challenges to the reasonableness of the agency's estimate and find them to be without merit. In particular, Comint's allegations concerning the discrepancies between Digital's prior contract and this one overlook the agency's methodology, which incorporated factors other than Digital's prior contract to arrive at its estimate.

First, PTO's argument that its estimate was for the "worst-case scenario" that the interim contract would run for a full year, when it will not,[7] overlooks the fact that the estimate must include the entire contract period, including options. 13 C.F.R. § 124.311(a)(2)(i). Hence, the fact that this contract will not run its entire period is irrelevant here. Second, PTO appears to argue that the correct estimate lies somewhere between the spreadsheet's estimate for fiscal year 1996 and the corrected estimate for fiscal year 1997, since the contract was awarded in the last quarter of fiscal year 1996. While this may be true, PTO has proffered neither a "correct estimate" nor any statement that such an estimate would be below the competitive acquisition threshold. Moreover, the actual number of units projected to be in PTO's inventory in fiscal year 1997 has been put into question by PTO's statements which suggest that they are significantly understated. Third, PTO's apparent assertion that a "reasonable range" in its estimate should be sufficient here is unsupported by any such language in the regulation, which sets forth a specific threshold figure. 13 C.F.R. § 124.311(a)(2). The related claim that the definitized contract price of $2.8 million supports the agency's estimate misses the point. While the regulations provide for minor miscalculations in such estimates during contract formation, 13 C.F.R. § 124.311(a)(2)(ii), in such cases, the critical decision whether to proceed with a sole source or a competitive acquisition has already been made. In contrast, a minor miscalculation in an offering letter, which is the basis for that critical decision, may mean the difference between a sole source and a competitive acquisition. Such was the case here.

PTO correctly states that its stated methodology, described above, has not been disputed. The problem here is that PTO did not properly apply its stated methodology. The agency clearly intended to arrive at a total estimate for fiscal year 1997 by applying a specified growth rate and a specified inflation rate, but inexplicably failed to properly apply them. Its failure to do so was unreasonable. See Government Contracting Resources, supra; Logics, Inc., B-237412, Feb. 13, 1990, 90-1 CPD ¶ 189. Since the regulations require a competitive acquisition where the anticipated award price exceeds $3 million; the agency's anticipated award price, if properly calculated, exceeds $3 million; and Comint states that it would have competed under such an acquisition, the firm was prejudiced by the agency's unreasonable calculation of its estimate.

Since the interim contract at issue here will soon be replaced by a multi-year contract for these services, it is not practical to recommend that PTO resubmit these requirements, along with a complete acquisition history and estimated award price, for SBA's consideration. We recommend that Comint be reimbursed the costs of filing and pursuing its protest, including reasonable attorneys' fees. Bid

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[7]PTO advises that an award of the multi-year contract for these services is imminent, and that the interim contract at issue will be terminated at that time.

Protest Regulations, section 21.8(d)(1), 61 Fed. Reg. 39039, 39046 (1996) (to be codified at 4 C.F.R. § 21.8(d)(1). Comint's certified claim for such costs, detailing the time and costs incurred, should be submitted within 60 days after receipt of this decision. Section 21.8(f)(1), 61 Fed. Reg. 39046 (to be codified at 4 C.F.R. § 21.8(f)(1).

The protests are sustained.

Comptroller General
of the United States

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