



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: All Star Maintenance, Inc.

File: B-249810.3

Date: November 24, 1992

Allen Sweet for the protester.
Timothy A. Beyland, Department of the Air Force, for the agency.
Tania L. Calhoun, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Air Force decision to set aside a contract for base housing maintenance for small disadvantaged business (SDB) concerns pursuant to section 1207 of Public Law 99-661 is not inconsistent with the Small Business Competitiveness Demonstration Program Act of 1988, 15 U.S.C. § 644 note (1988 and Supp. III 1991), which requires procurements of certain services and under certain circumstances to be conducted on an unrestricted basis, as the latter statute expressly excludes from its requirements SDB set-asides conducted pursuant to section 1207.

DECISION

All Star Maintenance, Inc. protests the Department of the Air Force's decision to set aside for small disadvantaged business (SDB) concerns solicitation No. F22608-92-B-0020, for military family housing maintenance services at Columbus Air Force Base, Mississippi. All Star contends that the **set-aside** for SDBs is contrary to the Small Business Competitiveness Demonstration Program Act of 1988 (SBCDP Act), 15 U.S.C. § 644 note (1988 and Supp. III 1991).

We deny the protest.

The solicitation was issued as an unrestricted procurement on July 28, 1992, with bid opening scheduled for August 27. On August 12, a protest was filed in our Office by another firm, requesting that the agency set aside the solicitation

for SDB concerns pursuant to Department of Defense Federal Acquisition Regulation Supplement (DFARS) § 219.502-2-70. The agency subsequently issued amendment No. 0001 to extend the bid opening date indefinitely pending resolution of the protest. The agency ultimately decided to set aside the solicitation for SDB concerns and notified potential bidders of that decision by letter dated September 24; this protest followed.¹

The Department of Defense (DOD) SDB set-aside program implements section 1207 of Public Law 99-661, as amended, 10 U.S.C. § 2301 note (1988 and Supp. III 1991). 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 that goal to DOD's discretion. Sletager, Inc., B-241149, Jan. 25, 1991, 91-1 CPD ¶ 74.

The DOD regulations are found in DFARS part 219. They provide that a procurement shall be set aside for exclusive SDB participation if the contracting officer determines there is a reasonable expectation that: (1) offers will be obtained from at least two responsible SDB concerns; (2) award will be made at a price not exceeding the fair market price by more than 10 percent; and (3) scientific and/or technical talent consistent with the demands of the acquisition will be offered. DFARS § 219.502-2-70(a); see also Grove Roofing, Inc., B-240743 et al., Dec. 10, 1990, 90-2 CPD ¶ 470. The DOD program also prescribes when a procurement is not to be set aside for SDBs, including when the acquisition is for construction (including maintenance and repairs) and is under \$2 million. DFARS § 219.502-2-70(b) (2).

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

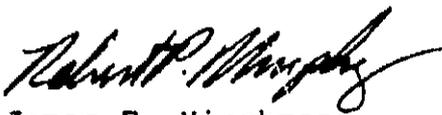
¹While the initial protest was being considered, another firm filed a protest in our Office arguing that the solicitation should not be set aside for SDBs; however, that firm failed to file comments on the agency report and its protest was dismissed.

small business participation goals. "Construction," which includes base housing maintenance, see Grove Roofing, Inc., SUPRA, is one of the four designated industry groups included in the demonstration program. However, the SBCDP Act also specifically provides that set-asides for SDBs under section 1207 are exempt from the demonstration program. See Kato Corp., 69 Comp. Gen. 374 (1990), 90-1 CPD ¶ 354.

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 during the period when small business set-asides cannot be considered for acquisitions in the four designated industry groups, the restrictions at DFARS § 219.502-2-70(b)(1), (2), and (3) do not apply and the acquisitions shall be considered for SDB set-asides. DFARS § 219.1006(b)(1)(B).

All Star argues that DFARS § 219.1006(b)(1)(B) is inconsistent with the SBCDP Act, and asks that we declare it void and direct DOD to remove it from the DFARS. However, as discussed above, the SBCDP Act expressly provides that the requirement for unrestricted competition does not apply to procurements set aside pursuant to section 1207. Thus, the DFARS provision requiring SDB set-asides for construction projects under \$2 million cannot be considered inconsistent with the SBCDP Act.

The protest is denied.²


James F. Hinchman
General Counsel

²In its comments on the agency report, All Star, for the first time, argues that nondisadvantaged small businesses are generally denied a reasonable opportunity to compete for base housing maintenance contracts. The protester's unwarranted piecemeal presentation of this argument is untimely filed and will not be considered. See Science Sys. and Applications, Inc., B-240311; B-240311.2, Nov. 9, 1990, 90-1 CPD ¶ 381