The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Techplan Corporation; American Maintenance Company

File: B-228396.3, B-229608

Date: March 28, 1988

DIGEST

1. Department of Defense (DOD) set-aside program for small disadvantaged businesses which does not contain an exclusion for procurements which have been previously set aside for small businesses is a legally permissible implementation of section 1207 of DOD Authorization Act, which directs that five percent of contract funds are to be made available for contracts with small disadvantaged businesses and specifically allows the use of less than full and open competitive procedures to meet that goal.

2. Department of Defense (DOD) contracting activities making contract awards under DOD set-aside program for small disadvantaged businesses are not required to comply with justification and approval requirements of Competition in Contracting Act of 1984 (CICA) since set-aside program, which implements the procedures in section 1207(e) of the DOD Authorization Act, falls within the statutory exception to the procedural requirements of CICA, including the justification and approval requirement of 10 U.S.C. § 2304(f).

3. Agency decision to delay publication of initial regulatory flexibility analysis required by Regulatory Flexibility Act until after effective date of interim rule is not subject to review by General Accounting Office where agency determined under emergency provision of the Act that publication of the rule without prior public comment was necessary to meet statutory goal and, under the Act, that determination is not subject to judicial review.

DECISION

Techplan Corporation protests the terms of request for proposals (RFP) No. N00024-87-R-4414(Q), issued by the Navy for engineering and technical support services for the Navy's fleet modernization program management information

system. American Maintenance Company (AMC) protests similar terms in RFP No. F08650-87-R-0020, issued by the Air Force for custodial services. The protesters, both nondisadvantaged small businesses, argue that the solicitations, which were issued as 100 percent small disadvantaged business set-asides, should be amended to allow competition by all small businesses since, in the past year, both firms successfully performed under small business set-aside contracts for these same requirements.1/ We deny the protests.

BACKGROUND

Both solicitations were issued as total set-asides for small disadvantaged businesses (SDBs) pursuant to Defense Federal Acquisition Regulation Supplement (DFARS) §§ 219.501-70 and 219.502-72, 52 Fed. Reg. 16,263, 16,266 (1987). This special category of set-aside was authorized by section 1207 of the National Defense Authorization Act for Fiscal Year 1987, Pub. L. No. 99-661, 100 Stat. 3816 (1986), which establishes a Department of Defense (DOD) goal of awards to SDBs of five percent of the dollar value of total contracts to be awarded by DOD for fiscal years 1987, 1988 and 1989. Section 1207(e) directs the Secretary of Defense to "exercise his utmost authority, resourcefulness and diligence" to attain the five percent goal and permits the use of less than full and open competitive procedures to do so, provided that contract prices do not exceed fair market value by more than ten percent.

To implement this statutory mandate, DOD's Defense Acquisition Regulatory (DAR) Council drafted an interim rule which amended various DFARS provisions and established the procedures for conducting SDB procurements. Specifically, the interim rule established a "rule of two" regarding set-asides for SDB concerns. This first interim rule provides that whenever a contracting officer determines that competition can be expected to result between two or more SDB concerns and that there is a reasonable expectation that the award price will not exceed the fair market price by more than ten percent, the contracting officer is to reserve the acquisition for exclusive competition among SDB firms. The interim rule further provides that no separate justification or determination is required to set aside a solicitation for SDBs.

1/ Although the protests were filed by different firms and involve solicitations issued by different agencies, we have considered them in a single decision since they raise essentially the same issues.

The interim rule was published on May 4, 1987, and was made effective for all DOD solicitations issued on or after June 1. 52 Fed. Reg. 16,263. The Federal Register notice solicited public comments on the rule, which were required to be submitted on or before August 3. DOD explained that the rule was made effective without prior public comment because existing procurement procedures were inadequate to meet the mandated five percent goal. 52 Fed. Reg. 16,264.

After issuing the interim rule and reviewing public comments, the DAR Council prepared draft revisions to the rule. On October 29, at a hearing before the House Armed Services Committee's Acquisition Policy Panel, the Deputy Secretary of Defense indicated that, among other changes, the proposed revisions would "address a need for some protection for the non-small disadvantaged business by proposing to exempt what are known as 'repetitive set-asides' from the SDB procedures," but would still provide a ten percent bidding preference for SDBs. At the request of the House Panel, DOD officials agreed not to issue revisions to the interim rule until Congress had commented.

Subsequently, after the protests were filed and after receiving comments from the House Panel, on February 19, 1988, the DAR Council published a second interim rule. See 53 Fed. Reg. 5,114 (1988). This rule became effective on March 21, and carries a 30-day comment period. Among other changes, the February 19 rule provides that SDB set-asides will not be conducted when a product or service has been previously acquired successfully by the contracting office on the basis of a small business set-aside under Federal Acquisition Regulation (FAR) § 19.501(g). 53 Fed. Reg. 5,123.

PROTESTERS' POSITION

The protesters object to the inclusion of the subject solicitations within the SBD set-aside program as embodied in the initial SDB set-aside rule. While the protesters concede that the initial rule was in effect when the solicitations were issued, they argue that initial program was invalid and that the solicitations should be canceled and the requirements resolicited under the second interim rule.

In this regard, the protesters argue that DOD's SDB set-aside program as set forth in the initial rule was inconsistent with the intent of Congress as expressed in section 1207 of the 1987 Authorization Act, and in the Small Business Act, because it prevents them, as small businesses which had previously fulfilled the government's requirements represented by these solicitations, from competing. The

protesters note that section 1207(g)(4)(C) of the Authorization Act requires that DOD analyze and report to Congress on the impact of the five percent SDB goal on "the ability of business concerns not owned and controlled by socially and economically disadvantaged individuals to compete for contracts" with DOD. Further, the protesters note that section 15 of the Small Business Act, 15 U.S.C. § 644, as amended by section 921 of the 1987 Authorization Act, states that the heads of federal agencies should make efforts to expand participation by all small business concerns. The protesters also argue that not allowing competition by nondisadvantaged small businesses who have participated in prior small business set-asides for these requirements is contrary to FAR § 19.501(g). The protesters argue that by amending the original interim rule to exclude from SDB set-asides solicitations for products or services which have been previously acquired on the basis of a standard small business set-aside, DOD expressly recognized and corrected the defect in that rule. According to the protesters, the Navy and Air Force could and should follow the new rule but have simply chosen not to do so.

ANALYSIS

In our view, there is nothing in section 1207 of the 1987 Authorization Act to prevent DOD from using an SDB set-aside program to meet the five percent goal. Section 1207(e) specifically allows the use of less than full and open competitive procedures to meet that goal. Thus, it is clear in our view that DOD has authority to conduct a set-aside program to meet the five percent goal. See Agency for International Development, Developing Countries Information Research Services--Reconsideration, B-218622.2 et al., Sept. 25, 1985, 85-2 CPD ¶ 336.

Further, although the protesters strongly object to DOD's initial May 4, 1987 rule which does not contain an exclusion for procurements which have been previously set aside for small business, we reject the protesters' contention that the May 4 SDB set-aside scheme conflicts with provisions of the Small Business Act and the FAR.

First, while as the protesters argue there are several references in the 1987 Authorization Act to the effect that DOD is to expand and report on the opportunities for increased participation for nondisadvantaged small business, there is nothing in the Authorization Act which either directs or prohibits DOD from implementing a particular type of program to meet the five percent SDB goal. The most specific instruction is that the Secretary of Defense may use less than full and open competitive procedures for the benefit of SDBs. It was left to the Secretary to "exercise

his utmost authority, resourcefulness and diligence" to develop a program that would meet the rather difficult-to-reconcile goals of increasing SDB participation while also presumably increasing overall small business participation.

Second, although the protesters argue that the SDB set-aside program is contrary to the repeat set-aside rule in FAR § 19.501(g), under that regulation a requirement is to be set aside exclusively for small business only "if required by agency regulations." In this case, the agency regulations, the DFARS, required SDB set-asides, whenever the SDB rule of two was satisfied, regardless of how the commodity or service had been procured in the past. DFARS §§ 219.501-70, 219.502-72. In sum, it is our view that the SDB set-aside program as contained in the initial May 4 interim rule was, at the time it was issued, a legally permissible implementation of the 1987 Authorization Act requirements.

The protesters nevertheless argue that Congress has expressed its dissatisfaction with DOD's initial SDB program in section 806 of the National Defense Authorization Act for Fiscal Years 1988 and 1989, Pub. L. No. 100-180, §§ 806(a), (b)(7), 101 Stat. 1019 (1987), which states that DOD shall to the "maximum extent practicable" maintain current levels in number and dollar value of contracts awarded under the section 8(a) program and the section 15(a) small business set-aside program of the Small Business Act, in addition to providing new opportunities for SDBs in order to meet the goal of the 1987 Authorization Act. According to the protesters, this language shows that Congress disapproved of DOD's initial rule and dictates that the solicitations in this case, which will use 1988 funds, be competed under the more current SDB regulations.

We do not agree that section 806 of the 1988 and 1989 Authorization Act requires that the acquisitions in question here remain open for competition by nondisadvantaged small businesses. As the protesters point out, section 806 directs DOD to issue regulations which, "to the maximum extent practicable," maintain current levels of contracts under the section 8(a) and 15(a) programs, while also providing new opportunities for SDBs. There is nothing in the Authorization Act, however, that requires DOD to maintain particular requirements as set-asides for nondisadvantaged small businesses.

Moreover, even assuming that the newer February 19 rule is a more appropriate implementation of the 1987 Authorization Act's SDB goal, we do not agree with the protesters' contention that the Air Force and Navy are required to follow the new rule here. The February 19 Federal Register notice

indicates that the new rule was to be effective on March 21. Although Techplan argues that the new rule supersedes application of the original rule for solicitations issued before that date, such as those at issue here, the February 19 Federal Register notice did not specifically require application of the new rule to previously issued solicitations, and in our view, the reasonable interpretation of the rule is that it applies only to solicitations issued on or after March 21. Consistent with this view, in a February 17 memorandum submitted to our Office by the Navy, the DAR Council indicated that the February 19 rule was effective only for solicitations issued on or after March 21.2/

The protesters also argue that, in drafting the interim rule, DOD failed to comply with its duty under the Competition in Contracting Act of 1984 (CICA), 10 U.S.C. § 2304(f) (Supp. III 1985), to issue a written justification for its decision to use less than full and open competitive procedures. Although the interim rule states that no separate justification or determination is required to set aside a solicitation for SDBs, the protesters argue that section 1207 does not authorize DOD to waive the justification and approval process under CICA. According to the protesters, DOD does not have absolute authority under section 1207 to use less than full and open competition; rather, that authority is limited by the 1987 Authorization Act "[t]o the extent practicable and when necessary to facilitate achievement of the five percent goal."

We do not agree with the protesters that a justification and approval under CICA, 10 U.S.C. § 2304(f), is required to set aside a requirement for exclusive SDB participation. In

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2/ Although AMC argues that the Air Force solicitation should not have been set aside under the terms of the first interim rule, we note that the contracting officer determined, as required by DFARS § 219.502-72(a), that there was a reasonable expectation that offers would be obtained from at least two responsible SDB concerns and that award would be made at a price not exceeding the fair market value by more than ten percent. Moreover, the Air Force received inquiries from eight SDB firms in response to a Commerce Business Daily synopsis of the RFP. Under DFARS § 219.501(b), the determination to set aside a particular requirement for SDBs is in the discretion of the contracting officer. This Office will not disturb a contracting officer's set-aside determination unless there has been a clear showing of an abuse of that discretion. Litton Electron Devices, B-225012, Feb. 13, 1987, 66 Comp. Gen. ___, 87-1 CPD ¶ 164. There has been no such showing here.

relevant part, 10 U.S.C. § 2304(a)(1)(A) states that the requirements of CICA, including the justification and approval procedures in 10 U.S.C. § 2304(f), apply "except in the case of procurement procedures otherwise expressly authorized by statute." Section 1207(e) of the 1987 Authorization Act expressly authorizes DOD to enter into contracts using less than full and open competitive procedures as long as the contract price does not exceed fair market cost by more than ten percent. In our view, the procedure set out by section 1207(e), as implemented by DOD in the DFARS, falls within the above-stated statutory exception, including the justification and approval requirement in section 2304(f). In this respect, awards under section 1207(e) are similar to awards under sections 8 and 15 of the Small Business Act (15 U.S.C. §§ 637, 644) under which a justification and approval also is not required. See 10 U.S.C. § 2304(b)(3).

The protesters also argue that the first interim rule is defective since it was published and made effective by DOD without an analysis of the effect of that rule on small business as required by the Regulatory Flexibility Act of 1980, 5 U.S.C. §§ 601 et seq. (1982). Under the Act, agencies are required to prepare an initial regulatory flexibility analysis of proposed rules that have significant economic impact on a substantial number of small entities. 5 U.S.C. §§ 603, 605(b). An agency may, however, waive or delay the required analysis by publishing in the Federal Register a written finding that the rule is being promulgated in response to an emergency that makes timely compliance with the requirement of section 603 impracticable. 5 U.S.C. § 608(a). Further, under section 611(a), determinations by an agency concerning the applicability of any provisions of the Act to any actions of the agency are not subject to judicial review.

Here, as permitted by 5 U.S.C. § 608(a), DOD decided to delay the initial regulatory flexibility analysis required by 5 U.S.C. § 603. The May 4, 1987, Federal Register announcement of the first interim rule stated that preparation of the required analysis was delayed until issuance of the second interim rule so that the impact of both rules could be considered together. The Federal Register announcement also stated that publication of the interim rule without prior public comment was necessary to achieve the five percent goal since present procedures were inadequate to meet that goal. 52 Fed. Reg. 16,264. Since, under section 611(a), the agency's determination is not subject to judicial review, it is also not subject to review by our Office. Crowley Towing & Transportation Co., B-218427.2, May 15, 1985, 85-1 CPD ¶ 552.

Finally, AMC argues, without citing any legal support, that DOD's implementation of the May 4 interim rule without prior public comment violated the firm's right to due process under the Constitution. In the absence of a clear judicial precedent on this issue, we decline to consider AMC's challenge to DOD's action on constitutional grounds; the issue is a matter for the courts, not our Office, to decide. See DePaul Hospital and The Catholic Health Association of the United States, B-227160, Aug. 18, 1987, 87-2 CPD ¶ 173.

The protests are denied.

James F. Hinchman
General Counsel