G A O
Accountability * Integrity * Reliability

Comptroller General
of the United States

United States General Accounting Office
Washington, DC 20548

Decision

Matter of: Ocuto Blacktop & Paving Company, Inc.

File: B-286800

Date: February 21, 2001

Stephen L. Walthall, Esq., and Anne M. Zielenski, Esq., Kelly & Walthall, for the protester.
Dawn G. Phillips, Esq., and Janie C. Cavitt, Esq., Department of the Army, and John W. Klein, Esq., and Gene Marie M. Pade, Esq., Small Business Administration, for the agencies.
Katherine I. Riback, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Army Corps of Engineers' issuance of a solicitation for environmental remediation work at a closed military base as a competitive 8(a) set-aside was consistent with Defense Federal Acquisition Regulation Supplement subpart 226.71, where there was a reasonable expectation that offers would be received from 8(a) eligible concerns located in the vicinity of the work.

DECISION

Ocuto Blacktop & Paving Company, Inc. protests the terms of request for proposals (RFP) No. DACA41-01-R-0002, a competitive set-aside for section 8(a) eligible concerns,[1] issued by the United States Army Corps of Engineers for environmental remediation work at the former Griffiss Air Force Base (AFB), Rome, New York. Ocuto complains that the solicitation did not properly apply the preference for

[1] Section 8(a) of the Small Business Act authorizes the Small Business Administration (SBA) to contract with government agencies and arrange for the performance of such contracts by awarding subcontracts to socially and economically disadvantaged small businesses. 15 U.S.C. § 637(a) (1994).

businesses located in the vicinity of Griffiss AFB, as required by section 2912 of the National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, 107 Stat. 1547, and Defense Federal Acquisition Regulation Supplement (DFARS) § 226.7103(c), for work associated with closing or realigning military installations.

We deny the protest.

The statute relevant here is codified at 10 U.S.C. § 2687 note (1994), and provides, in pertinent part:

> (a) Preference required.--In entering into contracts with private entities as part of the closure or realignment of a military installation under a base closure law, the Secretary of Defense shall give preference, to the greatest extent practicable, to qualified businesses located in the vicinity of the installation and to small business concerns and small disadvantaged business concerns. Contracts for which this preference shall be given shall include contracts to carry out activities for the environmental restoration and mitigation at military installations to be closed or realigned.

The statute thus establishes a preference for local, small, and small disadvantaged businesses, but does not establish a priority among these three groups. See Ocuto Blacktop & Paving Co., Inc., B-284165, Mar. 1, 2000, 2000 CPD ¶ 32 at 3 n.1.[2]

DFARS § 226.7103 states:

> In considering acquisitions for award through the section 8(a) program (Subpart 219.8 and [Federal Acquisition Regulation] FAR Subpart 19.8) or in making set-aside decisions under Subpart 219.5 and FAR Subpart 19.5 for acquisitions in support of a base closure or realignment, the contracting officer shall–
>
> > (a) Determine whether there is a reasonable expectation that offers will be received from responsible business concerns located in the vicinity of the military installation that is being closed or realigned.

---

[2] In Ocuto Blacktop & Paving Co., Inc., supra, we sustained Ocuto's protest of the Corps's use of a preplaced regional indefinite-delivery/indefinite-quantity contract to obtain environmental remediation at Griffiss AFB because the record did not show that the agency had given reasonable consideration to the statutory preference for business concerns located in the vicinity of the installation. This RFP for environmental remediation at Griffiss AFB is in response to the recommendation made in that decision.

> (b) If offers can not be expected from business concerns in the vicinity, proceed with section 8(a) or set-aside consideration as otherwise indicated in Part 219 and FAR Part 19.
>
> (c) If offers can be expected from business concerns in the vicinity—
>
> > (1) Consider section 8(a) only if the 8(a) contractor is located in the vicinity.[3]
> >
> > (2) Set aside the acquisition for small business only if one of the expected offers is from a small business located in the vicinity.

The 8(a) program has both competitive and noncompetitive components, depending upon the dollar value of the requirement. See 13 C.F.R. § 124.501(b) (2000). Where, as here, the acquisition value exceeds $3 million, any 8(a) contract must be competed among 8(a) firms; 8(a) acquisitions of less than $3 million must be noncompetitive awards. FAR § 19.805-1(a)(2); 13 C.F.R. § 124.506(a). In addition, according to the SBA, its regulations allow for a competitive 8(a) acquisition for construction limited to 8(a) eligible concerns in a certain geographical area where the agency solicitation provides for such a limitation. See SBA Comments (Feb. 15, 2001); 13 C.F.R. § 124.507(c)(2), (3).

The agency issued this solicitation, as a competitive nationwide 8(a) set-aside, contemplating a single award of an indefinite-delivery/indefinite-quantity contract on October 31, 2000, for base realignment and closure environmental remediation projects at Griffiss AFB.[4] The contract to be awarded was for a 3-year base period with a single 2-year option for task orders up to a cumulative total of $15 million. The technical evaluation factors listed in descending order of importance were company experience, past performance, management plan, and an evaluation preference for businesses. RFP § M.3. The primary subfactor of the evaluation

---

[3] As originally promulgated as an interim regulation, paragraph (1) read "[s]et aside the acquisition for small disadvantaged business only if one of the expected offers is from a small disadvantaged business located in the vicinity." 59 Fed. Reg. 15,501, (Apr. 1, 1994). The current version was issued in Defense Acquisition Circular 91-7 as a final regulation effective May 17, 1995. 60 Fed. Reg. 29,491 (June 5, 1995). The only stated reason for the change in the wording was that the revised paragraph "clarifies the procedures at 226.7103 to address criteria for consideration of awards to contractors under the section 8(a) program."

[4] On that same date, the agency also issued another solicitation (No. DACA41-01-R-0001) for environmental remediation work at Griffiss AFB as a small business set-aside contemplating up to two awards for a cumulative $35 million.

preference for businesses factor was the local or small or small disadvantaged business preference. RFP §§ M.3, M.4. The local business preference was stated as follows:

> Local businesses are defined as those located within the following counties: Oneida, Lewis, Oswego, Herkimer, Hamilton, Fulton, Montgomery, Otsego, Madison, Chenango, Cortland, Jefferson, and Onondaga. To qualify for this preference, the firm must have been located in one of the counties listed on or before September 1993 and continued to do business in one of the counties since that date. To receive a rating for this subfactor, offerors shall submit a federal-, state-, county-, or local government certified document that will substantiate the offeror's place of business within one of these counties for the required period of time.

RFP § L.6.d.1(1).

The SBA has identified two 8(a) eligible firms located in the vicinity. Corps Report, Tab 5, Letter from SBA to the Corps (Mar. 21, 2000). The protester has not challenged these firms' 8(a) or local status.

The protester, which is a local small business but not an 8(a) eligible concern, argues that the solicitation did not comply with the regulations for the use of businesses located in the vicinity of the closed base. Ocuto argues that "once it has been determined that there is a reasonable expectation that offers will be received from responsible business concerns located in the vicinity" of the closed military installation, then the regulation "does not allow for competitive nationwide 8(a) set asides." Protester's Comments at 3. The protester contends that DFARS § 226.7103(c) "actually limit[s] the 8(a) set aside to the 8(a) contractor that is located in the vicinity" (emphasis supplied), which indicates that only "a sole selection process" of an 8(a) contractor located in the vicinity is permissible. Protester's Comments at 4. Recognizing that procurements over $3 million, such as this one, are not to be awarded as sole-source 8(a) acquisitions, the protester essentially takes the position that this means there cannot be any 8(a) preference here.

We recognize that the wording of the regulation is problematic. Specifically, the phrase "the 8(a) contractor" supports the protester's interpretation, in that it could be read to suggest, through use of the definite article and the singular, that a sole-source 8(a) award to an identified 8(a) firm is contemplated. This view is supported by the contrast with the language in the following subparagraph regarding the treatment of small businesses, where the regulation says that the acquisition is to be set aside for small business "only if one of the expected offers" is from a small business located in the vicinity.

We nonetheless reject the protester's reading of the regulation, for a number of reasons. First, the language does not unambiguously support the protester's

position: there is no reference to sole-source 8(a) awards, nor is there a prohibition on 8(a) competitions for acquisitions above $3 million. Indeed, since the context of the problematic language is the agency's planning about how to structure an acquisition, at the time of that planning, no offer has been received and, obviously, no 8(a) contract, or "8(a) contractor," yet exists. In this context, we find reasonable the Corps's position that the regulation was intended to determine whether the procurement could be placed under the 8(a) program, and was not intended to limit or designate which part of the 8(a) program, competitive or noncompetitive, could be utilized, and did not specifically do so. The agency argues that if the intent of this regulation was to allow only for noncompetitive awards to local 8(a) firms, then one would expect that this intent would be clearly articulated in the regulation.

The protester's position, as noted above, is essentially that 8(a) competitive procurements, whether limited to local firms or not, are simply not permitted under the regulation. The result is that the preference for small disadvantaged businesses would essentially be nullified for acquisitions over $3 million, since 8(a) acquisitions of that size must be competed. Such an interpretation would seem to be inconsistent with the statutory scheme that the regulation is implementing. In this regard, section 2912 of the National Defense Authorization Act for Fiscal Year 1994 and DFARS § 226.7102 state a preference for local, small business, and small disadvantaged businesses, but do not indicate that one of these preferences takes precedence over the others. The protester's interpretation of the regulation would result in a preference for local non-8(a) firms over non-local 8(a) businesses, a preference not found in the statute.

There is no indication that these significant repercussions were contemplated by the drafters of the regulation. Instead, we find that the agency reasonably interpreted DFARS § 226.7103(c)(1) as permitting a competitive 8(a) set-aside, so long as there was an 8(a) eligible concern located in the vicinity.[5] The agency thus interprets DFARS § 226.7103(c)(1) as parallel to DFARS § 226.7103(c)(2), which provides that a small business set-aside should be issued if "one of the expected offers is from a small business located in the vicinity." Notwithstanding the concern that we have regarding the regulatory language, we view this interpretation as reasonable and consistent with the statutory scheme.

In reaching this conclusion, we are mindful that the interpretation of the Department of Defense (DOD), the agency responsible for promulgating this regulation, deserves great weight. We defer to an agency's reasonable interpretation of its regulations, even where the regulation is less than clear and potentially subject to more than one

---

[5] We do not reach the question of whether a competitive 8(a) set-aside may be nationwide, or whether it must be limited to local 8(a) firms. Ocuto is not an interested party to raise that issue, because, as a non-8(a) firm, it could not compete even in a local 8(a) competition.

interpretation. Israel Aircraft Indus., Ltd.—Recon., B-258229.2, July 26, 1995, 95-2 CPD ¶ 46 at 5; New Hampshire-Vermont Health Serv., B-189603, Mar. 15, 1978, 78-1 CPD ¶ 202 at 5; see Udall v. Tallman, 380 U.S. 1, 16-17 (1964).

In this regard, we view as significant that the record indicates that DOD had consistently taken the position that this regulation contemplated competitive 8(a) set-asides as appropriate. For example, on January 18, 1996, the Deputy Assistant Secretary (Contracting) for the Department of the Air Force provided guidance regarding Contract Preference for Local, Small and Small Disadvantaged Businesses at Closure/Realignment Bases, which states in pertinent part:

> As new contract actions are initiated, we should . . . us[e] source selection criteria to provide preferences. Preferences for local businesses of any size and set-asides for 8(a) and small businesses located anywhere are authorized by DFARS Subparts 226.7200 and 226.7103, respectively, and are consistent with the Competition in Contracting Act [CICA].

Protest, exh. C.[6] In addition, the Air Force Base Conversion Agency issued a Base Realignment and Closure Contracting Plan for Local, Small and Small Disadvantaged Business Participation to show its compliance with FAR part 19, DFARS part 219, and DFARS subparts 226.71 and 226.72, which states with regard to "new, Individual Contract Awards":

> The [contracting officer] will consider awarding a Small Business or 8(a) setaside contract consistent with FAR Part 19 and DFARS Part 219; however, . . . competitive 8(a) contract actions may not result in local contractor selection. This is because such acquisitions cannot restrict competition to the local area since Section 2912 (DFARS 226.71) is not a CICA exception.

Agency Report, exh. 6, attach., at 2.

For these reasons, we find that the agency reasonably issued this RFP as a competitive 8(a) set-aside. However, we are, by letter of today to the Acting Director

---

[6] The protester cites this memorandum as the appropriate DOD guidance for applying the local preference to implement section 2912 of the National Defense Authorization Act for Fiscal Year 1994. Protest at 2; Protester's Comments at 3. We also note that the United States District Court for the Northern District of New York has cited this memorandum as evidence of DOD's policy in this regard. See Ocuto Blacktop and Paving Co., Inc. v. Perry, 942 F. Supp. 783, 787-88 (N.D.N.Y. 1996).

of the Defense Acquisition Regulations Council, raising our concern about the lack of clarity in the regulation.

The protest is denied.

Anthony H. Gamboa
Acting General Counsel