



The Comptroller General
of the United States

Washington, D.C. 20548

Leikowitz

Decision

Matter of: G&D Foods, Inc.
File: B-235013; B-235014
Date: August 7, 1989

DIGEST

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 (SDB), protests the award of contracts to any other firms under request for proposals (RFPs) Nos. DLA13H-89-R-8258 and DLA13H-89-R-8036, issued by the Defense Personnel Support Center, a field activity of the Defense Logistics Agency (DLA). We deny the protests.

These solicitations, which sought offers for a variety of perishable food items, including beef, pork and eggs, provided for application of a 10 percent price evaluation factor in favor of certain eligible SDBs. 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 the preference on the basis that it was not a regular dealer in the items being procured. G&D contends that DLA improperly determined that it was not a regular dealer of perishable food items, that it should have been given the evaluation preference, and that it should receive the award based on its low evaluated price after application of this preference.

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 (DOD) Federal Acquisition Regulation Supplement (DFARS) § 252.219-7007 (DAC 88-2),

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reprinted in its entirety in each of the two 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--

. . . .

(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 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 and Supp. IV 1986), which generally requires that, to be considered a regular dealer, a firm must maintain 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 two 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 Services Region (DCASR) to verify G&D's status as a regular dealer. Based on the information provided by DCASR, which indicated that G&D 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 either of the two solicitations.

As stated above, G&D argues that it qualifies as a regular dealer in the variety of food items (beef, pork and eggs) being procured here and thus should have received the benefits of the SDB evaluation preference. G&D previously raised this same issue when challenging DLA's award of contracts for similar perishable food items under several 1988 solicitations. G&D Foods, Inc., B-233511 et al., Feb. 7, 1989, 89-1 CPD ¶ 125. As is the case with the procurements currently at issue, DLA, for each of these 1988 solicitations, determined that G&D was not a regular dealer in the food items being procured, was thus ineligible for the evaluation preference, and consequently was not in line for award under any of these solicitations.

In considering G&D's prior protests, our Office first rejected G&D's claim that DOD's implementation of the regular dealer requirements for participation in the SDB preference program represented an improper exercise of the agency's authority under section 1207 of the National Defense Authorization Act, 1987, 10 U.S.C. § 2301 note (Supp. IV 1986), noting that the Act left to DOD's discretion the establishment of regulations and procedures to achieve the stated objective of awarding five percent of its contracts to SDB concerns. We then concluded that DLA, acting pursuant to the DFARS, reasonably determined that G&D was not an independent regular dealer in the food items procured and thus was not eligible for the SDB evaluation preference under any of the 1988 solicitations. In reaching this conclusion, we focused on several factors which, considered together, supported DLA's findings, including (1) G&D had close ties with its lessor, a non-SDB concern; (2) virtually G&D's entire operation, office and warehouse space, were located in this non-SDB firm's facility; (3) G&D apparently did not maintain a separate inventory from which sales were made on a regular basis; and (4), except for orders filled from stock maintained by other non-SDB concerns, most of G&D's orders were filled from this non-SDB firm's stock.

G&D, in its current protests, in addition to reiterating positions previously raised and rejected by our Office, asserts that it has undergone significant growth since the issuance of our prior decision which conclusively establishes its status as a regular dealer in the perishable food items presently being procured. In this regard, G&D states that it recently acquired ownership of an independently operated retail food establishment, which maintains an inventory in perishable food items from which sales are made on a routine basis. Considering the substantial business conducted by this retail firm, G&D contends, any

lingering doubt regarding its status as a regular dealer has been eliminated.

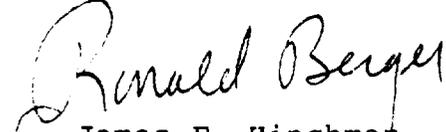
Even assuming G&D's ownership of the retail food establishment, we do not think DLA's determination that G&D still does not qualify as a regular dealer was unreasonable. While the record does suggest that G&D may have acquired an interest in this retail firm, we agree with DLA that this acquisition alone does not establish G&D's status as a regular dealer in perishable foods.

DLA has adopted the position taken by the Department of Labor in administering the Walsh-Healey Act that each separate business entity must satisfy the Act's regular dealer requirements based solely upon its own standing and may not rely upon the standing of any affiliated entity. Alsco Commercial Furniture Co., Administrator's Decision, P.C.-469, Dec. 11, 1952, reprinted at 11 Wage & Hour Cas. 236. As we recognized in our prior decision, DLA may, within reason, impose eligibility requirements for participation in the SDB preference program to ensure that participation in the program is limited to legitimate SDB concerns. G&D Foods, Inc., B-233511 et al., supra. DLA's adoption of the Department of Labor's separate entity doctrine is, in our opinion, consistent with this objective in that it further reduces the likelihood that other than legitimate SDB firms will in fact obtain the benefits of the SDB preference program. DLA's insistence that G&D itself, and not merely an affiliated firm, must be a regular dealer in order to qualify for the benefits of the evaluation preference therefore was proper.

Under the applicable agency standards, G&D still has not established that it is a regular dealer in the perishable food items being procured here. In particular, G&D has not demonstrated any significant change relative to its circumstances at the time of the prior procurements, with respect to its close ties with a non-SDB concern, its lack of an inventory from which sales are made on a regular basis, and its practice of filling most of its orders from stock maintained by large businesses. Indeed, G&D indicated in its offers at issue here that it would do nothing more than act as a middleman or broker; G&D planned to subcontract the contracts in their entirety to a large business which in turn would be responsible for all aspects of contract performance, including food preparation, packaging and delivery. We therefore conclude that DLA again reasonably determined that G&D still was not an independent

regular dealer in the food items being procured, and thus was not eligible for the SDB evaluation preference under either of the two solicitations.

The protests are denied.


James F. Hinchman
General Counsel