Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Atlantic Coast Contracting, Inc.

File: B-260686

Date: July 13, 1995

Ronald Draughon, for the protester.
Riggs L. Wilks, Jr., Esq., Department of the Army, and David R. Kohler, Esq., Small Business Administration, for the agencies.
Scott H. Riback, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency properly placed requirement under Small Business Act's section 8(a) program, and removed it from the section 15 small business set-aside program, where Small Business Administration determined that doing so would not result in adverse impact, as defined in applicable regulations.

DECISION

Atlantic Coast Contracting, Inc. (ACC) protests the decision of the Department of the Army to acquire custodial and housekeeping services at Womack Army Medical Center, Fort Bragg, North Carolina[1] under the Small Business Administration's (SBA) section 8(a) program.[2] ACC maintains that the acquisition should be conducted as a small business set-aside under section 15 of the Small Business Act (15 U.S.C. § 644 (1988)) rather than as a section 8(a) set-aside.

[1]The Army has not yet issued its solicitation but advises that its issuance as a section 8(a) set-aside is imminent, as the current contract is about to expire.

[2]Section 8(a) of the Small Business Act, 15 U.S.C. § 637(a) (1988 & Supp. V 1993), authorizes SBA to enter into contracts with government agencies and to arrange for performance through subcontracts with socially and economically disadvantaged small business concerns.

We deny the protest.

This requirement was originally set aside for small businesses under section 15 of the Small Business Act in 1989. Award was made to an eligible small business concern, G&H Building and Maintenance, Inc., for a base year with four 1-year option periods. During the third option year, G&H was unable to satisfactorily perform the requirement, and the Army terminated its contract for default. Thereafter, in order to meet its need for the services, the Army contacted SBA and requested that the contract be placed with an eligible firm under SBA's section 8(a) program. After a limited competition involving three eligible 8(a) firms, award was made to Triple P Services for the remainder of the contract.[3] At the time of the 1993 award, SBA prepared a document entitled "Impact Determination Statement," in which it determined, essentially, that, since there was no incumbent small business contractor, there was no adverse impact. SBA thus permitted the agency to award the remainder of G&H's contract to Triple P, an 8(a) firm.

ACC contends that the current requirement cannot properly be moved into the 8(a) program; since the requirement was previously set aside for small businesses--even though following G&H's termination it was performed by a section 8(a) concern--the Army is again required to set it aside for small businesses absent an SBA determination that setting the acquisition aside for the 8(a) program will not adversely impact small business concerns or other small business programs.[4] ACC maintains that SBA has not made an adequate impact determination, that there are numerous small businesses capable of competing for the requirement which would be adversely impacted, and that removing the procurement from the small business set-aside program obviously will have an adverse impact on that program.

The Small Business Act affords SBA and contracting agencies broad discretion in selecting procurements for the 8(a) program and our Office will not consider a protest challenging a decision to procure under the 8(a) program absent a showing of possible fraud or bad faith on the part of government officials, or an allegation that specific laws

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[3]This contract expired on December 31, 1994, but was extended on a sole-source basis pending both preparation of the solicitation in question and issuance of our decision in this protest.

[4]In general, agencies are required to obtain goods or services using repetitive small business set-asides where the requirement has previously been successfully met using a small business set-aside. Federal Acquisition Regulation (FAR) § 19.501(g).

or regulations have been violated. American Mutual Protective Bureau, B-243329.2, June 16, 1994, 94-1 CPD ¶ 371. ACC does not allege fraud or bad faith, and we conclude that there has been no violation of applicable statutes and regulations.

SBA's regulations require it to execute an impact statement before accepting a requirement into the 8(a) program; SBA must determine in writing whether acceptance of the acquisition "would have an adverse impact on other small business programs or on an individual small business." 13 C.F.R. § 124.309(c) (1995). SBA made the requisite determination here. At the time G&H was terminated and award was made to Triple P, SBA determined that since there was no longer an incumbent small business, there was no adverse impact that would preclude including the requirement in the 8(a) program.

Much of ACC's protest takes issue with the limited scope of SBA's impact study; it seems to have been based only on the impact on the incumbent, ignoring other "individual small business[es]" and other small business programs. While SBA's review did in fact focus on the impact (or, here, the lack thereof) on an incumbent small business, SBA's approach was consistent with its regulations and procedures. As SBA points out in its report to our Office on this matter, the purpose of the adverse impact regulation is to protect incumbent small business contractors. The regulation itself states: "[t]he adverse impact concept is designed to protect small business concerns which are performing government contracts awarded outside the 8(a) program. . . ." 13 C.F.R. § 124.309(c). Consistent with this language, SBA's Standard Operating Procedures (section 80 05 2 (1990)) provide that "[i]mpact determinations are not required where there is no incumbent small business. . . ."

As for the requirement to consider the impact on other small business programs, SBA's report to our Office in this matter states that SBA's "no adverse impact" determination was dependent in part on this provision. Although the standard form impact determination SBA uses does not provide detailed supporting information, the protester has provided, and the record contains, no information suggesting that there is any adverse program impact that would preclude moving the requirement into the 8(a) program. The fact that the requirement will be removed from the small business set-aside program does not by itself represent an adverse impact within the meaning of the regulation, since this same impact is present every time a requirement is moved from the section 15 program into the 8(a) program. Thus, under ACC's interpretation, a requirement could never be moved from the section 15 program into the 8(a) program, since there always

would be an adverse impact on the section 15 program; this result obviously was not contemplated by the regulation.

We conclude that the agency's intended inclusion of this requirement under the 8(a) program is unobjectionable.

The protest is denied.

Robert P. Murphy
General Counsel