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The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Baszile Metals Service

File: B-237925; B-238769

Date: April 10, 1990

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protester.

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agency.

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Michael R. Golden, Esq., Office of the General Counsel, GAO,
participated in the preparation of the decision.

DIGEST

Department of Defense regulatory requirement that small disadvantaged business (SDB) regular dealers provide a product manufactured by a small business concern when there is no SDB manufacturer in order to be eligible for an SDB evaluation preference in unrestricted procurements is a reasonable implementation of its broad statutory mandate to award 5 percent of the dollar value of its contracts to SDB concerns and is within the agency's authority to impose.

DECISION

Baszile Metal Service, a small disadvantaged business (SDB), protests the terms of invitation for bids (IFB) No. DLA-500-89-B-0941, issued by the Defense Logistics Agency (DLA) for aluminum sheet and plate. The protester argues that the IFB, as amended, improperly contained a provision which deprived it of an SDB evaluation preference which would have rendered its bid low. This protest was filed after bid opening.^{1/}

^{1/} While the protester and the agency agree that this protest is untimely under our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1989), we are considering the protest under our significant issue exception because the protest involves an issue that has not been considered on the merits in our previous decisions and which will affect many

(continued...)

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DLA issued the IFB on October 5, 1989 on an unrestricted basis. The IFB initially incorporated Department of Defense Federal Acquisition Regulation Supplement (DFARS) clause, "Notice of Evaluation Preference for Small Disadvantaged Business (SDB) Concerns (Unrestricted) (SEP 1988)," as was found in DFARS § 252.219-7007 (1988 ed.). Under this provision, an SDB firm, except for a regular dealer, was entitled to a 10 percent evaluation preference but only if it agreed that: (1) in the performance of a contract for services, at least 50 percent of the cost of contract performance incurred for personnel would be expended for employees of the SDB firm; and (2) in the performance of a supply contract, the SDB firm would perform work for at least 50 percent of the cost of manufacturing, not including the costs of materials. An SDB regular dealer, however, could have provided the product of any business concern, i.e., another SDB, a small business concern, or a large business, and still be considered for the 10 percent evaluation preference.

On October 25, the agency, by amendment No. 0001, deleted this version of the clause and incorporated in its place the clause at DFARS § 252.219-7007 (Alternate I) (DAC 88-11), entitled, "Notice of Evaluation of Small Disadvantaged Business (SDB) Concerns (Unrestricted) (Alternate I) (July 1989)." This provision added the requirement that an "SDB regular dealer submitting an offer in its own name . . . furnish, in performing this contract, only end items manufactured or produced by small business concerns."^{2/}

Baszile is an SDB regular dealer. Baszile's bid, dated November 20, 1989, indicated that it did not intend to provide a product manufactured by a small business concern. Consequently, the agency did not apply the evaluation preference. Had the evaluation preference been applied, Baszile's price would have been low for contract line item No. 35. Baszile filed this protest on November 30.

^{1/}(...continued)
procurements in the future. 4 C.F.R. § 21.2(b); see Altex Enters., Inc., 67 Comp. Gen. 184 (1988), 88-1 CPD ¶ 7.

^{2/} While the Alternate I clause included in the solicitation requires SDB regular dealers to furnish small business products, the basic clause (DFARS § 252.219-7007 (DAC 88-11)) requires SDB regular dealers to furnish end items manufactured by SDB concerns. The Alternate I clause is used when a determination is made that there are no SDB manufacturers available which can meet the requirements. DFARS § 219.7002 (DAC 88-13).

Baszile argues that the July 1989 version of the clause is invalid because it constitutes a redefinition of the term SDB, and only the Small Business Administration (SBA), not the Department of Defense (DOD), has the authority to issue such a redefinition. Baszile also argues that the regulation improperly denies the preference to SDB regular dealers supplying products manufactured by a large business where, as here, there are no small business manufacturers in the market.^{3/} We find no merit to this protest.

DOD established the SDB preference program primarily under authority of section 1207 of the National Defense Authorization Act, 1987, 10 U.S.C. § 2301 note (1988), which left to DOD's discretion the promulgation of regulations and procedures necessary to achieve the stated objective of awarding 5 percent of the dollar value of its contracts to SDB concerns. G&D Foods, Inc., B-233511 et al., Feb. 7, 1989, 89-1 CPD ¶ 125; see also Pub. L. No. 100-180, § 806(b), 10 U.S.C. § 2301 note (1988) (requiring the Secretary of Defense to issue regulations to ensure progress toward meeting the 5 percent goal). Where, as here, Congress delegates broad authority to an agency to issue regulations implementing a statute, such agency regulations are given controlling weight unless they are arbitrary, capricious or manifestly contrary to the statute. See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843-844 (1984). We see no basis for concluding that DOD's regulations are improper under this test.

First, the regulatory clause does not redefine the term SDB. Section 1207 defines small business and SDB firms by reference to section 8(d) of the Small Business Act, 15 U.S.C. § 637(d) (1988), which refers to an SDB as a small business concern at least 51 percent owned by one or more socially and economically disadvantaged individuals and whose management and daily operations are controlled by one or more such individuals.^{4/} The DFARS clause does not change that definition; it simply imposes an obligation on

^{3/} The agency does not dispute the protester's contention that there are no small businesses or SDB concerns that manufacture the products required here.

^{4/} The IFB stated that the term "small disadvantaged business (SDB) concern" has the meaning set forth in the clause entitled Small Disadvantaged Business Concern Representation--a small business concern, owned and controlled by individuals who are both socially and economically disadvantaged as defined by the SBA.

SDB firms wanting the evaluation preference to provide end items manufactured by a small business.

Second, the protester has not shown that DOD's DFARS implementation is arbitrary or capricious or inconsistent with statute. The law itself (section 1207) simply established the 5 percent goal for DOD. It did not specify any particular method to be used by DOD to achieve the goal, although it authorized the Secretary of Defense to use other than full and open competition if necessary, but to pay not more than 10 percent above the fair market cost. DOD, in its implementing regulations, has provided for SDB set-asides and, in certain unrestricted procurements, the use of the evaluation preference. See DFARS §§ 219.502-72, 219.7000 (DAC 88-13). As indicated above, the determination to use these approaches is within the discretion granted to DOD by section 1207. Inherent in that discretion is the authority to determine, and from time to time modify, the circumstances under which SDB set-asides and preferences will be utilized, see Abbott Prods. Inc., B-231131, Aug. 8, 1988, 88-2 CPD ¶ 119, and DOD indeed has varied its implementation approach since initiating the program. For example, DOD originally provided for SDB set-asides even when the product or service previously had been acquired under a small business set-aside; DOD subsequently revised its regulations to preclude SDB set-asides under such circumstances. See Techplan Corp; American Maintenance Co., 67 Comp. Gen. 357 (1988), 88-1 CPD ¶ 312, recon. denied, American Maintenance Co.--Request for Recon., B-228396.5, June 7, 1988, 88-1 CPD ¶ 534; Logistical Support, Inc., 67 Comp. Gen. 381 (1988), 88-1 CPD ¶ 385; Logistical Support, Inc., B-230190.2, Oct. 19, 1988, 88-2 CPD ¶ 369. Similarly, DOD's original rules provided for use of the evaluation preference in small business set-asides; under more recent rules, DOD decided that the preference will not be used in such set-asides. See DeHorn Corp., B-232059, Aug. 9, 1988, 88-2 CPD ¶ 122, recon. denied, B-232059.2, Sept. 28, 1988, 88-2 CPD ¶ 296; see also W.M. Marable, Inc., B-234987, B-235097, May 3, 1989, 89-1 CPD ¶ 425.5/

5/ DOD's discretion in this area is further indicated by our holding that DOD has authority to determine regular dealer requirements for entitlement to an SDB evaluation preference, even though DOD's approach differs from the traditional approach used by the Department of Labor in administering the regular dealer requirements of the Walsh-Healey Public Contracts Act. See MIA Creative Foods, Inc., B-233940, Mar. 28, 1989, 89-1 CPD ¶ 318; G&D Foods, Inc., B-233511, supra.

In its current regulations, DOD has decided that SDBs that compete as regular dealers should get the benefit of an evaluation preference only if they will furnish the product of an SDB manufacturer or, if there is no SDB manufacturer, the product of a small business manufacturer. We see nothing in section 1207 that precludes this approach. Moreover, we see nothing arbitrary or capricious about the requirements. DOD's approach focuses not only on the vendor seeking a preference in a specific procurement, but also on the long range possibilities of fostering the growth of SDB and small business manufacturing concerns. See 53 Fed. Reg. 49,577-8 (1988). In this regard, DOD has imposed similar requirements for total SDB set-asides and SDB preferences in partial small business set-asides--there too SDB regular dealers must furnish the product of an SDB manufacturer or a small business manufacturer if there is no SDB manufacturer. See DFARS §§ 219-508 (DAC 88-13), 252.219-7010 (DAC 88-11), 252.219-7006 (1988 ed.). Given the important national goal of fostering small business growth, see 10 U.S.C. § 2301(c) (1988) and 15 U.S.C. § 631a (1988), we do not think it unreasonable for DOD to provide for small business manufacturer participation in these procurement programs when SDB manufacturers are not available, cf., Group Hospital Serv., Inc. (Blue Cross of Texas), 58 Comp. Gen. 263 (1979), 79-1 CPD ¶ 245 (permitting use of a socioeconomic consideration to break a "tie" in a negotiated procurement), and we see nothing improper in DOD's conclusion that paying a premium to SDB regular dealers offering large business products would not provide an incentive to the development of small business and SDB manufacturers in given industry groups. In short, we think that DOD, as matter of sound policy, can reasonably refuse to pay the premium, resulting from use of the evaluation preference, for contract awards that benefit large businesses that sell to the government through SDB regular dealers. The fact that this precludes some SDBs from receiving the benefits of the SDB preference program does not invalidate the DOD requirement. MIA Creative Foods, Inc., B-233940, supra; G&D Foods, Inc., B-233511, supra.

Baszile also alleges that the July 1989 DFARS provision is contrary to 15 U.S.C. § 637(a)(17) (1988). That provision essentially requires a small business regular dealer to represent that under the SBA's 8(a) program (15 U.S.C. § 637(a) or the small business set-aside program (15 U.S.C. § 644(a)) it will supply the product of a small business manufacturer, except that the Administrator of SBA is given the authority to waive the requirement for small business products where there are no small business manufacturers in

the market.^{6/} Baszile argues that DOD violated this provision with its inconsistent regulation that does not allow an evaluation preference where, as here, there are no small business or SDB manufacturers.

As stated, the provision literally applies to the 8(a) program and small business set-aside procurements, not unrestricted procurements as is the case here. We note that even if section 637(a)(17) applied to SDB preferences in unrestricted procurements, the SBA has advised our Office that the Administrator has not waived the requirement for contractors to provide a product manufactured by a small business for the class of products required under this solicitation. Thus, under section 637(a)(17), Baszile is not permitted to supply a product manufactured by a large business.

Finally, the protester argues that the regulation is inconsistent with 15 U.S.C. § 644(m)(1), which requires that, in issuing regulations which implement section 1207, agencies shall not reduce the number or dollar amount of contracts awarded under the 8(a) or set-aside programs and shall not alter or change the procurement process utilized for those programs. Here, however, there is no indication in the record that DOD's policy concerning evaluation preferences for SDBs in unrestricted procurements would impact the overall goals of either of these programs in the manner proscribed

Accordingly, the protest is denied.^{7/}


for James F. Hinchman
General Counsel

^{6/} The provision also states that "an otherwise responsible business concern . . . shall not be denied the opportunity to submit and have considered its offer . . . because such concern is other than the actual manufacturer or processor of the product to be supplied under the contract."
15 U.S.C. § 637(a)(17)(A).

^{7/} Baszile has filed an identical protest against solicitation No. DLA500-90-B-0132, also issued by DLA. For the reasons stated in this decision, and by this decision, we deny this protest as well.