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Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Department of the Navy--Request for
Reconsideration

File: B-235205.2

Date: January 5, 1990

DIGEST

Although prior decision found that agency decision to withdraw small business set-aside was unreasonable and therefore recommended that contracting officer adequately investigate the potential small business interest, that recommendation is modified since the procurement is no longer subject to small business set-aside requirements.

DECISION

The Department of the Navy requests reconsideration of our decision in The Taylor Group, Inc., B-235205, Aug. 11, 1989, 89-2 CPD ¶ 129. In that decision, we concluded that the Navy had improperly withdrawn the total small business set-aside in request for proposals No. N62467-89-R-0256, and recommended that the Navy again set aside the procurement if, after investigation, it determined that there was sufficient small business interest to justify the set-aside. In its request for reconsideration, the Navy asks that we reverse or modify our prior decision because it has recently corrected an improper size classification of the procurement. Under the proper classification the Navy is not required to set-aside the acquisition under the terms of the Small Business Competitiveness Demonstration Program Act of 1988 (SBCDPA), Pub. L. No. 100-656, tit. VII, 102 Stat. 3889, 3892 (1988). For the reasons that follow, we affirm our decision, but modify our recommendation.

As noted above, we sustained the protest of The Taylor Group on grounds that the Navy had improperly changed the solicitation from a total small business set-aside to an unrestricted procurement. In particular, we found that the Navy had not properly discharged its obligation to investigate whether there existed a sufficient small business interest in the acquisition so as to justify its continued

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set-aside for small businesses.^{1/} Accordingly, we recommended that the Navy conduct a more thorough investigation of the extent of small business interest in the acquisition and, if it found sufficient interest, to again set aside the acquisition.

Subsequent to our initial decision, and apparently in connection with its review of the procurement, the Navy discovered that it had used an incorrect standard industrial classification (SIC) code in the solicitation as it had been originally issued. Specifically, the Navy found that it had used SIC code No. 8744, "base maintenance," when in fact it should have used SIC code No. 1799, "special trade contractors not elsewhere classified." However, because the Navy had made the award of a contract on urgency grounds three days prior to the issuance of our decision, it simply issued a modification incorporating the new SIC code into the existing contract.

In its request for reconsideration, the Navy argues that we should reverse or modify our prior decision because it is no longer required to set aside this procurement. The Navy argues that the terms of the SBCDPA, Pub. L. No. 100-656, supra, and the Department of Defense (DOD) implementing regulations, DOD Federal Acquisition Regulation Supplement § 219.1070 (DAC 88-8), allow it to conduct this procurement on an unrestricted basis now that the acquisition in question has been assigned SIC code No. 1799.^{2/}

Upon receipt of the Navy's reconsideration request, we solicited the views of the Small Business Administration (SBA) regarding the propriety of a post-award SIC code modification as well as the appropriateness of the new SIC code assigned by the Navy given the nature of the contract's requirements. In response, the SBA has advised our Office that a contracting officer properly can execute a contract

^{1/} The requirement had been previously set aside for small businesses.

^{2/} The statute essentially precludes the setting aside of solicitations for small businesses in various industry groups where an agency has achieved a goal of expending 40 percent of its procurement funds for that industry group on contracts awarded to small businesses. The implementing regulations preclude altogether (for a 4-year period) the setting aside of acquisitions after January 1, 1989, in the specified industry groups unless the contracting agency is otherwise directed. The specified industry groups affected include those in SIC code No. 1799.

modification to change a SIC code to accurately reflect the work to be performed under the contract and that "SIC code 1799 appears to more accurately reflect the work to be performed" The SBA has also advised that, because the SIC code change occurred after the date for the submission of proposals, its Office of Hearings and Appeals likely would decline to consider a challenge to the reclassification of the requirement on timeliness grounds. See Federal Acquisition Regulation § 19.303(c) (FAC 84-12); 13 C.F.R § 121.11 (1989).

We think that, while our previous decision was correctly decided, subsequent events warrant modification of our recommendation. The Navy has determined that it originally used an inappropriate SIC code for the procurement and has now assigned it a different SIC code, an action with which the SBA does not disagree. Procurements with this new SIC code are not, under current law and regulation, required to be set aside for small business. Therefore, we will not object to the award based on the unrestricted solicitation.

Our earlier recommendation is modified accordingly.

Milton J. Arosar
for Comptroller General
of the United States