Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Microform Inc.

File: B-244881.2

Date: July 10, 1992

James P. Ruocchio for the protester.
David R. Kohler, Esq., and Donald A. Morrison, Esq., Small Business Administration, and Kurt D. Summers, Esq., General Services Administration, for the agencies.
Sylvia Schatz, Esq., David Ashen, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest by incumbent small business contractor that the Small Business Administration (SBA) failed to properly determine adverse impact on protester of accepting contract requirement into the 8(a) program is denied where protester merely disagrees with the SBA's conclusion and does not show that regulation governing adverse impact determinations has been violated.

DECISION

Microform Inc. protests the decision of the General Services Administration (GSA) and the Small Business Administration (SBA) to place request for proposals (RFP) No. GS00K89AFC2560 (RFP-2560) for microfilm and magnetic tape services in the Small Business Administration's (SBA) section 8(a) program.[1] Microform is the incumbent small business contractor for these services under a prior small business set-aside. It contends that the SBA did not properly analyze all relevant factors, as required by SBA regulations, in determining the adverse impact on Microform from setting aside the requirement for the 8(a) program.

We deny the protest.

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[1]Section 8(a) of the Small Business Act authorizes the SBA to enter into contracts with government agencies and to arrange for the performance of such contracts by letting subcontracts to socially and economically disadvantaged small business concerns. 15 U.S.C. § 637(a) (1988 and Supp. II 1990).

SBA regulations provide that the SBA will not accept a requirement previously met by a small business into the 8(a) program if doing so would have an adverse impact on other small business programs or on an individual small business. 13 C.F.R. § 124.309(c) (1992). In this regard, the regulations state that the SBA will consider "all relevant factors" in determining the impact of an 8(a) award. 13 C.F.R. § 124.309(c)(1). The regulations further provide that the SBA will presume an adverse impact on small business concerns and not accept a procurement into the program where (1) a small business, which has performed the requirement for at least 24 months, is currently performing the requirement or has finished performance within 30 days of the procuring agency's offer of the requirement for the 8(a) program; and (2) the estimated dollar value of the offered 8(a) award would be 25 percent or more of the incumbent's most recent annual gross sales. 13 C.F.R. § 124.309(c)(2).

By letter dated March 29, 1991, the SBA wrote to GSA and asked for assistance in identifying for inclusion under the 8(a) program potential contracting opportunities with respect to services for converting computer-generated output to microfilm/microfiche and hard copy. GSA identified the services that were included in RFP-2560.

Upon receipt of GSA's offer, the SBA notified Microform of the proposal to place the requirement under the 8(a) program. The SBA requested that Microform provide the SBA with specific financial information, including a financial statement for the past two years, the most recent quarterly financial statements, and a separate detailed break-out, by quarter, of income derived under the incumbent contract; the SBA advised Microform that the information would be used to ascertain whether Microform would be adversely affected by award of the requirement to an 8(a) contractor. The agency subsequently requested Microform to submit SBA Form 355, "Application for Small Business Size Determination," and any additional information that would assist the SBA in its impact determination. Microform responded by providing all of the requested information, including an independent accounting firm's financial analysis of Microform which indicated that Microform is a debtor in possession, having filed a voluntary petition for reorganization on June 20, 1991, under Chapter 11 of the bankruptcy statutes, 11 U.S.C. § 1101 et seq. (1988).

Based upon the information submitted by Microform, the SBA calculated the 1990 revenues of Microform and its affiliate to be $2,948,495; it computed the value of the proposed 8(a) contract to be $475,000. Since the dollar value of the proposed contract represented only 16 percent of the protester's total sales, the SBA found there was no presumption

of adverse impact under 13 C.F.R. § 124.309(c)(2). The SBA also examined additional factors relevant to business impact, as listed in its Standard Operating Procedure (SOP) No. 80-05, paragraph 78(d), including whether loss of the contract would force the incumbent into bankruptcy, affect a significant percentage of the incumbent's employees, or significantly impair the value of assets that the incumbent purchased exclusively for the procurement. The SBA determined that Microform would not be forced into bankruptcy by loss of a contract to satisfy the requirement, since Microform had already filed for reorganization under Chapter 11 prior to the proposed award date of this contract, and, in the SBA's view, the loss of sales represented by the requirement was not sufficient by itself to prevent reorganization. The SBA also determined that since only 16 to 20 percent of Microform's current employees perform services with respect to the existing contract, the loss of this contract would not result in a significant percentage of the firm's employees being terminated. In addition, the SBA found that while Microform had purchased equipment and subcontractor services solely to perform this contract, failure to continue performance of the work would not significantly impair the value of these assets to the firm since the equipment and services were not so specialized that the firm could not use them in the performance of other similar contracts. The SBA therefore concluded that the effect on Microform of its loss of the contract did not appear sufficient to warrant a determination of adverse impact. Accordingly, by letter dated September 13, the SBA notified GSA that it had accepted the agency's offering of the services on behalf of LaDorn Systems Corporation, an 8(a) program participant.[2]

Microform contends that the SBA violated 13 C.F.R. § 124.309(c)(1) by failing to properly analyze "all relevant factors," as listed in paragraph 78(d) of SOP No. 80-05, prior to determining that inclusion of this requirement in the 8(a) program would not have an adverse impact on Microform as the incumbent small business contractor. Specifically, Microform disagrees with the SBA's determination that loss of the contract would not prevent the firm from reorganizing under Chapter 11. Further, Microform maintains that loss of the contract would have a significant impact on its current employees, since the firm is located in a high unemployment area and has many employees with limited education and job skills who would have difficulty finding other

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[2]Microform initially protested the SBA's acceptance of the requirement into the 8(a) program before the SBA had completed its adverse impact study. The protest was dismissed as premature. Microform, Inc., B-244881, Aug. 23, 1991, 91-2 CPD ¶ 194.

employment if laid off by Microform. Microform also disputes the SBA's determination that the equipment and services purchased by Microform to perform the contract could be used to perform other similar contracts; according to Microform, 30 percent of the firm's expenses under the incumbent contract were spent on customized equipment that has no other application.

The Small Business Act affords the SBA and contracting agencies broad discretion in selecting procurements for the 8(a) program. Integrity Mgmt. Int'l, Inc., B-230795.2, Apr. 25, 1988, 88-1 CPD ¶ 400. Accordingly, our Office will not consider a protest challenging the decision to procure under the 8(a) program absent a showing of possible fraud or bad faith on the part of government officials or that specific laws or regulations may have been violated. Korean Maintenance Co., B-243957, Sept. 16, 1991, 91-2 CPD ¶ 256; San Antonio Gen. Maintenance, Inc., B-240114, Oct. 24, 1990, 90-2 CPD ¶ 326. Here, the question is whether there has been a violation of 13 C.F.R. § 124.309. (Although the protester also refers to SOPs, the SOPs merely provide internal SBA policies and guidelines; they are not regulations having the force and effect of law. Therefore, the SBA's compliance with those internal procedures concerns executive branch management decisions which our Office generally will not review under our bid protest function. PECO Enters., Inc., 68 Comp. Gen. 130 (1988), 88-2 CPD ¶ 566.)

As described above, the SBA, based on accurate and up-to-date information submitted by Microform, examined the extent to which loss of the contract would have an impact on Microform's reorganization plan, current employees, and capital equipment investments. The SBA then determined that Microform would not suffer the level of adverse impact contemplated under the regulations. Although Microform disagrees with the SBA's evaluation, the record does not establish that the SBA did not make the adverse impact determination provided for in 13 C.F.R. § 124.309. Such a determination necessarily is a discretionary one for the SBA, which must balance various program requirements for different segments of the small business community. Therefore, in the absence of a showing (1) that the determination was made in bad faith; (2) that there actually was no meaningful adverse impact determination, see Korean Maintenance Co., supra; or (3) that the determination was inconsistent with a specific provision of the regulation, see San Antonio Gen. Maintenance, Inc., supra, we have no basis to sustain a protest on this issue. There is no such showing here.

Microform also asserts that LaDorn is not qualified to perform the instant contract because the firm has never performed contracts for similar services and in fact has subcontracted with another firm to perform the contract.

However, the SBA, and not our Office, is responsible for verifying that a particular 8(a) firm is eligible and qualified for a particular requirement that has been reserved for the 8(a) program. 13 C.F.R. § 124.313(a); see Little Susitna, Inc., B-244228, July 1, 1991, 91-2 CPD ¶ 6. Accordingly, this is not a matter for our consideration.

The protest is denied.

for James F. Hinchman
General Counsel