



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: John Blood

File: B-261477

Date: September 27, 1995

John Blood for the protester.

Allen W. Smith, Department of Agriculture, for the agency.

Jacqueline Maeder, Esq., and Paul Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest against the agency's decision to convert a requirement from a small business set-aside to a section 8(a) set-aside is sustained where the procurement was initially issued and publicized as a small business set-aside, and was subsequently accepted by the Small Business Administration (SBA) for the section 8(a) program on the basis of an agency request which failed to provide SBA with this relevant history.

DECISION

John Blood protests the decision of the Department of Agriculture, Forest Service, to convert the requirement under request for quotations (RFQ) No. 06-95-03—the thinning of 144 areas in Medicine Bow National Forest—from a small business set-aside to a set-aside for participants in the Small Business Administration's (SBA) section 8(a) program. Blood contends that the Forest Service violated the applicable regulation in offering the requirement for contracting under the 8(a) program.

We sustain the protest.

The RFQ, issued on March 2, 1995, as a small business set-aside, requested quotations by April 5. The Forest Service utilized the small purchase procedures set forth in Part 13 of the Federal Acquisition Regulation (FAR). To publicize the procurement, the Forest Service mailed the RFQ to firms that had previously performed the services.

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After April 5, the protester contacted the agency and, when told that no purchase order had been issued under the RFQ, requested a copy of the solicitation. Blood then submitted the low quote on April 17.

Before the quotations were evaluated and a purchase order issued, the Forest Service became aware of an 8(a) contractor who was working in the area. Because the agency has experienced difficulty in finding 8(a) contractors, by letter dated May 9, the Forest Service offered the project to the SBA for inclusion in SBA's section 8(a) program.¹ In this letter, the Forest Service identified the project, listed the Standard Industrial Classification code (SIC) for the work to be performed, and provided the estimated cost of the project and the current contractor's name and address. The contracting officer informed Blood on May 11 that the agency had determined to submit this work to the SBA under the 8(a) program.² Blood protested to our Office on May 19.

Blood protests that the Forest Service violated FAR § 19.804-2(a)(9) in offering the procurement to the SBA after it had been advertised as a set-aside for small businesses.

FAR § 19.804-2(a) provides that an agency must notify the SBA of its plans to place 8(a) contracts with the SBA and identify, among other things, the work to be performed, the time frame for completing the contract action, the SIC code that applies to the principal nature of the acquisition, the anticipated dollar value of the requirement, and the acquisition history, if any, of the requirement, including the names and addresses of any small business contractors which have performed this requirement during the previous 24 months. FAR § 19.804-2(a)(9) also provides that the agency notification to SBA must include:

"A statement that no solicitation for this specific acquisition has been issued as a small business set-aside or a small disadvantaged business set-aside, and that no other public communication (such as notice in the Commerce Business Daily) has been made evidencing the contracting agency's clear intention to set aside the acquisition for small business or small disadvantaged business."

¹Section 8(a) of the Small Business Act authorizes SBA to enter into contracts with government agencies and to arrange for performance of such contracts by letting subcontracts to socially and economically disadvantaged small business concerns. 15 U.S.C. § 637(a) (1994).

²The SBA accepted the requirement for the 8(a) program by letter dated May 18.

Agencies are required to submit this information because under SBA regulation, absent extraordinary circumstances³, once a procurement has been publicly announced as a small business set-aside or a solicitation has been issued as a small business set-aside, a requirement cannot thereafter be accepted into the section 8(a) program. See 13 C.F.R. § 124.309(a) and (b) (1995).

Here, the solicitation was issued and publicized in March and in May the Forest Service offered the requirement for inclusion in the 8(a) program. The Forest Service argues that FAR § 19.804-2(a)(9) applies only to requirements for which requests for proposals (RFP) and invitations for bids (IFB) advertised in the Commerce Business Daily (CBD) were issued. In fact, the specific language of that regulation and of 13 C.F.R. § 124.309 does not exclude either RFQs or other means of publicizing procurements. Rather, while these regulations contain references to RFPs, IFBs, and CBD publications, the references are provided only as examples of solicitation types and publication modes; they are not denominated as exhaustive.

Because the Forest Service had issued a solicitation and publicized the procurement as a small business set-aside, SBA could not, absent extraordinary circumstances, accept the procurement into the 8(a) program. See Industrial Data Link Corp., B-246682, Mar. 19, 1992, 92-1 CPD ¶ 296; L. Washington & Assocs., Inc., B-241950.2, June 25, 1991, 91-1 CPD ¶ 600. The Forest Service, however, did not provide the required statement to SBA that a solicitation had not been issued or publicized as a small business set-aside; neither did the Forest Service inform SBA that a solicitation had been issued and publicized and suggest that some extraordinary circumstances warranted acceptance into the 8(a) program. As a result, the SBA, assuming that no solicitation had been issued and publicized, accepted the procurement on that basis.⁴

Under the circumstances, we conclude that the Forest Service failed to provide the SBA the information that SBA needed so that, pursuant to regulation, it could

³An example of an extraordinary circumstance provided in the regulation is "where a procuring agency had made a decision to offer the requirement to the 8(a) program before the [CBD] notice was sent out and the procuring agency acknowledges and documents that the notice was in error." 13 C.F.R. § 124-309 (b). See also subsection (a), containing similar language with respect to solicitations issued in error.

⁴In this regard, while the Forest Service states that it was informed by the SBA that it could offer this procurement for the 8(a) program even though an RFQ had been issued, this advice, to be consistent with the applicable regulations, could have meant only that doing so was permissible if "extraordinary circumstances" were present.

properly determine whether to accept this previously-advertised procurement into its section 8(a) program. Accordingly, since there is no suggestion in the record that the type of extraordinary circumstance envisioned by the SBA regulation may exist here, we recommend that the Forest Service withdraw its request that the SBA accept this procurement into the 8(a) program and proceed with the procurement outside of that program. We also find that Blood is entitled to reimbursement of its protest costs. 4 C.F.R. § 21.6(d) (1995). In accordance with 4 C.F.R. § 21.6(f), Blood's certified claim for such costs, detailing the time expended and costs incurred, must be submitted directly to the Forest Service within 60 days after receipt of this decision.

The protest is sustained.

/s/ James F. Hinchman
for Comptroller General
of the United States