The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: MIA Creative Foods, Inc.

File: B-233940

Date: March 28, 1989

DIGEST

1. Department of Defense 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 fresh shell eggs, and thus was not eligible for SDB evaluation preference under solicitation for these goods, where record indicates that the SDB has never before sold those goods to any customer and does not maintain a true inventory from which sales are made on a regular basis.

DECISION

MIA Creative Foods, Inc., a small disadvantaged business (SDB) concern, protests the award of a contract under invitation for bids (IFB) No. DLA13H-88-B-9372, issued by the Defense Personnel Support Center, a field activity of the Defense Logistics Agency (DLA). The IFB, which was for the provision of fresh shell eggs to the Naval Training Station, Great Lakes, Illinois, provided for the application of a 10 percent price evaluation factor in favor of certain eligible SDBs. DLA found that MIA, which would have been in line for award of the contract had this evaluation factor been applied, did not qualify for the preference on the basis that it was not a regular dealer in eggs. MIA contends that the agency improperly limited application of the SDB preference to SDBs found to be regular dealers, and alternatively argues that it is in fact a regular dealer in eggs and other items.

We deny the protest.

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 the original IFB. 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--
>
> . . . . .
>
> "(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."

Amendment 0002 added the following explanation:

> "NOTE: (THE FOLLOWING APPLIES ONLY TO PERISHABLE SUBSISTENCE ACQUISITIONS)
>
> ONLY OFFERS FROM SDB CONCERNS QUALIFYING AS EITHER A MANUFACTURE OR REGULAR DEALER UNDER . . . THIS SOLICITATION WILL BE ELIGIBLE FOR THE SDB EVALUATION PREFERENCE DESCRIBED ABOVE. SUCH ELIGIBILITY IS, HOWEVER, CONTINGENT UPON THE OFFEROR AGREEING TO ALL TERMS AND CONDITIONS SET FORTH IN CLAUSE 52.219-7007." [quoted above.]

Provision 52.222-K001 of the IFB, entitled "Type of Business (Perishable Subsistence)" defined regular dealer as follows:

> "(2) Regular Dealer - As used in this provision, it means a person (or concern) that owns, operates, or maintains a store, warehouse, or other establishment in which the materials, supplies, or articles of the general character described by the specifications and required

under the contract are bought, and kept in stock, and sold to the public in the usual course of business."

The provision further advised bidders that prior representations were superseded and that all bidders must represent themselves as a manufacturer of the supplies offered; a regular dealer in the supplies offered; or other.

DLA, as well as other Department of Defense (DOD) activities, construes these clauses as establishing eligibility requirements for receipt of the SDB evaluation preference; that is to say, an SDB, to qualify for the preference, must either be a regular dealer or agree to perform 50 percent of the requested work. As shown in provision 52.222-K001, 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). See 41 C.F.R. § 50-206.53 (1988).

Although MIA represented itself as an SDB and as a regular dealer under the "Walsh-Healey Public Contracts Act Representation" (See Federal Acquisition Regulation (FAR) § 52.222-19 (FAC 84-34)), it failed to certify itself in accordance with provision 52.222-K001. The contracting officer was unfamiliar with MIA, and therefore requested the appropriate Defense Contract Administration Service Management Area (DCASMA) Office to verify MIA's status as a regular dealer and its financial capability to perform.

The DCASMA survey team found that MIA had never supplied fresh shell eggs to any customer, did not maintain a true inventory of any products, and that MIA's only participation in the contract would be contract administration. All remaining tasks (production, packaging, and delivery) were to be handled by an independent egg farm. The team also was unable to verify MIA's financial capability to perform. DLA agreed with the team's findings that MIA was not a regular dealer entitled to the SDB evaluation preference, and thus would not be the low bidder.

MIA first contends that DLA improperly limited eligibility for the SDB preference under the IFB to only those SDB's who qualified as regular dealers, as defined by the Walsh-Healey Act. MIA notes that the Walsh-Healey Act specifically exempts the acquisition of perishables (such as fresh eggs) from the regular dealer requirement because of the difficulties inherent in maintaining an inventory in such goods. See also FAR § 22.604-1(b) (FAC 54-34). In this regard, MIA notes that it is not conventional industry

practice to maintain an inventory of eggs. MIA contends that DLA, by effectively excluding SDBs dealing in perishable good items, violates the public policy of encouraging SDB participation in government procurement as enunciated in section 1207 of the National Defense Authorization Act, 1987, 10 U.S.C. § 2301 note (Supp. IV 1986).

We disagree. We have recently considered and rejected the identical argument made by an SDB supplier of perishable food items. G&D Foods, Inc., B-233511 et al., Feb. 7, 1989, 89-1 CPD ¶ ___. In G&D, we recognized that in implementing the SDB preference program, DOD has discretion under section 1207 in establishing the regulations and procedures necessary to achieve the stated objective of awarding 5 percent of its contacts to SDB concerns. Considerable deference must be accorded agencies charged with the implementation of broad statutory mandates, and regulations implementing such laws may be invalidated only 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 the agency's position is not a sufficient basis on which to challenge the propriety of a regulation. Id., 401 U.S. at 416.

As we recognized in G&D, 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 socioeconomic 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 MIA's position, there is no indication that DLA has applied the regular dealer requirements (e.g., inventory) in such a strict manner that no SDB can qualify as a regular dealer eligible for the preference in perishable item procurement. (In fact, DLA states that in two separate instances, it determined that an SDB did qualify as a regular dealer for eggs). 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 Foods, Inc., B-233511 et al., supra.

Alternatively, MIA argues that it does qualify as a regular dealer, citing industry practice regarding inventories of eggs. While it admits that it has never supplied fresh shell eggs to any customer, it does claim, in the course of its business as a regular dealer in subsistence, to offer them for sale. With regard to its lack of cold storage facilities, MIA alleges that provisions therefor have "been in effect for some time." Finally, MIA notes that it has been determined to be a regular dealer by another federal agency.

Our review of the record, as well as MIA's admission that it has never before sold eggs, fully support DLA's reasonable determination that MIA is not a regular dealer in eggs. The DCASMA pre-award survey team reported that MIA produces and distributes various snack foods and canned goods from space it leases from another food service company located across the street. MIA did not maintain an inventory in fresh shell eggs or have cold storage available for that purpose; in fact the only inventory it maintained consisted of sample canned goods. While it claims provisions for cold storage to be "in effect," MIA submits no evidence of them and it appears that the only such facility is owned by the independent egg farm. In fact, when MIA was provided an opportunity to refute the findings of the DCASMA team, as adopted by the contracting officer, it merely asserted that its operation was consistent with the industry practice regarding inventories and criticized DLA's use of the SDB evaluation preference. Likewise, in its protest, MIA has submitted no evidence to support its claimed status as a regular dealer and we do not believe that the unspecified determination by another agency of regular dealer status is persuasive.

Furthermore, inasmuch as the eggs were to be produced, packaged, and delivered from the egg farm, it is clear that MIA not only was not a regular dealer, but was not going to

perform at least 50 percent of the cost of manufacturing. See DFARS § 52.219-7007. Thus, MIA was not eligible for the SDB evaluation preference under either criterion set forth in the IFB.

Accordingly, the protest is denied.

James F. Hinchman
General Counsel