

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

## Decision

**Matter of:** Korean Maintenance Company  
**File:** B-243957  
**Date:** September 16, 1991

E. Alan Arnold, Esq., Smith, Currie & Hancock, for the protester.  
Vicki E. O'Keefe, Esq., Department of the Navy, for the agency.  
Behn Miller and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

### DIGEST

Protest that Small Business Administration (SBA) improperly accepted into the 8(a) program a modified contract for custodial services previously performed under a non-8(a) small business set-aside contract is sustained where contracting agency failed to furnish SBA with adequate information regarding the proposed offering and, consequently, SBA lacked sufficient accurate information on which to determine whether the offering was appropriate for acceptance into the 8(a) program.

### DECISION

Korean Maintenance Company (KMC) protests the modification of contract No. N47408-89-D-3871, issued by the Naval Facilities Engineering Command, Department of the Navy, under the Small Business Administration's (SBA) 8(a) program, for custodial services at the Naval Construction Battalion Center (NCBC), Port Hueneme, California.

We sustain the protest.

### BACKGROUND

Section 8(a) of the Small Business Act authorizes SBA to contract with government agencies and to arrange for performance of such contracts by awarding subcontracts to socially and economically disadvantaged small businesses. Under the Act and its implementing regulations, SBA may not accept any requirement into the 8(a) program which would have an adverse

impact on an individual small business. 13 C.F.R. § 124.309(c) (1991). The purpose of the adverse impact concept is to protect incumbent small businesses who are currently performing an offered requirement outside the 8(a) program; accordingly, when there is no small business incumbent--for example, when the proposed 8(a) contract is for new work not substantially similar to a contract previously awarded to a small business--the concept of adverse impact does not apply. Id.; Support Mgmt. Servs., Inc.--Recon., B-229583.2, June 9, 1988, 88-1 CPD ¶ 547. In this regard, SBA regulations provide that a requirement previously performed by a non-8(a) small business concern may nonetheless constitute a "new" requirement; specifically, 13 C.F.R. § 124.309(c) provides:

"The expansion or alteration of an existing requirement shall be considered a new requirement where the requirement is materially expanded or modified so that the ensuing requirement is not substantially similar to the prior requirement due to the magnitude of the expansion or alteration."

In this case, based on the contracting officer's representations, SBA concluded that the offered modification constituted a "new" requirement; therefore, the modification was accepted into the 8(a) program without considering the procurement's adverse impact on KMC, the incumbent small business contractor who had performed these services under a prior small business set-aside. In its protest, KMC challenges SBA's conclusion that the proposed modification constitutes a "new" requirement on the ground that the Navy failed to give SBA sufficient accurate information on which to base its decision.

As modified, 8(a) contract No. N47408-89-D-3871 represents the merger of two custodial services contracts--contract No. N62474-87-D-3220 (contract No. 3220), which was awarded pursuant to a small business set-aside to KMC on November 4, 1987, and contract No. N47408-89-D-3871 (contract No. 3871), which was awarded as an 8(a) contract to Customer Service, Inc. (CSI) on January 12, 1989. Contract No. 3220 was awarded to KMC for a 1-year base period with four 1-year option periods. According to the contracting officer, in January 1991 she decided not to exercise the fourth option year in KMC's contract because KMC was performing unsatisfactorily; instead, the contracting officer decided to combine the custodial services performed by KMC under contract No. 3220 with the custodial services performed by CSI under contract No. 3871 into a single base custodial services requirement for award to CSI under the 8(a) program.

On January 28, the contracting officer contacted the regional SBA contracting specialist by telephone and informed him of the proposed offering. The contracting officer told the specialist that the proposed solicitation package would be substantially different from the contract performed by KMC in terms of the level of services provided and the number of buildings involved. According to the contracting officer, based on these representations, the SBA specialist advised the contracting officer during this conversation that these purported changes were significant enough to qualify as a "new" requirement and that, as such, the additional custodial services would be accepted into the 8(a) program and awarded to CSI by means of a modification to contract No. 3871.

Apparently, several telephone conversations took place between the contracting officer and the SBA officer in an effort to expedite this plan.<sup>1/</sup> By letter dated March 13, the contracting officer requested permission from SBA to add the "remaining base custodial services" currently performed by KMC to the existing CSI contract; in her request, the contracting officer stated that the "work is currently being performed unsatisfactorily by a small disadvantaged firm, [KMC]." Additionally, the contracting officer again represented that:

"The enclosed performance requirements reflect additions and deletions of buildings as well as changes in levels in service<sup>(2/)</sup> from those currently being performed and therefore, constitute a new requirement."

Although a government cost estimate for the proposed modification and a copy of the existing CSI contract were included with the request, no copy of the KMC contract was furnished.

By letter dated March 14, SBA authorized the contracting officer to begin direct negotiations with CSI for a new 8(a) custodial services solicitation; the letter also provided

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<sup>1/</sup> Since the Navy did not plan to exercise the fourth option year of KMC's contract, KMC's performance under contract No. 3220 was scheduled to expire on May 10, 1991.

<sup>2/</sup> According to the agency, the service levels establish the frequency with which a task is required to be performed. Other than the general reference in the March 13 letter to unspecified changes in the service levels, none of the correspondence between the Navy and SBA elaborates on such changes. In fact, the Navy's subsequent letters to SBA dated May 6 and 9, discussed later in our decision, omit any reference to changes in service levels.

that a memorandum of the Navy's negotiations with CSI must be submitted to SBA for final approval and acceptance.

On April 1, KMC received a letter dated March 28 from the contracting officer informing it that the Navy did not intend to exercise the fourth option year of its contract; on May 3, KMC learned that the subject services had been offered to SBA for award to CSI under the 8(a) program.

On May 6, after discussions with KMC, the SBA contracting specialist contacted the contracting officer by telephone and asked her to submit a revised request for modification. That day, the contracting officer submitted a second copy of the March 13 request package to the contracting specialist.

On May 9, KMC filed the instant protest with this Office. That same day, the contracting officer submitted a revised request for a contract modification to the SBA contracting specialist; in this request, the contracting officer advised the SBA that "the requirement offered reflects an overall 28 [percent] change in the number of buildings and a 49 [percent] total change in square footage from that currently being performed by [KMC]."

Included with the request was a copy of KMC's protest as well as a 3-page list of mathematical computations summarizing asserted square footage differences between the KMC contract and the proposed 8(a) modification.

By letter dated May 10, the SBA contracting specialist reaffirmed SBA's acceptance of the contract No. 3871 modification into the 8(a) program. Specifically, this letter provided:

"Our determination that an impact study was not necessary is based on the provisions of subject offer letter and above regulation<sup>3/</sup> that this is considered to be a new requirement."

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<sup>3/</sup> The only regulation referred to in the letter is 13 C.F.R. § 124.309(b), which concerns acceptance of a requirement into the 8(a) program where the contracting agency has expressed publicly a clear intention to reserve the procurement as a small business or small disadvantaged business set-aside. That provision clearly does not apply here; the intended reference was presumably to 13 C.F.R. § 124.309(c).

## ANALYSIS

The Small Business Act affords SBA and contracting agencies broad discretion in selecting procurements for the 8(a) program; we will not consider a protest challenging a decision to procure under the 8(a) program absent a showing of possible fraud or bad faith on the part of government officials or that specific laws or regulations have been violated. San Antonio Gen. Maintenance, Inc., B-240114, Oct. 24, 1990, 90-2 CPD ¶ 326. Here, the issue is whether the Navy complied with the requirement in 13 C.F.R. § 124.308(c) to furnish adequate information regarding the proposed offering, and consequently whether SBA had sufficient accurate information on which to base its determination that the proposed contract constituted a new requirement pursuant to 13 C.F.R. § 124.309(c).

In determining whether a requirement should be accepted into the 8(a) program, SBA is entitled to rely on the contracting officer's representations regarding the offered requirement; in this regard, the SBA regulations place the primary responsibility on the procuring agency to submit all relevant information necessary to SBA's decision-making process. See 13 C.F.R. § 124.308. In this case, based on our review of the record, we find that the Navy gave SBA insufficient information from which to make a judgment regarding the status of the proposed modification.

In devising the proposed modification to the 8(a) contract, the contracting officer deleted 13 buildings that were covered under the KMC contract and added 17 different buildings. Collectively, the 13 deleted buildings amount to 173,928 square feet of space; the 17 new buildings amount to 197,327 square feet. In summarizing the differences between the KMC contract and the proposed 8(a) contract, the contracting officer added these deletions and additions together; in her May 9 submission to SBA, based on the lump sum figure of additions and deletions (371,255 square feet), the contracting officer represented that the proposed modification amounted to a 28 percent change in the number of buildings and a 49 percent change in square footage. Based on this representation, SBA determined that the proposed modification constituted a "new" requirement.<sup>4/</sup>

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<sup>4/</sup> In its report on the protest, the Navy refers to a few other differences between the KMC contract and the proposed modification, such as the addition of roving service personnel for barracks and child care facilities. The Navy does not explain the impact of these changes on the scope of work, and,

(continued...)

The contracting officer's calculations submitted to SBA were misleading. Under contract No. 3220, KMC was required to clean 105 buildings or 767,971 square feet; the proposed modification would add to contract No. 3871, 109 buildings to be cleaned or 791,370 square feet. Contrary to the 28 percent and 49 percent changes asserted by the contracting officer, the proposed modification would, in fact, only result in a 3 percent increase in the square footage and a 3.8 percent increase in the number of buildings for which services are required under KMC's contract. This figure was never provided to SBA, nor could it easily be ascertained from the three pages of figures which were submitted to SBA in the second May 9 request for modification.5/

Further, SBA was never provided with a copy of the KMC contract, even though, under 13 C.F.R. § 124.308(c)(9), the contracting agency is required to provide SBA with the acquisition history of any requirement offered to the 8(a) program. Examination of the KMC contract not only would have confirmed that the only notable difference between it and the proposed modification was the scope, not type, of work required, but also may have misled SBA as to the change in scope.6/

Whether the change in the scope of work from KMC's existing contract to the proposed modification constitutes a change of sufficient magnitude to qualify the modified requirement as "new" under § 124.309(c) is a matter reserved for determination by SBA. Accordingly, we recommend that the Navy resubmit

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4/ (...continued)

In any event, none of this information was provided to SBA for its consideration.

5/ We note that these figures should have been provided in the initial March 13 offer letter. See State Janitorial Servs., Inc., B-240646, Dec. 6, 1990, 90-2 CPD ¶ 463.

6/ We recognize that the Navy may be suggesting that the basis for its position that the proposed modification is a new requirement was merely the change in the particular buildings to be serviced, as opposed to the change in the scope of the contract. It is not clear that the applicable SBA regulation contemplates such an interpretation or that SBA's approval of the proposed 8(a) contract without an adverse impact study was based on this interpretation; in fact, SBA's approval letter gives no indication of the specific basis of its approval. We think that the only reasonable interpretation of the record before us is that SBA read the Navy's submission as proposing a significant change in the scope of work to be performed.

the proposed contract modification to SBA along with a complete acquisition history of the requirement, which includes a copy of the KMC contract. Because we sustain the protest, we find that KMC is entitled to the costs of pursuing this protest, including attorneys' fees. 4 C.F.R. § 21.6(d)(1) (1991).

The protest is sustained.

*Milton J. Aoulan*  
for Comptroller General  
of the United States