



Comptroller General
of the United States
Washington, D.C. 20548

Decision

Matter of: State Janitorial Services, Inc.
File: B-240646
Date: December 6, 1990

Stephen D. Tom, Esq., White & Tom, for the protester.
Lt. Col. William J. Holland, Department of the Air Force, and
David R. Kohler, Esq., Small Business Administration, for the
agencies.
George Ruppert, Esq., and John M. Melody, Esq., Office of the
General Counsel, GAO, participated in the preparation of the
decision.

DIGEST

1. Protest that Air Force improperly canceled solicitation synopsis in Commerce Business Daily as 100 percent small business set-aside in order to set the procurement aside for the Small Business Administration's 8(a) program is denied where record indicates that agency always intended to offer the requirement to the 8(a) program and only erroneously synopsised the requirement as a small business set-aside.
2. Protest is sustained where Small Business Administration failed to properly consider potential adverse impact on small businesses prior to accepting requirement, which previously was set aside for small business, into 8(a) program.

DECISION

State Janitorial Services, Inc. protests the cancellation of invitation for bids (IFB) No. F64605-90-B-0040, issued by the Department of the Air Force as a total small business set-aside for housekeeping/custodial services at Hickam Air Force Base, Hawaii, and the determination to include the requirement in the Small Business Administration's (SBA) 8(a) program. State also complains that SBA improperly failed to determine the potential adverse impact on State before accepting the requirement into the 8(a) program. State is the incumbent small business contractor for these services under a prior small business set-aside.

We deny the protest in part and sustain it in part based on the SBA's failure to make a proper adverse impact determination.

The requirement was synopsized in the June 14, 1990, issue of the Commerce Business Daily (CBD) as a total small business set-aside. The Air Force subsequently determined, however, that this synopsis was incorrect, since it had intended to include the requirement in SBA's 8(a) program. (Section 8(a) of the Small Business Act authorizes SBA to enter into contracts with government agencies and to arrange for performance of such contracts by letting subcontracts to socially and economically disadvantaged small business concerns. 15 U.S.C. § 637(a) (1988).) Therefore, in the July 2 issue of the CBD, the agency published a notice canceling the requirement; thereafter, the requirement was included in the 8(a) program.^{1/}

State contends that the inclusion of the requirement in the 8(a) program violated SBA's regulations. Specifically, State cites 13 C.F.R. § 124.309(b) (1990), which provides that SBA will not accept requirements into the 8(a) program once they have been advertised in the CBD as small business set-asides, absent "extraordinary circumstances," such as where the agency "had made a decision to offer the requirement to the 8(a) program before the notice was sent out and the procuring agency acknowledges and documents that the notice was in error." State maintains that the Air Force has not adequately demonstrated that it decided to offer the subject requirement to the 8(a) program before the notice was sent to the CBD on June 11 for publication on June 14, and has not established that the notice was published in error. We do not agree.

The record contains an affidavit from a contract specialist for SBA's Honolulu district office, which states that during the last week of May 1990, he was approached by the owner/operator of McClean's Restoration Services, a participant in the 8(a) program. McClean's informed the contract specialist

^{1/} The agency argues that the protest is untimely because the protester failed to file its protest within 10 days after July 2, when the requirement cancellation was published in the CBD. We find that the protest is timely. Our Bid Protest Regulations require that protests be filed within 10 days after the basis of protest is known or should have been known. 4 C.F.R. § 21.2(a)(2) (1990). State's protest against the 8(a) set-aside was filed on August 7, and since the record does not show when State learned of the reason for the cancellation following the July 2 CBD announcement which did not state the reason for cancellation, we will consider the protest on the merits.

that the contracting officer at Hickam informed him that this requirement for housekeeping/custodial services at the Medical Group Building was to be set aside under the 8(a) program. The contracting officer has confirmed that he had this conversation with the contract specialist. This information establishes that the Air Force did in fact intend to include this requirement in the 8(a) program before the June 14 CBD synopsis was published. The Air Force further explains that the contracting officer subsequently transferred to another government agency, and that the cognizant contracting specialist, unaware that the requirement was to be included in the 8(a) program, proceeded to advertise the procurement as a small business set-aside by mistake.

While State asserts its belief that in fact the Air Force decided to include the requirement in the 8(a) program only after it sent the notice to SBA on June 11, there simply is no evidence in the record showing the decision was made after the notice appeared in the CBD on June 14. The record does not support the protester's contention that there was a change in procurement strategy and does not show fraud or bad faith on the part of the government in making the determination to set aside the subject requirement for an 8(a) award. We conclude, therefore, that the CBD notice of a small business set-aside was published erroneously, and that SBA did not violate 13 C.F.R. § 124.309(b).

State also alleges that SBA failed to comply with 13 C.F.R. § 124.309(c), which states that SBA will not accept a previous small business set-aside requirement into the 8(a) program if doing so would have an adverse impact on other small business programs or on an individual small business. In this regard, the regulation provides that SBA will consider all relevant information in determining the impact of an 8(a) award, and will presume an adverse impact on small business concerns and not accept a procurement for the program, where a small business has been performing the requirement for at least 24 months, and the estimated dollar value of the offered 8(a) award would be 25 percent or more of the incumbent's most recent annual gross sales. State contends that SBA did not properly consider whether accepting the 8(a) award would have an adverse impact on State.

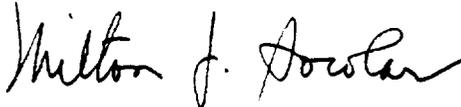
We find that SBA did not follow 13 C.F.R. § 124.309(c) in determining whether including this requirement in the 8(a) program will have an adverse impact on the incumbent small business contractor, State. The record shows that the SBA contract specialist accepted the requirement into the 8(a) program August 8. The statement finding no resulting adverse impact on any other small business concern was dated August 9. Further, SBA states that it has been unable to locate any notes or other documentation supporting the

determination of no adverse impact, and concedes that the cognizant contracting specialist did not ask State for information on its most recent gross sales before signing the impact statement, a factor specifically to be included in the determination. 13 C.F.R. § 124.309(c)(2). In addition, the impact statement itself does not even contain a solicitation number and incorrectly states that the procurement has not been offered previously by public solicitation under a small business set-aside.

In sum, notwithstanding the one-page form entitled "IMPACT STATEMENT" furnished us by SBA, the record as a whole clearly establishes that SBA did not properly determine the potential adverse impact of an 8(a) award on State, as required by SBA's regulations. See San Antonio General Maintenance, Inc., B-240114, Oct. 24, 1990, 90-2 CPD ¶ ____. Accordingly, we sustain this aspect of the protest against SBA's actions.

We recommend that SBA properly perform an adverse impact analysis for the inclusion of this requirement in the 8(a) program, taking into consideration all relevant factors, including State's "most recent gross sales." If SBA concludes that including the requirement in the 8(a) program would have an adverse impact on State, the procurement should not be reserved under section 8(a). Further, we find that State is entitled to the costs of pursuing this protest, including attorneys' fees. 4 C.F.R. § 21.6(d)(1) (1990).

The protest is denied in part and sustained in part.



for Comptroller General
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