



Comptroller General
of the United States

Washington, D.C. 20548

A. Cooper

Decision

Matter of: Sletager, Inc.
File: B-241149
Date: January 25, 1991

Ralph Sletager for the protester.
Lester Edelman, Esq., Department of the Army, for the agency.
Sabina K. Cooper, Esq., Ralph O. White, Esq., and Christine S.
Melody, Esq., Office of the General Counsel, GAO, participated
in the preparation of the decision.

DIGEST

1. Department of the Army decision to set aside a contract for house painting for small disadvantaged business (SDB) concerns was proper because the Small Business Competitiveness Demonstration Program Act of 1988, 15 U.S.C. § 644 note (1988), establishing a demonstration program where procurements of services from firms in designated industry groups are conducted on an unrestricted basis, does not relieve the agency of statutory requirements to set aside contracts for SDBs.
2. A challenge to the propriety of a small disadvantaged business set-aside does not involve a violation of Executive Order 11246 or Federal Acquisition Regulation § 22.802, which concerns the prohibition of discrimination against any employee or applicant for federal employment because of race, color, religion, sex or national origin.
3. The exceptions to the requirement to set aside an acquisition for exclusive small disadvantaged business participation where the services have previously been acquired on the basis of a small business set-aside or where the acquisition is for construction, including maintenance and repairs, do not apply to procurements involving the four industry groups, one of which is construction, covered by the Small Business Competitiveness Demonstration Act of 1988.

DECISION

Sletager, Inc., a small business, protests the decision by the U.S. Army Corps of Engineers, Seattle District, to set aside for small disadvantaged business (SDB) concerns, invitation for bids (IFB) No. DACA67-90-T-0017, for exterior painting in two housing areas at Fort Lewis, Washington. Sletager

050433/143032

essentially contends that the set-aside for SDBs conflicts with the requirements of the Small Business Competitiveness Demonstration Program Act of 1988 (the SBCDP Act), 15 U.S.C. § 644 note (1988), and that the application of the SDB program to construction contracts is improper.

We deny the protest.

The Army announced the proposed SDB set-aside in the Commerce Business Daily on May 30, 1990, inviting SDB concerns to indicate interest in the acquisition by providing evidence of capability to perform and a statement of eligibility as an SDB. The Army received 12 responses to this notice from SDB concerns and, after review, issued the IFB on July 23, setting aside the procurement as proposed. On August 15 Sletager submitted an agency protest challenging the set-aside. The Army denied the protest on September 10. Following bid opening on September 11, at which one bid from an SDB was received, Sletager protested to our Office on September 14. Sletager objects to setting aside this procurement for SDB concerns, asserting that the Department of Defense Federal Acquisition Regulation Supplement (DFARS) provisions purporting to authorize the SDB set-aside conflict with the SBCDP Act.

The Department of Defense (DOD) established its program of set-asides to implement section 1207 of the National Defense Authorization Act for Fiscal Year 1987, 10 U.S.C. § 2301 note (1988). The authorizing legislation established for DOD a goal to award 5 percent of the dollar value of its contracts to SDB concerns, but left the promulgation of regulations and procedures necessary to achieve the stated objective to the discretion of the agency. G&D Foods, Inc., B-233511 et al., Feb. 7, 1989, 89-1 CPD ¶ 125; see also Pub. L. No. 100-180, § 806(b), 10 U.S.C. § 2301 note (1988) (requiring the Secretary of Defense to issue regulations to ensure progress toward meeting the 5 percent goal).

The DOD program is set forth at DFARS part 219. This program provides that a procurement shall be set aside for exclusive SDB participation if the contracting officer determines that there is a reasonable expectation that: (1) offers will be obtained from at least two responsible SDB concerns, and (2) award will be made at a price not exceeding the fair market price by more than 10 percent. DFARS § 219.502-72(a). The program's regulations also provide that the contracting officer should presume that these requirements are met if the acquisition history shows that: (1) within the past 12-month period a responsive offer from at least one responsible SDB concern was within 10 percent of the award price on a previous procurement of similar supplies or services; and (2) the contracting officer has reason to know

(from the activity's relevant solicitation mailing list, response to presolicitation notices, or other sufficient factual information) that there is at least one other responsible SDB source for similar supplies or services. DFARS § 219.502-72(c).

In comparison, the SBCDP Act establishes a demonstration program under which solicitations for the procurement of services in designated industry groups are to be issued on an unrestricted basis, provided the agency has attained its small business participation goals. Section 713(a). "Construction" is one of the four designated industry groups included in the demonstration program. Section 717. However, the Act also specifically provides, at section 713(a), that set-asides for SDBs under section 1207 of the 1987 Defense Authorization Act, which DFARS § 219.502-72 implements, are exempt from the demonstration program. See Kato Corp., 69 Comp. Gen. 374 (1990), 90-1 CPD ¶ 354. The Act further states that any inconsistent regulatory requirement shall be waived.

The Federal Acquisition Regulation (FAR) provision implementing the SBCDP Act identifies participating agencies and designated industries, and references implementing procedures established by the Office of Federal Procurement Policy and by participating agency supplements to the FAR. FAR § 19.1001. DOD implements the program through DFARS subpart 219.10, which provides, in relevant part, that "acquisitions in the designated industry groups shall continue to be considered for placement under the 8(a) program (see FAR subpart 19.8) and for small disadvantaged business set-asides (see [DFARS] § 219.502-72)." DFARS § 219.1070-1(a).

As discussed above, section 713(a) of the SBCDP Act expressly provides that the requirement for unrestricted competition does not apply to procurements set aside pursuant to section 1207 of the 1987 Defense Authorization Act; similarly, DOD's implementing regulations provide that acquisitions in the designated industry groups "shall continue to be considered . . . for small disadvantaged business set-asides." DFARS § 219.1070-1(a). Thus, the SBCDP Act, and its implementing regulations, on their face, do not relieve DOD of its obligation to procure services or supplies by means of an SDB set-aside where otherwise required.^{1/}

^{1/} Further, section 601 of Pub. L. No. 100-656 (the statute which includes the SBCDP Act), amended the Small Business Act to require contracting officials to "increase, insofar as possible, the number" of procurements under the SDB set-aside program. As we stated in Kato, we think this provision was

(continued...)

In its comments on the agency report submitted in response to this protest, Sletager claims that the Army errs in arguing that this procurement falls within the exemption to the SBCDP Act granted for contracts set aside pursuant to section 1207 of the 1987 Defense Authorization Act. According to Sletager, since the exemption set forth in section 713(a) of the SBCDP Act applies only to procurements for services in the industry groups included in the demonstration program, and since a contract for painting does not constitute a service contract, the exemption granted for SDB procurements is inapplicable. Thus, Sletager asserts that this procurement is covered by the SBCDP Act, and must be issued on an unrestricted basis.

Sletager's assertion that the exemption set forth in section 713 of the SBCDP Act applies only to service contracts is based upon the wording of section 713(a) of the Act which provides, in relevant part, as follows:

"FULL AND OPEN COMPETITION.--Except as provided in subsections (b) and (c), each contract opportunity with an anticipated value of \$25,000 or more for the procurement of services from firms in the designated industry groups (unless set aside pursuant to section 8(a) of the Small Business Act [cites omitted] or section 1207 of the National Defense Authorization Act for Fiscal Year 1987 [cites omitted]) shall be solicited on an unrestricted basis during the term of the Program" (Emphasis added.)

Sletager's proposed interpretation of section 713(a) is based on a flawed interpretation of the Act. Further, even assuming that interpretation is correct, it does not support Sletager's conclusion--that this procurement is covered by the SBCDP Act and should therefore be conducted on an unrestricted basis.

Section 713(a) of the Act serves the dual purpose of establishing the general applicability of the demonstration program to contracts valued at \$25,000 or more for the designated industry groups, and establishing exceptions from the demonstration program for ongoing SDB set-aside programs of the Small Business Administration and DOD. Because this section serves this dual purpose, Sletager's proposed interpretation of the section--that the provision only applies

1/(...continued)

intended to clarify that the prohibition on the use of small business set-asides in the designated industry groups did not also amount to a prohibition on the use of SDB set-asides; it was not intended to alter the SDB program.

to "services" from the designated industry groups--must apply both to the operation of the demonstration program and the SDB exceptions to that program.

There is no indication in the statute that the use of the word "services" in section 713(a) was intended to limit the application of the demonstration program to certain types of work performed by the concerns within the designated industry groups. Such a limitation would have little meaning given that all four of the industries included in the demonstration program provide "services," as opposed to manufactured goods.^{2/} Likewise, since section 713(a) governs both the establishment of the demonstration program and the SDB exceptions thereto, there is no indication that only some subset of the type of work provided by these industry groups is excepted from the demonstration program for purposes of conducting SDB set-asides.

Even accepting Sletager's argument, its interpretation of the SBCDP Act would not only make the SDB exception inapplicable, but also would exclude the procurement at issue from the demonstration program itself. Sletager argues that procurements for painting are construction contracts and not service contracts. However, if section 713(a) is interpreted as limiting the scope of the demonstration program to service contracts--as Sletager argues the same sentence limits the SDB exceptions to the demonstration program--then the demonstration program does not include contracts for construction, only contracts for construction services. Since Sletager insists that the painting contract here is not a contract for construction services, Sletager's proposed interpretation results in excluding the contract from the demonstration program.

Sletager further asserts that the Army's SDB set-aside program is unconstitutional, arguing that it is not consistent with a set-aside program properly tailored to remedy prior discrimination, and that the 28 percent goal for SDB participation at Fort Lewis is excessive in light of the DOD's 5 percent goal for SDBs.

^{2/} Section 717 of the SBCDP Act designates the following industry groups for its demonstration program:

"(1) construction (excluding dredging); (2) refuse systems and related services; (3) architectural and engineering services (including surveying and mapping); and (4) non-nuclear ship repair."

None of these industry groups provides manufactured goods, as opposed to services.

Where, as here, a clear judicial precedent is lacking, we will not consider a protester's challenge to the constitutionality of set-aside programs on the federal level. Seyforth Roofing Co., Inc., B-235703, June 19, 1989, 89-1 CPD ¶ 574. Sletager argues, however, that its protest does not just raise a constitutional question, but involves a violation of specific regulations, FAR § 22.802 and Executive Order 11246, as well. As the Army correctly advised Sletager, both FAR § 22.802 and Executive Order 11246 involve the prohibition of discrimination against any employee or applicant for employment because of race, color, religion, sex or national origin; the solicitation at issue included the requisite clauses, and cannot be enforced until after contract award. Accordingly, this procurement, which concerns the propriety of an SDB set-aside, does not involve a violation of either FAR § 22.802 or Executive Order 11246.

Sletager's last argument concerns the exception created to the requirement for the set-aside of an acquisition for exclusive SDB participation where the services had previously been acquired on the basis of a small business set-aside or where the acquisition is for construction, including maintenance and repairs. DFARS § 219.502-72(b)(1) and (2). Those provisions prohibit total SDB set-asides for acquisitions for construction, including maintenance and repairs, in excess of \$5,000 and under \$2 million;^{3/} and where the product or service has been previously acquired on the basis of a small business set-aside.

DFARS § 219.1070-1(c)(2), which, as noted above, implements the SBCDP Act, states that the exceptions listed under § 219.502-72(b)(1) and (2) do not apply to procurements involving the four industry groups covered by the SBCDP Act, and that therefore such acquisitions "shall be considered for [SDB] set-asides." Accordingly, all construction projects are properly considered for SDB set-asides and the Army did not err in its decision to set aside the particular acquisition at issue here since the SBCDP Act program was in effect.

The protest is denied.


for James F. Hinchman
General Counsel

^{3/} The dollar limits in DFARS § 219.502-72(b)(2) are established by reference to DFARS § 219.501(g)(s-71).