



Decision

Matter of: Aldevra
File: B-411752
Date: October 16, 2015

Rodney Marshall for the protester.
Maj. Michael G. Pond, Department of the Army; Michael D. Tully, Esq., General Services Administration; and John W. Klein, Esq., and Sam Q. Le, Esq., Small Business Administration, for the agencies.
Paula A. Williams, Esq., Jennifer D. Westfall-McGrail, Esq., and Edward Goldstein, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that agency was required by statute to set aside a Federal Supply Schedule order valued at approximately \$4,300 is denied where statute and implementing regulations specifically provide that decision whether to set aside such an order is within the discretion of the contracting agency.

DECISION

Aldevra, of Portage, Michigan, a small business, protests the terms of request for quotations (RFQ) No. 999313, issued by the Department of the Army, National Guard Bureau, Kansas Air National Guard for an ice machine and water dispenser. The protester contends that the agency improperly failed to set aside the solicitation for small business concerns.

We deny the protest.

The RFQ, issued on June 29, 2015, contemplates the issuance of a delivery order for an ice machine/water dispenser on a brand name or equal basis. The solicitation was issued via the General Services Administration's (GSA) e-Buy portal pursuant to the Federal Supply Schedule (FSS) procedures in Federal Acquisition Regulation (FAR) Subpart 8.4. The requirement, which has a value of approximately \$4,300, was not set aside for small business competition. Prior to the scheduled closing time for receipt of quotations on July 9, Aldevra, which holds an FSS contract, protested to our Office.

Aldevra contends that there are multiple small businesses, including several holding FSS contracts, capable of providing the desired item. Accordingly, the protester argues, section 15(j) of the Small Business Act, 15 U.S.C. § 644(j), dictates that the contemplated order be set aside for small businesses. This section provides in relevant part as follows:

- (1) Each contract for the purchase of goods and services that has an anticipated value greater than \$2,500 but not greater than \$100,000¹ shall be reserved exclusively for small business concerns unless the contracting officer is unable to obtain offers from two or more small business concerns that are competitive with market prices and are competitive with regard to the quality and delivery of the goods or services being purchased.

15 U.S.C. § 644(j)(1). This set-aside mandate has been implemented under Federal Acquisition Regulation (FAR) § 19.502-2, Total small business set-asides. The gist of the protester's argument, which is supported by the Small Business Administration (SBA),² is that because the above order has a value between \$3,000 and \$150,000, § 644(j) requires that it be set aside for small businesses unless market research establishes that competitive offers from two or more small businesses cannot reasonably be expected. As explained below, we disagree.

In 2010, Congress amended the Small Business Act to address small business set-asides under multiple award contracts. Specifically, section 1331 of the Small Business Jobs Act of 2010, Pub. L. 111-240 (hereinafter, the Jobs Act), added the following provision to section 15 of the Small Business Act:

- (r) MULTIPLE AWARD CONTRACTS.—Not later than 1 year after the date of enactment of this subsection, the Administrator for Federal Procurement Policy and the Administrator, in consultation with the Administrator of General Services, shall, by regulation, establish guidance under which Federal agencies may, at their discretion—

¹ At the time the RFQ was issued, the lower dollar threshold was \$3,000 and the upper threshold was \$150,000. As of October 1, 2015, the lower threshold has been further adjusted upward to \$3,500. 80 Fed. Reg. 38294 (July 2, 2015).

² Because the legal issues raised by the protest relate to the Small Business Act, and the SBA regulations implementing it, as well as the Federal Supply Schedule program, which is administered by the GSA, our Office solicited the views of both the SBA and the GSA.

(1) set aside part or parts of a multiple award contract for small business concerns, including the subcategories of small business concerns identified in subsection (g)(2);

(2) notwithstanding the fair opportunity requirements under section 2304c(b) of title 10, United States Code, and section 303J(b) of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 253j(b)),^[3] set aside orders placed against multiple award contracts for small business concerns identified in subsection (g)(2); and

(3) reserve 1 or more contract awards for small business concerns under full and open multiple award procurements, including the subcategories of small business concerns identified in subsection (g)(2).

The committee report accompanying the underlying Senate bill, S. Rpt. 111-343, explained that while the Small Business Act and the Federal Acquisition Regulation required federal agencies to set contracts aside for small businesses where there was a reasonable expectation of reasonably priced bids from two or more small businesses, “these general set-aside requirements have been interpreted not to apply to multiple-award contracts;” thus, the Senate bill “provided clear direction” to contracting officers by authorizing small business set-asides in multiple-award contracts.⁴ S. Rpt. 111-343 at 7.

³ 41 U.S.C. § 253j has subsequently been recodified as 41 U.S.C. § 4106.

⁴ The Senate Report did not explain what the committee meant when it indicated that the general set-aside requirements in the Small Business Act had been interpreted not to apply to multiple-award contracts. This interpretation of the Small Business Act, however, is consistent with the Report of the Acquisition Advisory Panel to the Office of Federal Procurement Policy and the United States Congress in January of 2007. With regard to multiple-award contracts generally, the Report of the Acquisition Advisory Panel noted that “there is no specific statutory or regulatory authority for agencies to reserve orders under these contracts for small business competition in order to achieve agency goals,” Panel Report at 23; see also id. at 304 (“there is no express legal authority to limit competition for orders based on socioeconomic status”). In addition, with regard to GSA’s Multiple Award Schedule (i.e., FSS) program specifically, the Panel Report made reference to the absence of a requirement “to conduct small business set-aside analysis prior to placing an order under GSA’s MAS program,” id. at 301; see also id. at 304 (“there is no express legal authority to limit competition for MAS orders to SBCs [small business concerns].”). Our Office took a contrary position in Delex Systems, Inc., B-400403, Oct. 8, 2008, 2008 CPD ¶ 181, which concluded that the set-aside provisions of FAR § 19.502-2(b) applied to competitions for task and delivery orders issued under multiple-award contracts. We subsequently found that our holding in Delex had

(continued...)

On November 2, 2011, the Department of Defense, GSA, and NASA (at the request of the officials identified in subsection (r)) issued an interim rule amending sections of FAR Parts 8, 12, 16, 19, 38, and 52 to implement section 1331 of the Jobs Act. 76 Fed. Reg. 68032. Of particular relevance to the protest here, FAR Subpart 8.4, which sets forth the provisions and procedures for placing orders under the FSS program, was amended to provide that while the socio-economic programs set forth under FAR part 19 are not mandatory when placing orders under the FSS program, contracting officers are vested with the discretion to set aside orders for small business concerns. Specifically, FAR § 8.405-5(a)(1)(i) was revised as follows:

- (a) Although the preference programs of part 19 are not mandatory in this subpart, in accordance with section 1331 of Public Law 111-240 (15 U.S.C. 644(r))—
 - (1) Ordering activity contracting officers may, at their discretion—
 - (1) Set aside orders for any of the small business concerns identified in 19.000(a)(3).

Also of relevance, FAR part 19, which implements the acquisition-related sections of the Small Business Act, was amended to establish that contracting officers are vested with the discretion to set aside orders placed under the FSS program and all other multiple award contracts. Specifically, FAR § 19.502-4(c) was revised as follows:

In accordance with section 1331 of Public Law 111-240 (15 U.S.C. 644(r)) contracting officers may, at their discretion—

* * * * *

- (c) Set aside orders placed under multiple award contracts for any of the small business concerns identified in 19.000(a)(3). For orders placed under the Federal Supply Schedules Program see 8.405-5. For all other multiple award contracts see 16.505.

On October 2, 2013, SBA revised its own regulations to implement section 1331 of the Jobs Act. 78 Fed. Reg. 61114. As relevant here, 13 C.F.R. § 125.2(e)(1) provides the following general summary pertaining to small business set-asides

(...continued)
been superseded by the passage of section 1331 of the Jobs Act. Edmond Scientific Co., B-410179, B-410179.2, Nov. 12, 2014, 2014 CPD ¶ 336 at 8 n.10.

under multiple-award contracts⁵:

(e) Multiple Award Contracts.

(1) General

(i) The contracting officer must set-aside a Multiple Award Contract if the requirements for a set-aside are met. This includes set-asides for small businesses, 8(a) Participants, HUBZone SBCs, SDVO SBCs, WOSBs or EDWOSBs.

(ii) The contracting officer in his or her discretion may partially set-aside or reserve a Multiple Award Contract, or set aside, or preserve the right to set aside, orders against a Multiple Award Contract that was not itself set aside for small business. The ultimate decision of whether to use any of the above-mentioned tools in any given procurement action is a decision of the contracting agency.

(iii) The procuring agency contracting officer must document the contract file and explain why the procuring agency did not partially set-aside or reserve a Multiple Award Contract, or set-aside orders issued against a Multiple Award Contract, when these authorities could have been used.

(Underline added.) In issuing the final rule, the SBA explained as follows:

Of particular note, the final rule, like the proposed rule, preserves the discretion that section 1331 vests in agencies to decide whether or not to use any of the enumerated set-aside and reserve tools. There is nothing in the rule that compels an agency to award a multiple award contract with a partial set-aside, contract reserve, or contract clause that commits (or preserves the right) to set aside orders when the “rule of two” is met. The rule only requires that agencies consider these tools before awarding the multiple award contract and, if they choose not to use any of them, document the rationale. Agencies have the discretion to forego using the section 1331 tools even if the requirements could be met; they simply need to explain how their planned action is consistent with the best interests of the agency and the agency’s overarching responsibility to provide maximum practicable opportunities for small businesses . . .

78 Fed. Reg. 61116.

Given the language of the Jobs Act, as well as regulatory provisions implementing the Jobs Act, it is readily apparent that the general small business set-aside rule for

⁵ The revised regulations expressly define multiple-award contracts as including multiple award schedule contracts issued by GSA. 13 C.F.R. § 125.1(k).

contracts valued between \$2,500 and \$100,000, set forth under section 644(j), and implemented under FAR § 19.502-2, does not apply when placing orders under the FSS program. In this regard, the Jobs Act clearly provides for granting agency officials discretion in deciding whether to set aside orders under multiple-award contracts. Moreover, the regulatory provisions implementing this statutory provision (FAR § 8.405-5(a)(1)(i) and FAR § 19.502-4(c)) establish that the small business rules set forth under FAR Part 19, which includes FAR § 19.502-2, are not mandatory, and instead afford contracting officers with the discretion to set aside orders under the FSS program.

In reaching our conclusion we recognize that it is a basic canon of statutory construction that each section of a statute should be construed in a manner that produces a harmonious whole. Ashland Sales & Serv. Co., B-401481, Sept. 15, 2009, 2009 CPD ¶ 186 at 5. We further recognize that in its submission to our Office pertaining to this protest, SBA argued that the most reasonable manner in which to harmonize sections 644(j) and (r) is to read section (j) as requiring that all FSS orders with values in the specified range be set aside unless market research shows that competitive offers from two or more small businesses cannot be expected, and to read section (r) as merely creating an exception to the requirement in 10 U.S.C. § 2304c(b) (and 41 U.S.C. § 4106) that all multiple-award contract holders be given a fair opportunity to compete for orders. According to SBA, a contrary interpretation would effectively repeal section 644(j) by implication. We disagree.

First, SBA's repeal by implication argument is misplaced since the application of section 644(r), by its terms, and as implemented through the regulations noted above, is limited to multiple-award contracts and orders placed under such contracts. Thus, to the extent the set-aside requirement of section 644(j) is understood as not applying to orders under multiple-award contracts, section 644(j) would continue to have full application to all other types of contracts. Accordingly, just as the SBA would seek to harmonize the provisions at issue by interpreting section 644(j) as carving out an exception with respect to section 644(r), an equivalent harmony can be achieved by changing the direction of the exception; that is, by properly understanding section 644(r) as having carved out a limited exception with respect to section 644(j) for orders under multiple-award contracts.

Our interpretation in this regard is further bolstered by the second problem with SBA's position. That is, SBA's reading of the two provisions is at odds with the regulatory framework adopted to implement section 644(r). As noted above, FAR § 19.502-2 expressly provides that the small business provisions of the FAR, to include the provision implementing section 644(j), are not mandatory. Accordingly, the regulations have essentially established section 644(r) as an exception to section 644(j) where orders under the FSS are concerned, thereby providing a harmonious application of the two sections. Third, we note that the interpretation set forth by SBA is at odds with its own regulations; specifically, 13 C.F.R.

§ 125.2(e), quoted above, which establishes, without identifying any exception, that it is within a contracting officer's discretion whether to set aside an order against a multiple-award contract that was not itself set aside for small business.

Because the record fails to support the protester's contention that the Army violated 15 U.S.C. § 644(j) by failing to set aside the contemplated FSS order here for small business competition, we deny Aldevra's protest.⁶

The protest is denied.

Susan A. Poling
General Counsel

⁶ To the extent the protester also argues that it was contrary to internal Department of the Army guidance, as reflected in a memorandum from the Office of the Assistant Secretary of the Army for Acquisition Logistics and Technology dated July 11, 2011, for the contracting officer not to set aside the order here, we will not consider the complaint. An agency's compliance with internal agency guidance is not a matter subject to our review through the bid protest process. B&B Med. Servs., Inc., B-407113.3, B-407113.4, June 24, 2013, 2013 CPD ¶ 162 at 6 n.6; Triad Logistics Servs. Corp., B-403726, Nov. 24, 2010, 2010 CPD ¶ 279 at 2-3.