Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Schwegman Constructors and Engineers, Inc.

File: B-272223

Date: August 28, 1996

Christopher Solop, Esq., and Lynn Hawkins Patton, Esq., Ott & Purdy, for the protester.
Richard P. Castiglia, Jr., Esq., Department of the Air Force, for the agency.
Tania L. Calhoun, Esq., and Christine S. Melody, Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest challenging solicitation's inclusion of evaluation preference for small disadvantaged business concerns in construction acquisitions pursuant to Department of Defense test program on ground that the preference contravenes the Small Business Competitiveness Demonstration Program (SBCDP) Act's mandate for full and open competition is denied; since the evaluation preference does not limit the sources that are permitted to compete, the competition remains "full and open" and does not violate the SBCDP Act.

2. General Accounting Office will not consider allegation that evaluation preference for small disadvantaged business concerns in construction acquisitions pursuant to Department of Defense test program is unconstitutional in light of Adarand Constructors, Inc. v. Pena and City of Richmond v. Croson Co. because neither decision constitutes clear judicial precedent on the constitutionality or legality of this test program and its evaluation preference.

DECISION

Schwegman Constructors and Engineers, Inc. protests the terms of invitation for bids (IFB) No. F22600-96-B-0031, issued by the Department of the Air Force to replace chillers at Keesler Air Force Base, Mississippi. Schwegman contends that the solicitation's inclusion of an evaluation preference for small and disadvantaged business (SDB) concerns is improper.

We deny the protest.

In Adarand Constructors, Inc. v. Pena, 115 S.Ct. 2097 (1995), the Supreme Court held that racial classifications must be subject to strict scrutiny and must serve a compelling governmental interest and be narrowly tailored to further that interest. The Department of Defense (DOD) subsequently suspended those sections of the Defense Federal Acquisition Regulation Supplement (DFARS) which prescribed the set-aside of acquisitions for SDB concerns in order to take account of the Adarand decision while an interagency government-wide review of affirmative action programs was conducted. 60 Fed. Reg. 54,954 (Oct. 27, 1995). On April 29, 1996, DOD issued its final rule amending the DFARS to implement initiatives designed to facilitate awards to SDB concerns in consideration of the Adarand decision. 61 Fed. Reg. 18,686 (Apr. 29, 1996). Relevant to this protest, DOD established a test program to ensure that offers from SDB concerns would be given an evaluation preference in most construction acquisitions whose value exceeds the simplified acquisition threshold. Id. at 18,688.

Under the test program, set forth at DFARS Subpart 219.72, offerors are required to separately state their bond costs where a solicitation requires bonding. Offers will first be evaluated on the basis of total price. If the apparently successful offeror is an SDB concern, no preference will be applied. If the apparently successful offeror is not an SDB concern, offers will be evaluated based upon total price minus bond costs. If, after the exclusion of bond costs, the apparently successful offeror is an SDB concern, bond costs will be added back to all offers, and SDB concerns will be given an evaluation preference by adding a factor of 10 percent to the total price of all other offers. The clause at DFARS § 252.219-7008, which explains this procedure, is to be included in all solicitations to which the test program applies.

On May 6, the Air Force issued this solicitation as an unrestricted procurement. The work to be performed is classified as construction work with a value in excess of $25,000. After amendment No. 0001 was issued to incorporate the clause at DFARS § 252.219-7008 into the solicitation, Schwegman filed this protest. Schwegman principally argues that the solicitation's inclusion of the clause violates the Small Business Competitiveness Demonstration Program (SBCDP) Act of 1988, 15 U.S.C. § 644 note (1994).

The SBCDP Act establishes a demonstration program under which solicitations for the procurement of services in designated industry groups are to be issued on an unrestricted basis, provided the agency has attained its small business participation goals. Construction is one of these designated industry groups. Section 717(b). Relevant to this protest, section 713 of the SBCDP Act states:

> "(a) Full and Open Competition. . . . [E]ach contract opportunity with an anticipated value of more than $25,000 for the procurement of services from firms in the designated industry groups (unless set aside pursuant to section 8(a) of the Small Business Act (15 U.S.C. 637(a))

> or section 2323 of Title 10, United States Code) shall be solicited on an unrestricted basis . . . . Any regulatory requirements which are inconsistent with this provision shall be waived."

Schwegman contends that the solicitation's inclusion of the evaluation preference renders this a restricted competition, in contravention of the SBCDP Act.

Unrestricted competition and restricted competition are terms that define the universe of firms that may compete for award under a given solicitation. Generally, in an unrestricted competition, all responsible sources are permitted to compete. Federal Acquisition Regulation (FAR) § 6.003. In a restricted competition, the sources permitted to compete are limited to, for example, small businesses under a small business set-aside. FAR § 6.203. Indeed, the SBCDP Act itself defines restricted competitions as those restricted to small business concerns under a small business set-aside, see section 713(b), and FAR § 19.1003(a) explains that the purpose of the program is to test the ability of small businesses to compete successfully in certain industry categories "without competition being restricted by the use of small business set-asides." Since the evaluation preference here does not limit the sources that are permitted to compete, the competition remains unrestricted and does not contravene the requirements of the SBCDP Act.

Schwegman claims our Office has held that using an evaluation preference in a procurement covered by the SBCDP Act violates the Act, citing our decision in Perdomo & Sons, Inc., B-240436, Nov. 19, 1990, 90-2 CPD ¶ 404. Schwegman has misread this decision.

In Perdomo, the Air Force inadvertently included the SDB evaluation preference clause prescribed at DFARS § 252.219-7007 in an unrestricted solicitation under the SBCDP Act. Our conclusion that the agency properly refused to apply the preference was not based upon any notion that it violated the SBCDP Act, but upon the fact that the applicable regulations specifically prohibited the inclusion of the evaluation preference. Presently, DFARS § 219.1006(b)(1)(B) specifically prohibits use of the evaluation preference at DFARS § 219.70, the provision at issue in Perdomo.[1] However, that same section specifically recognizes the exception for the construction acquisitions test program. Hence, unlike in Perdomo, use of the evaluation preference at issue here is not prohibited by the applicable regulations.

Schwegman's fundamental complaint is that this evaluation preference is unduly restrictive of competition. The protester believes that its application could be catastrophic to small businesses competing for the same procurement because they

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[1]At the time the decision in Perdomo was issued, DFARS § 219.1070-1(c)(3) prohibited application of the evaluation preference at issue in that case.

cannot reduce their prices by 10 percent and survive. However, a solicitation may include restrictive provisions to the extent necessary to satisfy the needs of the agency or as authorized by law. 10 U.S.C. § 2305(a)(1)(B) (1994). Since DFARS Part 219.72 required the Air Force to include this evaluation preference here, its presence is not legally objectionable.

Schwegman alternatively asks this Office to find that the inclusion of the clause is unconstitutional in light of the Adarand decision. The protester contends that DOD's test program regulations are not based on specific, direct evidence that past discrimination has limited the ability of SDB concerns to obtain contracts with the federal government.

There must be clear judicial precedent before we will consider a protest based on the asserted unconstitutionality of the procuring agency's actions. DePaul Hosp. and The Catholic Health Ass'n of the United States, B-227160, Aug. 18, 1987, 87-2 CPD ¶ 173. We have consistently held that since the Court in Adarand simply announced the standard that is to be applied in determining the constitutionality of programs involving racial classifications in the federal government, and remanded the case to the lower courts for further consideration in light of that standard, Adarand did not provide that precedent. Advanced Eng'g & Research Assocs., Inc., B-261377.2 et al., Oct. 3, 1995, 95-2 CPD ¶ 156; Elrich Contracting, Inc.; The George Byron Co., B-262015; B-265701, Aug. 17, 1995, 95-2 CPD ¶ 71.

Schwegman contends that, following the Court's decision in Adarand, racially based set-aside programs imposed by the federal government are subjected to the same level of "strict scrutiny" applied to racially based set-aside programs at the state or local level following the Court's decision in City of Richmond v. Croson Co., 488 U.S. 469 (1989), which concerned a municipality's minority set-aside program. Schwegman maintains that these two decisions taken together provide our Office with the clear judicial precedent it requires to review this matter. We disagree.

There must be clear judicial precedent on the precise issue presented to us before we will consider a protest based on the asserted unconstitutionality of a procuring agency's action. Neither the Adarand nor the Croson decision constitutes clear judicial precedent on the constitutionality or legality of this test program and its SDB evaluation preference. These decisions addressed the particular programs that were before the Court and, while they indicate what factors need to be considered to determine the constitutionality of such programs, we are unaware of, and the protester does not cite to, any dispositive federal court decisions applying the standards articulated in Adarand and Croson to a program which is sufficiently

similar to this one so as to warrant regarding those decisions as clear judicial precedent here. G.H. Harlow Co., Inc.--Recon., B-266144.3, Feb. 28, 1996, 96-1 CPD ¶ 116; see also Seyforth Roofing Co., Inc., B-235703, June 19, 1989, 89-1 CPD ¶ 574.

The protest is denied.

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