



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: CW Construction Services & Materials, Inc.

File: B-279724

Date: July 15, 1998

Kurt Thalwitzer, Esq., Mateer & Harbert, for the protester.
Denise Benjamin-Bibby, Esq., Small Business Administration, and Thomas W. Burt, Esq., Office of the Chief of Engineers, Department of the Army, for the agencies.
Aldo A. Benejam, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Small Business Administration (SBA) reasonably determined that protester was ineligible for award of 8(a) construction contract where protester failed to provide sufficient information during SBA's investigation to show that it established and maintained an office staffed with at least one full-time employee within the geographic area specified in the solicitation.
 2. Protest that solicitation for 8(a) construction contract contained a latent ambiguity is denied where protester has not demonstrated a reasonable possibility that it was prejudiced by the alleged ambiguity.
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DECISION

CW Construction Services & Materials, Inc. (CW) protests the determination by the Small Business Administration (SBA) that the firm is ineligible for award because it does not satisfy the geographic restriction contained in invitation for bids (IFB) No. DCA01-98-B-0025, issued by the U.S. Army Corps of Engineers, Mobile District for construction repairs at MacDill Air Force Base, Florida. The protester argues that the SBA's determination was unreasonable because CW maintains an office with at least one full-time employee within the geographic area specified in the IFB. The protester also argues that the IFB's geographic restriction contained a latent ambiguity.

We deny the protest.

BACKGROUND

The IFB was issued on February 17, 1998, as a competitive small disadvantaged business set-aside under section 8(a) of the Small Business Act, 15 U.S.C. § 637(a) (1994). The IFB sought bids for interior and exterior construction repairs to

Dorm 371 in MacDill Air Force Base. In a letter dated January 22, the Army offered the requirement to the SBA's Miami District. The SBA's regulations require that a contract opportunity offered to the 8(a) program be awarded on the basis of a competition restricted to eligible participants where there is a reasonable expectation that at least two eligible program participants will submit offers and award can be made at a fair market price; and the anticipated award price exceeds \$3 million for non-manufacturing contracts. 13 C.F.R. § 124.311(a) (1998). Since the anticipated award price here was not expected to exceed that threshold, the Army requested the SBA's approval in competing the requirement. See 13 C.F.R. § 124.311(c). The SBA approved the Army's request and also determined that the geographical area of competition for the requirement should be limited to the SBA South Florida District.¹

As amended, the IFB contained the provision at Federal Acquisition Regulation (FAR) § 52.219-18, Notification of Competition Limited to Eligible 8(a) Concerns-- Alternate I (Nov. 1989), which states in part as follows:

(a) Offers are solicited only from small business concerns expressly certified by the [SBA] for participation in the SBA's 8(a) Program and which meet the following criteria at the time of submission of offer--

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(4) The offeror's approved business plan is on the file and serviced by the following SBA district and/or Regional Office(s):

Miami District:
Small Business Administration
1320 S. Dixie Hwy, 5th Floor
Coral Gables, FL 33146
305-536-5058

Regional:
Small Business Administration
Suite 318
1720 Peachtree Rd., NW
Atlanta, GA 30309
404-347-5052

The Army received eight bids by the time set on March 19 for bid opening, ranging from \$1,386,900 to \$2,149,446; CW submitted the low bid. In view of the IFB's

¹15 U.S.C. § 637(a)(11) requires "to the maximum extent practicable" that 8(a) construction contracts "be awarded within the county or State where the work is to be performed." Under 13 C.F.R. § 124.311(g)(3), the SBA determines, based on its knowledge of the 8(a) portfolio, whether the competition should be limited only to those firms within the geographical boundaries of one or more SBA district offices, an entire SBA regional office, or adjacent SBA regional offices. Only those concerns located within the appropriate geographical boundaries are eligible to compete.

geographic limitation, by letter dated March 23, the Army requested that the SBA determine whether the firms that submitted the lowest four bids were eligible for award.²

The address provided for CW in the Army's letter indicated that the firm is located in Longwood, Florida. According to the SBA, Longwood is within the jurisdiction of the SBA's North Florida District Office, in Jacksonville. As such, the SBA states that in order to be eligible for award under the IFB, CW would need to establish that it maintains a branch office within the South Florida District. See PI Constr. Co., B-272174, B-272177, Oct. 2, 1996, 96-2 CPD ¶ 128 (SBA regulatory implementation of geographic restriction contemplates that 8(a) concerns will be eligible for award if they maintain a branch office in the designated area). The record shows that on March 24, Mr. Garcilaso Rey-Moran, an SBA official, telephoned CW president, Mr. Cecil V. Walker, to inquire whether CW maintained a branch office in the South Florida District. The record contains a declaration in which Mr. Rey-Moran states that he requested that Mr. Walker provide documentation routinely requested by the SBA to determine eligibility, such as a copy of a lease of office space and the name of an employee engaged in either marketing or other general business functions.

According to Mr. Rey-Moran's declaration, Mr. Walker responded that CW did not have a lease because the space CW used in South Florida was provided by a third party and that CW did not conduct any marketing from that office. Mr. Rey-Moran then requested that Mr. Walker provide at least a copy of a telephone bill in CW's name, to which Mr. Walker replied that he would transmit "something" to the SBA. On March 25, Mr. Walker transmitted a brief, 1-page letter to the SBA's Miami District office stating that CW had maintained an office in the Fort Lauderdale,

²Under the procedures set out in FAR § 19.805-2(c)(1) and 13 C.F.R. § 124.311(e)(6), the SBA determines the eligibility of the firms for award of the contract. In sealed bid acquisitions, the SBA is to first consider the eligibility of the low bidder. If that firm is ineligible for award, the SBA is to consider the eligibility of the next low bidder, and so on, until an eligible firm is identified or the list of bidders provided by the contracting agency is exhausted. Within 5 working days after receipt of the request for an eligibility determination, the SBA is to determine whether any firm identified by the contracting agency is eligible for award of the contract, including whether the firm is located within the required geographic location. 13 C.F.R. § 124.311(e)(5)(iii).

Florida area since 1995, and that in 1997 CW moved its operation to "1400 Lee Waganer Blvd. Fort Lauderdale, Florida." Mr. Walker further stated in his letter that:

The Broward County Aviation Department provides our current office in Fort Lauderdale. We will be providing Construction Management Services to the Fort Lauderdale-Hollywood International Airport through the year of 2003.

We will continue to run our South Florida operations from the Lee Waganer office.

Contrary to Mr. Rey-Moran's request, Mr. Walker did not provide a copy of a telephone bill in CW's name; did not provide a copy of a lease or any other document showing that CW had established and maintained an office in South Florida; and did not explain CW's office-sharing arrangement with the Broward County Aviation Department.

On March 26, relying upon the information in Mr. Walker's responses to Mr. Rey-Moran's telephone inquiry and based on the information in Mr. Walker's March 25 letter, the SBA's Assistant District Director for Minority Enterprise Development for the Miami District determined that CW was ineligible for award under the IFB. Specifically, the SBA concluded that CW did not satisfy the IFB's geographic limitation requirement because CW does not maintain an office within the South Florida area, but instead uses space provided to it by a local government for the performance of specific contracts for a branch of that government. The SBA also concluded that CW did not employ a full-time individual engaged in various business functions; rather, CW has several employees engaged in the performance of one specific contract. Accordingly, the SBA found CW ineligible and recommended that award be made to the next low, eligible bidder, Nikon, Inc. Award was made to Nikon on March 30, and this protest followed.

The protester's main contention is that the SBA's determination was unreasonable because, since 1991, CW has maintained an office in the South Florida area staffed with at least one full-time employee. The protester further argues that the IFB's geographic restriction contained a latent ambiguity.³

³The protester also argues that the IFB should not have contained a geographic restriction because the anticipated award price of this requirement would not exceed the \$3 million threshold and the Army's letter offering the contracting opportunity to the SBA imposed no geographic restrictions on the requirement. The fact that the Army's offering letter placed no geographic limitations on the requirement is immaterial since the SBA approved the agency's request to compete
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DISCUSSION

Section 8(a) of the Small Business Act, 15 U.S.C. § 637(a), authorizes the SBA to enter into contracts with government agencies and to arrange for performance through subcontracts with socially and economically disadvantaged small business concerns; FAR § 19.805 and 13 C.F.R. § 124.311 provide for and govern competitively awarded contracts set aside for 8(a) qualified concerns. Because of the broad discretion afforded to the SBA and the contracting agencies under the applicable statute and regulations, our review of actions under the 8(a) program is generally limited to determining whether government officials have violated applicable regulations or engaged in bad faith. See Border Maintenance Serv., Inc., B-250489, Feb. 3, 1993, 93-1 CPD ¶ 97 at 5, recon. denied, B-250489.4, June 21, 1993, 93-1 CPD ¶ 473. Here, we conclude that the SBA's determination that CW did not maintain a branch office within the IFB's geographic restriction, rendering the firm ineligible for award, was reasonable.

Implementing 10 U.S.C. § 637(a)(11), the applicable SBA regulation, 13 C.F.R. § 124.311(g)(3), provides that only 8(a) program participants "located within the appropriate geographical boundaries" are eligible to compete for 8(a) construction contracts. The regulations do not define this phrase or otherwise describe the circumstances under which the SBA would consider a participant "located within the appropriate geographical boundaries." However, the preamble to the regulations explains that the "SBA believes that a Program Participant may be considered as being located within a geographical boundary if it regularly maintains an office which employs at least one full-time individual within that geographical boundary." 60 Fed. Reg. 29,969, 29,971 (June 7, 1995).⁴ On August 7, 1997, the SBA issued an internal agency procedural notice stating that for purposes of 8(a) competitive award of construction contracts, a firm with a "branch office" located within the geographic boundaries of the relevant competitive area where the work is to be performed is eligible for award of the contract. That notice further stated that a "branch office" means an office with at least one full-time employee that:

- (1) is other than a firm's principal place of business for determining 8(a) eligibility;
- (2) is established and maintained by the firm for conduct of one or more business activity(ies) as an on-going business

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the requirement below the \$3 million threshold, and the SBA, not the procuring activity, has the discretion to determine whether to limit the competition to program participants based on geographic location. See 13 C.F.R. § 124.311(g)(3).

⁴The legal effect of that regulatory preamble and SBA's implementation of its regulations pertaining to geographic limitations for construction contracts were addressed in our decision in PI Constr. Co., supra.

concern (space provided by the government shall not be used to market other procurements and shall not be considered an office); (3) was established and operational on or before the date the instant requirement was accepted into the 8(a) program; and (4) is staffed by one or more full time employee(s) on the date that the instant requirement was accepted into the 8(a) program.

In its protest, CW concedes that its principal place of business is in Longwood, Florida (within the SBA's North Florida District), but asserts that it maintains an office in South Florida. In support of its position, CW explains that it uses space located at 1400 Lee Waganer Boulevard, in Fort Lauderdale, Florida, provided to CW by its "mentoring partner," O'Brien-Kreitzberg. The protester adds that, while this space is located on property owned by the local government (the Fort Lauderdale-Hollywood International Airport), CW does not have a lease in its name with the local government. In addition, contrary to its March 25 letter to the SBA's Miami District office, CW states that the firm does not provide any services directly to the airport authority. Specifically, CW states in its comments that its employees provide construction management services as a "sub-consultant" to its mentor, O'Brien-Kreitzberg, for a specific project O'Brien-Kreitzberg has with the Fort Lauderdale-Hollywood Airport.

While in its protest and comments on the agency report CW explains its relationship with O'Brien-Kreitzberg and provides a copy of a document entitled "Mentoring and Commitment Agreement," executed on January 30, 1998, between CW and O'Brien-Kreitzberg, CW failed to explain this relationship in response to Mr. Rey-Moran's inquiry on March 24, and did not provide a copy of this agreement until it filed this protest. In fact, Mr. Walker's March 25 letter made no mention of this arrangement and specifically stated that "[t]he Broward County Aviation Department provides [CW its] current office in Fort Lauderdale," without further explanation. In any case, nothing in the mentoring agreement between the firms makes reference to O'Brien-Kreitzberg providing CW office space at the Fort Lauderdale location, or suggests that O'Brien-Kreitzberg has space in Fort Lauderdale that it can make available to CW. The only document in the record that refers to the office sharing arrangement is an undated 1-page memorandum on O'Brien-Kreitzberg's letterhead, signed by a contracts administration manager, which simply states in relevant part that "[a]s part of the O'Brien Kreitzberg Program team, [CW] has offices provided by us." However, the memorandum does not state where those "offices" are located or whether CW established and maintains the office to conduct one or more business activities as an on-going business concern. Nor does that document explain whether CW office was established and operational on or before the date the instant requirement was accepted into the 8(a) program.

With regard to staffing at its Fort Lauderdale office, in its protest CW states that it satisfies the SBA eligibility requirement because it has a full-time employee engaged in general business activities, including marketing, in that office. There is no

indication in the record, however, that any evidence to support CW assertion was provided to the SBA before the eligibility determination was made.

We recognize that there is a discrepancy between Mr. Walker's and Mr. Rey-Moran's statements regarding their discussion of this issue during their telephone conversation on March 24. Mr. Rey-Moran states that Mr. Walker said that no marketing was conducted from CW Fort Lauderdale office. Mr. Walker, in contrast, states that he advised Mr. Rey-Moran that CW employees in its Fort Lauderdale office regularly market CW services in the South Florida area, but that Mr. Rey-Moran did not ask for their names. Even accepting Mr. Walker's version, however, CW did not provide any documentation or otherwise mention any employees in its March 25 letter sent in response to Mr. Rey-Moran's inquiry. In this regard, Mr. Walker states that had he been aware of the "branch office" rule and the significance of the SBA's inquiry, he would have been more precise in the wording of his March 25 letter. Mr. Walker also suggests that Mr. Rey-Moran's telephone inquiry did not provide sufficient notice that without a branch office in South Florida, CW would be deemed ineligible for award. In our view, it should have been apparent to Mr. Walker that Mr. Rey-Moran's inquiry related to the geographic restriction on eligibility for award set out in the IFB,⁵ and thus that CW should have submitted information fully responding to that issue.

Based on the limited information CW provided in response to Mr. Rey-Moran's inquiry, we have no basis to question SBA's determination that CW did not establish that it had a "branch office" within the IFB's geographical limitation. By Mr. Walker's own admission, CW could not provide a copy of a telephone bill or lease in its name showing that it maintained an office in South Florida, and did not provide any written evidence upon which the SBA's Miami District office could have determined that CW office was staffed with at least one full-time employee.⁶

⁵In fact, in its comments on the agency report, CW acknowledges that it "recognized that it was important to have a South Florida branch office," (page 5) and "believed that a branch office would be an important factor considered by the SBA" (page 9) in making award.

⁶We note that on March 27, Mr. Walker faxed another letter to SBA's North District Office explaining in greater detail CW presence in South Florida. In that letter, Mr. Walker provided a brief chronological history of the firm's business activities in Dade County (in South Florida) and provided greater details about its relationship with O'Brien, referred to its offices at various locations in South Florida, and stated its future business plans in the region. The protester does not explain, however, and it is not clear from the record, in view of Mr. Rey-Moran's specific request only 3 days earlier, why Mr. Walker transmitted this letter to the SBA's North District Office in Jacksonville on March 27, after its eligibility determination on March 26,

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Further, even the documents CW has submitted during these protest proceedings fail to show that the firm established and maintains an office within the IFB's geographic restriction. Based on our review of the record, we conclude that, in making its determination, the SBA reasonably relied on Mr. Walker's March 25 letter and the information he submitted to the Miami District Office on behalf of CW during that office's investigation, and reasonably concluded that CW was ineligible for award.

The protester also argues that the IFB's geographical restriction contained a latent ambiguity, subject to more than one reasonable interpretation. In this connection, CW states that the IFB required that bidders' approved business plans be on file and serviced by the SBA's Miami District "and/or" the Atlanta Regional Office. CW asserts that, since it has a business plan on file with, and is serviced by, the SBA's Jacksonville District, and since the SBA's Jacksonville District is located within, and is part of, the Atlanta Regional Office, it reasonably believed that CW business plan is on file and serviced by the Atlanta Regional Office, making the firm eligible for award.

The SBA concedes that the IFB's geographic restriction, by referring to the regional office, was incorrectly worded. The SBA explains that its regional offices exercise limited authority over the district offices in their region, see 13 C.F.R. § 101.104, and do not provide direct services or support to 8(a) firms in the portfolio of individual district offices. Under the applicable regulations, program participants, such as CW, are serviced in the field office serving the territory where the concern's principal place of business is located. 13 C.F.R. § 124.203. As such, the Atlanta Regional Office does not maintain on file or service approved business plans of any program participant. In this case, as the protester recognizes, CW principal place of business is in Longwood, Florida, which is serviced by the SBA's Jacksonville District Office in North Florida.⁷

Despite the incorrect wording of the geographic restriction, SBA asserts that the error did not prejudice CW. We agree. Competitive prejudice is an essential

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rather than to the SBA's Miami District office for that office's consideration when it had initially requested the information.

⁷While the protester maintains that it was unaware of what it calls the "inner workings" of the SBA, SBA's regulations are published in the Federal Register and the Code of Federal Regulations. CW was therefore on constructive notice that program participants are serviced in the field office serving the territory where the concern's principal place of business is located, not the regional office. See, e.g., Aircraft Components Inc., B-235204, Aug. 2, 1989, 89-2 CPD ¶ 98 at 2.

element of every viable protest. Diverco, Inc., B-259734, Apr. 21, 1995, 95-1 CPD ¶ 209 at 3. Our Office will not sustain a protest unless the protester demonstrates a reasonable possibility that it was prejudiced by the agency's actions, that is, unless the protester demonstrates that, but for the agency's actions, it would have had a substantial chance of receiving the award. McDonald Bradley, B-270126, Feb. 8, 1996, 96-1 CPD ¶ 54 at 3; see Statistica, Inc. v. Christopher, 102 F.3d 1577, 1581 (Fed. Cir. 1996). Contrary to CW position, the fact that CW would receive award under the IFB if the incorrect and unintended meaning of the geographic restriction were applied does not constitute prejudice. Rather, in considering the issue of prejudice in circumstances such as these, we look to see if the bidder would have altered its bid to its competitive advantage if it had had the opportunity to respond to the correct and intended provision. See Colt Indus., B-218834.2, Sept. 11, 1985, 85-2 CPD ¶ 284 at 5-6 (protester was not prejudiced by an ambiguous experience requirement in a solicitation where it could not comply with the intended meaning of the requirement). Here, the protester does not argue and there is no evidence in the record to show that CW could have prepared its bid differently or otherwise done anything to become eligible for award had it known of the error in the IFB. Thus, there is no evidence that CW was competitively prejudiced by the incorrect wording of the IFB's geographic restriction.⁸

The protest is denied.

Comptroller General
of the United States

⁸In its comments on the SBA report to our Office, CW points out that, prior to bid opening, the awardee, Nikon wrote a letter to the SBA inquiring whether a firm could have a business plan serviced by a regional office, thereby qualifying for all districts covered by that regional office. The SBA responded by providing Nikon with a copy of SBA's internal procedural notice clarifying the eligibility requirements for 8(a) construction contracts. CW argues that Nikon's inquiry should have placed the agency on notice that the IFB's geographic restriction was confusing, and asserts that the agency should have amended the IFB to provide all other potential bidders with a copy the SBA's procedural notice. As already explained, however, the error in the IFB was not prejudicial to CW. Even if the agency had provided CW with the procedural notice, CW could not have prepared its bid differently so as to become eligible for award.