Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Morrison Construction Services, Inc.

File: B-240789

Date: December 18, 1990

John H. Chapman for the protester.
Ralph Sletager for Sletager, Inc., an interested party.
Herbert F. Kelley, Jr., Esq., Department of the Army, for the agency.
Christina Sklarew, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. General Accounting Office will review procurements conducted competitively under section 8(a) of the Small Business Act since award decisions are no longer purely discretionary and are subject to Federal Acquisition Regulation.

2. Federal Acquisition Regulation (FAR) does not prohibit the use of an indefinite quantity contract for the acquisition of other than commercial items. Maintenance services, sold to the general public in the course of normal business operations based on market prices, constitute a commercial product as defined in FAR.

DECISION

Morrison Construction Services, Inc. protests the Department of the Army's solicitation No. DAHC76-90-R-0018, a competitive procurement for maintenance services being conducted under section 8(a) of the Small Business Act, 15 U.S.C. § 637(a) (1988). The 8(a) program provides for awards of government contracts to socially and economically disadvantaged small business concerns. We deny the protest.

The solicitation contemplates the award of a fixed-price, indefinite quantity type contract for maintenance of family housing units, including painting, cleaning, floor refinishing, and carpet installation services. Morrison contends that Federal Acquisition Regulation (FAR) § 16.504 does not permit the use of an indefinite quantity contract for this procurement.

Initially, the Army argues that Morrison's protest should be dismissed. The Army argues that since contracts are let under section 8(a) of the Small Business Act to the Small Business Administration (SBA) at the contracting officer's discretion on such terms as are agreed upon by the procuring agency and the SBA, the decision to place or not to place a procurement under the 8(a) program and the award of an 8(a) subcontract are not subject to our review absent a showing of possible fraud or bad faith on the part of government officials or that regulations may have been violated. See 4 C.F.R. § 21.3(m)(4) (1990). The Army contends that the protester has not met this standard.

Generally, 15 U.S.C. § 637(a)(1) authorizes the contracting officer "in his discretion" to let a contract to the SBA upon terms and conditions agreed to by the agency and SBA. Traditionally, we have limited our review of 8(a) awards to showings of possible fraud or bad faith or violation of regulations in light of the agency's broad discretion to determine if it will contract through the program or with a particular 8(a) vendor and because the procedure leading to an 8(a) award is not encompassed by the competitive procurement statutes. See Lee Assocs., B-232411, Dec. 22, 1988, 88-2 CPD ¶ 618.

There is, however, a new competition requirement under section 8(a). Where the anticipated award price of an 8(a) contract assigned a manufacturing Standard Industrial Classification code is $5 million, or $3 million in all other cases, and 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, the contract is to be awarded on the basis of competition among 8(a) firms. 15 U.S.C. § 637(a)(1)(D)(i) (1988), as amended by Pub. L. No. 100-656, § 303, 102 Stat. 3868-9 (1988); see 13 C.F.R. § 124.311 (1990). In sum, the Small Business Act now requires selection of an 8(a) firm on a competitive basis if the contract amount thresholds and other statutory conditions are met.

Our prior decisions limiting review of 8(a) awards were predicated on the agency's broad discretion to let a contract through the 8(a) program or to a particular 8(a) vendor and the lack of competitive selection procedures. While agencies continue to have the discretion to decide whether to award through the 8(a) program, the discretion to make award to a particular 8(a) firm is now limited by the new competition requirement. Moreover, SBA's regulations implementing the 8(a) program require that the competition be conducted in accordance with the FAR. See 13 C.F.R. § 124.311(f) (1990). Since our underlying rationale for restricting review of 8(a) awards no longer applies, and since the provisions of the FAR now apply to 8(a) competitions, we will review these 8(a)

competitive selections just as we review other competitive award selections.

Morrison's contention is that FAR § 16.504(b) does not permit the use of an indefinite quantity contract for this procurement. That regulation provides, in part, that "An indefinite quantity contract should be used only for items or services that are commercial products or commercial-type products . . . and when a recurring need is anticipated." Morrison asserts that the services being procured here are neither commercial nor commercial-type. The protester argues that construction services, for example, are unique with every sale and prices are normally established on a competitive bid basis for a specific job, and that there simply is not an established commercial catalog or market price for services such as construction and painting.

In our view, the use of the word "should," rather than "shall," in FAR § 16.504(b) indicates that the regulation is permissive in nature. It does not impose a mandatory prohibition against the use of the indefinite quantity type contract for other than commercial items or services. Moreover, we find the services being procured to be within the FAR definition of commercial products. The regulation defines "commercial product" as one sold or traded to the general public in the course of normal business operations at prices based on established catalog or market prices. FAR § 11.001.1/ Painting, cleaning carpets, and other similar maintenance services, even in large quantities, are not services that are unique or provided only to the government. Although the protester asserts that various aspects of this proposed contract such as payment on a square footage basis and possible large variations in the amount of services required are priced in the private sector on an individual basis, the FAR definition focuses on the commercial availability of the items or services being procured, not on the manner in which they are provided. Further, we do not think the commercial product definition should be read so narrowly as to require that the exact services be provided in the exact manner in a commercial setting. See Sletager, Inc., B-237676, Mar. 15, 1990, 90-1 CPD ¶ 298.

The protester also argues that the use of the indefinite quantity type contract imposes a disproportionate cost risk on the contractor, and that this is particularly inappropriate in the context of an 8(a) procurement. Morrison contends that the use of this type of contract creates a condition that can

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1/ There does not appear to be any separate definition for commercial services, but we do not think the underlying principles governing services and products differ.

put a small business contractor out of business, thwarting the purpose of the 8(a) program. However, the fact that a solicitation may impose risks on a contractor does not render it improper. Richard M. Walsh Assocs., Inc., B-216730, May 31, 1985, 85-1 CPD ¶ 621. It is within an agency's discretion to offer to the competition a proposed contract imposing risks upon the contractor and minimum administrative burdens on the government. Sentinel Elecs., Inc., B-221914.2 et al., Aug. 7, 1986, 86-2 CPD ¶ 166. The SBA requested use of an indefinite quantity type contract because 8(a) firms would need only obtain bonding for the specified minimum amounts, thus minimizing costs of submitting an offer and maximizing competition among 8(a) firms. The record also shows that at least four firms at the site visit believed the contract type would assist them in obtaining bonding.

Finally, Morrison complains that many line items in the solicitation's price schedule do not include a minimum quantity which the government would be obligated to purchase. In response to this protest, the agency has proposed to amend the solicitation to include the required minimum quantities. The agency's actions render this portion of the protest academic, and we need not consider it further.2/

The protest is denied.

James F. Hinchman
General Counsel

2/ The protester initially objected to other provisions in the RFP as unnecessary or ambiguous. The agency subsequently took corrective action in response to the protest. Morrison did not take issue with the agency action taken in its comments on the agency report. We deem it abandoned. Cajar Defense Support Co., B-239217, July 24, 1990, 90-2 CPD ¶ 74.