



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: G&D Foods, Inc.

File: B-233511; B-233512; B-233513; B-233514;
B-233515; B-233516; B-233517; B-233519;
B-233520; B-233521; B-233522; B-233523

Date: February 7, 1989

DIGEST

1. Department of Defense's requirement that small disadvantaged business (SDB) concerns be regular dealers in order to be eligible for an SDB evaluation preference reflects a logical means of promoting SDB contracting without leaving the preference program open to abuse by other than legitimate SDB concerns, and is within the agency's authority to impose.
2. Agency reasonably determined that a small disadvantaged business (SDB) was not a regular dealer in perishable food items, and thus was not eligible for SDB evaluation preference under solicitations for these goods, where record indicates that the SDB does not maintain a true inventory of these items from which sales are made on a regular basis.

DECISION

G&D Foods, Inc., a small disadvantaged business concern, protests the award of contracts under 12 different solicitations (DLA13H-88-R-8890; DLA13H-88-R-8889; DLA13H-88-R-8981; DLA13H-88-R-9001; DLA13H-88-B-8896; DLA13H-88-R-8891; DLA13H-88-R-9122; DLA13H-88-R-8914; DLA13H-88-R-9287; DLA13H-88-B-8893; DLA13H-88-B-9198) issued by the Defense Personnel Support Center, a field activity of the Defense Logistics Agency (DLA). These solicitations, which sought offers for a variety of perishable food items, including meats, poultry and eggs, provided for application of a 10 percent price evaluation factor in favor of certain eligible small disadvantaged business (SDB) concerns. DLA found that G&D, which would have been in line for award under each of the solicitations had this evaluation factor been applied, did not qualify for this preference on the basis that it was not a regular dealer in the items being procured. G&D contends that DLA improperly limited

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application of this preference to SDBs found to be regular dealers, and alternatively argues that it is in fact a regular dealer of perishable food items.

We deny the protests.

The terms and conditions of the evaluation preference in issue here are set forth in the standard clause, "Notice of Evaluation Preference for Small Disadvantaged Business [SDB] Concerns," Department of Defense Federal Acquisition Regulation Supplement (DFARS) § 52.219-7007, reprinted in its entirety in each of the 12 solicitations. This clause provides in pertinent part as follows:

"(b) Evaluation. After all other evaluation factors described in this solicitation are applied, offers will be evaluated by adding a factor of ten percent (10%) to offers from concerns that are not SDB concerns. . . .

"(c) Agreement. By submission of an offer and execution of a contract, the SDB Offeror/Contractor (except a regular dealer). . . . agrees that in performance of the contract in the case of a contract for--

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(2) Supplies. The concern shall perform work for at least fifty percent (50%) of the cost of manufacturing the supplies, not including the cost of materials."

DLA (and, evidently, all other Department of Defense (DOD) activities) construes this last section of the standard clause as establishing eligibility requirements for receipt of the SDB evaluation preference, i.e., an SDB, to qualify for the preference, must either be a regular dealer or agree to perform 50 percent of the requested work. Moreover, in evaluating a firm's status as a regular dealer, DLA has adopted the definition of this term as set forth in regulations implementing the Walsh-Healey Public Contracts Act, 41 U.S.C. § 35 (1982), which generally requires that, to be considered a regular dealer, a firm must lease warehouse space on a continuing basis (not on a demand basis), and maintain a true inventory from which sales are made. 41 C.F.R. § 50-206.53 (1988).

In responding to each of the 12 solicitations, G&D certified that it was both an SDB and a regular dealer. DLA questioned the accuracy of this latter certification,

however, and therefore requested the appropriate Defense Contract Administration Service Management Area (DCASMA) to verify G&D's status as a regular dealer. Based on the information provided by DCASMA, which indicated that G&D leased warehouse space only on an as needed basis and maintained, at most, a minimal inventory in the requested perishable food items, DLA determined that G&D was not a regular dealer. (There is no dispute that G&D does not qualify as a manufacturer of the supplies on the basis of performance of 50 percent of the manufacturing.) DLA thus concluded that G&D was ineligible for the SDB evaluation preference; consequently G&D was not in line for award under any of the 12 solicitations.

G&D initially argues that DLA improperly limited eligibility for the SDB preference under each of the 12 solicitations to only those SDBs that qualified as regular dealers, as defined by the Walsh-Healey Act. G&D notes that the Federal Acquisition Regulation (FAR) specifically exempts firms participating in procurements for perishable food items from complying with the regular dealer requirements imposed by the Walsh-Healey Act, because of the difficulties inherent in maintaining an inventory of these goods. FAR § 22.604-1(b). For this same policy reason, G&D maintains that firms also should not be required to be regular dealers for purposes of qualifying for an SDB preference; in this regard, G&D alleges that imposition of this eligibility requirement effectively precludes SDBs from obtaining the benefits of this preference as it is impracticable for them to maintain a sufficient inventory in perishable food items to qualify as a regular dealer. DLA's insistence that SDBs nevertheless be regular dealers to qualify for the preference, G&D contends, is thus contrary to the public policy of encouraging participation of SDBs in government procurements, and therefore improper.

We disagree. DOD implemented the SDB preference program primarily under authority of section 1207 of the National Defense Authorization Act, 1987, 10 U.S.C. § 2301 note (Supp. IV 1986), which left to DOD's discretion the establishment of regulations and procedures necessary to achieve the stated objective of awarding 5 percent of its contracts to SDB concerns. It is well established that considerable deference must be accorded agencies charged with the implementation of broad statutory mandates; regulations promulgated by agencies to implement such laws therefore may only be invalidated if found to be arbitrary

and capricious. Citizens to Preserve Overton Park Inc. v. Volpe, 401 U.S. 402, 413-416 (1972). Mere disagreement with an agency's position is not a sufficient basis upon which to challenge the propriety of a regulation. Id. at 416.

The record shows that DOD's imposition of the regular dealer eligibility requirement for participation in the SDB preference program serves a legitimate government interest. Specifically, the requirement, which is patterned after eligibility requirements for participation in other socio-economic programs, such as small business set-asides and the section 8(a) program, see 15 U.S.C. §§ 637(a), 644 (1982 and Supp. IV 1986), is designed to prevent large businesses from using SDBs as mere "fronts" in order to improperly obtain the competitive advantages of the preference. DOD, and DLA specifically, has determined that the government's interest in preventing this abuse is strong enough that it should extend to all procurements, including those for perishable food items.

We think DOD's position reflects a logical means of promoting SDB contracting without leaving the preference program open to abuse by other than legitimate SDB contractors; this achieves a balance between competing policy interests. Contrary to G&D's position, there is no indication that DLA has applied the regular dealer requirements (e.g., inventory and warehouse leasing) in such a strict manner that no SDB can qualify as a regular dealer eligible for the preference in perishable item procurements. (In fact, DLA states that in nine separate instances, it determined that an SDB qualified as a regular dealer for perishable food items.) We conclude that DLA properly applied the regular dealer requirements in determining eligibility for the preference here. Although DOD's application of the regular dealer requirements departs from the application of the Walsh-Healey Act, and obviously could prevent certain SDBs from receiving the benefits of the SDB preference program, we do not consider these factors sufficient to render the requirement invalid.

G&D alternatively argues that it qualifies as a regular dealer in the variety of food items (meats, poultry and eggs) being procured here. G&D states that it routinely sells these food products to government and non-government entities, and maintains that it has previously been found eligible for the evaluation preference in procurements for these items. Further, G&D states that it in fact leases warehouse space on a continuing basis where it maintains stock in items of the same character as those to be acquired under the solicitations here.

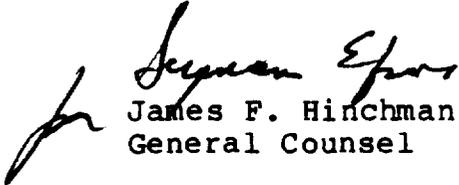
G&D's claims as to its status as a regular dealer notwithstanding, we do not consider DLA's determinations in this regard unreasonable. While the record does document G&D's previous business dealings with the government, these dealings do not establish that G&D is a regular dealer in perishable foods. The fact that G&D has been awarded contracts for these items does not signify that DLA ever determined that it was a regular dealer; rather, DLA relied upon G&D's self-certification under these prior procurements. Only after being confronted with conflicting evidence regarding G&D's status did DLA, in connection with the 12 procurements at issue here, request DCASMA to conduct a thorough examination of G&D to establish affirmatively its credentials as a regular dealer.

The DCASMA review revealed several factors which together cast doubt on the independence of G&D and led DLA to conclude that the firm is not a regular dealer. Specifically, DCASMA found G&D's alleged warehouse stock to be commingled with and, in fact, indistinguishable from the inventory of the non-SDB concern from which G&D leases warehouse space on an as needed basis. DCASMA also found this stock to be limited in quantity and not of the same character as the items being solicited. Finally, DCASMA discovered that G&D's sales generally were not filled from this stock but, rather, were filled from the inventory of its non-SDB lessor.

G&D has submitted information consisting of invoices of orders for perishable goods recently placed and a copy of its inventory in an attempt to refute DCASMA's findings. We do not find this evidence sufficient, however, to establish that G&D maintains a true inventory in the items to be procured from which sales are made on a regular basis, i.e., two of the requirements for regular dealer status. The inventory evidenced by these documents is limited in scope and, more importantly, there is no evidence showing that orders were actually filled from this inventory and not from the stock maintained by G&D's lessor or other non-SDB concerns as DCASMA specifically found. The facts remain that G&D has close ties with its lessor, a non-SDB concern; virtually G&D's entire operation, office and warehouse space, are located in this non-SDB firm's facility; G&D apparently does not maintain a separate inventory from which sales are made on a regular basis; and except for orders filled from stock maintained by other non-SDB concerns, most of G&D's orders are filled from this non-SDB firm's stock. We conclude that DLA reasonably determined that G&D was not

an independent regular dealer in the food items being procured, and thus was not eligible for the SDB evaluation preference under any of the 12 solicitations.

The protests are denied.

 James F. Hinchman
General Counsel