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Comptroller General
of the United States

Washington, D.C. 20548

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Decision

Matter of: DynaLantic Corp.

File: B-256245

Date: May 24, 1994

Jeffrey A. Weinstock, Esq., for the protester.
Andrea E. Brotherton, Esq., Department of the Navy, for the agency.
Paul E. Jordan, Esq., and John Van Schaik, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Department of Defense's (DOD) use of a 10-percent evaluation preference for small disadvantaged business concerns (SDB) is a legally permissible implementation of 10 U.S.C. § 2323, which establishes a goal of 5 percent of the contract funds obligated each fiscal year for the award of contracts and subcontracts to SDBs.

DECISION

DynaLantic Corp. protests the inclusion of an evaluation preference for small disadvantaged businesses (SDB) under request for proposals (RFP) No. N61339-93-R-0031, issued by the Naval Air Warfare Center, Training Systems Division (hereinafter, "Center"), Department of the Navy, for a conversion program for armored vehicle simulators. DynaLantic, a small business, contends that the SDB preference is illegal and improperly applied to the military simulation/training industry.

We deny the protest.

The RFP advised offerors that award would be made to the offeror with the lowest-priced, technically acceptable offer. Where, as here, price and price-related factors form the basis for award, Department of Defense (DOD) contracting agencies must provide a 10-percent price evaluation

preference for SDBs. Defense Federal Acquisition Regulation Supplement (DFARS) Subpart 219.70. The preference provision, as included in the RFP, provides in pertinent part:

> "(1) Offers will be evaluated by adding a factor of ten percent to the price of all offers, except--(i) Offers from [SDB] concerns, which have not waived the preference; . . .
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> . . . . .
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> (2) The ten percent factor will be applied on a line item by line item basis or to any group of items on which award may be made. . . . The ten percent factor will not be applied if using the preference would cause the contract award to be made at a price which exceeds the fair market price by more than ten percent."

DFARS § 252.219-7006(b).

The statute on which the DFARS clause is based establishes a goal of 5 percent of the total funds obligated for DOD contracts (procurement, research, development, test and evaluation, military construction, and operation and maintenance) in the fiscal years of 1987 through 2000, as the objective for the combined total of contract and subcontract awards to SDBs and others.[1] 10 U.S.C. § 2323(a)(1) (Supp. V 1993). The DFARS clause is one method by which DOD agencies seek to achieve the goal.

Prior to the January 6, 1994, closing date for receipt of proposals, DynaLantic filed an agency-level protest challenging the inclusion of DFARS § 252.219-7006 in the RFP. When the agency denied its protest, DynaLantic filed this protest with our Office.

DynaLantic challenges the Navy's use of the preference on the basis that the DFARS clause "is an illegal regulation, not specified, anticipated, or permitted by existing statutory authority" and is inconsistent with congressional intent. According to DynaLantic, the statute specifies only five methods for DOD to achieve the 5-percent goal: technical assistance, infrastructure assistance, advance payments, awards under section 8(a) of the Small Business Act (15 U.S.C. § 637(a) (1988 and Supp. IV 1992)), and use of SDB set-asides. 10 U.S.C. § 2323(c) and (e). In

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[1]In addition to SDBs, the statute lists historically black colleges and universities and certain minority institutions.

DynaLantic's view, since the 10-percent evaluation preference is not specified in the statute, it is illegal. We find that DynaLantic has too narrowly construed the statute.

While the statute specifies various methods for achieving the 5-percent goal, the list is not exhaustive. In addition to the requirement to provide technical and infrastructure assistance (10 U.S.C. § 2323(c)), section 2323(e) provides that, to achieve the goal, the Secretary of Defense shall ensure that substantial progress is made in increasing awards of DOD contracts to SDBs; "exercise his utmost authority, resourcefulness, and diligence"; and actively monitor and assess the progress of Defense agencies in attaining the goal. 10 U.S.C. § 2323(e)(1)(A). Section 2323(e)(3) also provides that "to the extent practicable and when necessary to facilitate achievement" of the goal, the Secretary "may enter into contracts using less than full and open competitive procedures," but shall not pay a price exceeding fair market price by more than 10 percent per contract or subcontract. The section identifies two examples of such procedures: awards under section 8(a) and partial set-asides. While DynaLantic interprets these examples as the only methods permitted, it is plain from the context of the statute that the Secretary is not restricted to them.

The current statute, while containing more provisions, is essentially the same as predecessor legislation passed by Congress in 1986, and later repealed when 10 U.S.C. § 2323 was enacted. Section 1207 of the National Defense Authorization Act for Fiscal Year 1987, Pub. L. No. 99-661, 100 Stat. 3816 (1986), provided the same 5-percent goal and, to achieve that goal, required the Secretary to exercise his utmost authority, resourcefulness, and diligence, and authorized the use of less than full and open competition. We reviewed the provisions of section 1207 and an earlier implementing DFARS provision which authorized SDB set-asides. Techplan Corp.; American Maintenance Co., 67 Comp. Gen. 357 (1988), 88-1 CPD ¶ 312. In our review, we found nothing in section 1207 which either directed or prohibited DOD from implementing a particular type of program to meet the 5-percent goal. Id. at 359-60. The Court of Appeals for the Federal Circuit reached the same conclusion when it reviewed DFARS § 219.7001 in conjunction with section 1207. Commercial Energies v. United States, 929 F.2d 682 (Fed. Cir. 1991). In discussing its finding that the line item-by-line item application of the 10-percent preference was appropriate, the court held that "in implementing the preference, the [DOD] was properly within the terms of the statute. . . ." Id. at 685. The court further observed that "[t]he statute sets a goal, without setting forth a specific mechanism by which the [DOD] should meet that

goal." Id. at 686. The court concluded that DOD had provided a "rational procedure and mechanism for meeting the Congressional goal. . . ." Id. While, as the protester notes, the court was faced with a challenge to the "line item by line item" aspect of the DFARS preference clause, we believe that implicit in the court's rationale was its finding that the 10-percent evaluation preference was a proper implementation of the statute.

We reach the same conclusion here. The statute requires the Secretary to prescribe regulations which require that contracting officers emphasize the award of contracts to SDBs in all industry categories. 10 U.S.C. § 2323(e)(5)(B). The statute also goes so far as to allow DOD to use other than full and open competitive procedures to meet the 5-percent goal; the 10-percent evaluation preference in DFARS § 252.219-7006 is a less restrictive, more competitive approach. Since the statute set the goal, left open the method for achieving it, and specifically required emphasis on the goal, we find no basis for concluding that the DFARS evaluation preference provision is inconsistent with the statute itself or with the intent of the Congress in enacting it. See Techplan Corp.; American Maintenance Co., supra.

In this regard, we note that the 10-percent preference first appeared in DFARS § 219.7007 in November 1988 and was implemented on the basis of the statutory authority of the Secretary of Defense to establish procedures necessary to achieve the 5-percent goal. In 1992, when Congress repealed section 1207, its enactment of 10 U.S.C. § 2323 contained essentially the same provisions as section 1207. While Congress made various revisions in its enactment of section 2323, the new statute is silent on the issue of a 10-percent preference. Congress was presumably aware of the regulations promulgated by DOD and, had it believed that the 10-percent preference was contrary to the authority vested in the Secretary of Defense or was otherwise improper, it could have dealt with it explicitly in the statute. See Albernaz v. United States, 450 U.S. 333, 341-42 (1981). This silence suggests that Congress does not view the use of a 10-percent preference as contrary to the provisions of section 2323.

DynaLantic next argues that use of the clause in this and future procurements has the effect of significantly lessening the opportunities of non-SDB small businesses to compete in the military simulation/training industry in violation of 10 U.S.C. § 2323(e)(3) and (e)(5)(E). According to DynaLantic, the Center is responsible for the procurement of the majority of training systems/simulators for both the Navy and the Army, and from fiscal year 1991 through 1993 contract awards to non-SDB small business

concerns have decreased. In the protester's view, application of the 10-percent preference under these circumstances is improper under the statute. We disagree. As discussed above, section 2323(e)(3) authorizes the use of other than full and open competitive procedures so long as the price paid does not exceed 10 percent more than the fair market price. That section also provides that the Secretary of Defense shall adjust that percentage "for any industry category if available information clearly indicates that nondisadvantaged small business concerns in such industry category are generally being denied a reasonable opportunity to compete for contracts because of the use of that percentage in the application of this paragraph."

While DynaLantic has submitted figures which demonstrate a decrease in non-SDB small business awards at the Center, we do not believe that these figures establish that non-SDB small businesses are being denied a reasonable opportunity to compete due to the application of the 10-percent evaluation preference. For example, the dollar value of the Center's SDB awards went from $31,415,000 in 1991 to $73,603,000 in 1993, while non-SDB small business awards went from $45,986,000 in 1991 to $14,718,000 in 1993. However, these figures are misleading. According to the Navy, they include contract awards for procurements other than training aids and devices, the industry category at issue.[2] The agency also observes that large businesses are winning a larger share of awards since 1988, and are essentially taking business from both small and SDB concerns. Further, the Center is not the only agency in DOD responsible for procuring such aids and devices. For example, the Naval Air Systems Command, Naval Sea Systems Command, and the Training and Doctrine Command also procure training aids and devices. Throughout DOD, small businesses, including section 8(a) firms and other SDBs, received $124 million in awards or approximately 29 percent of the training aids and devices awards of $418,514,000. Of the $124 million, non-8(a) SDB awards accounted for $42.7 million, and non-SDB small business awards accounted for $56.2 million.[3]

While SDBs have won an increasing share of the Center's total contract awards, there is no evidence to establish that the protester or other non-SDB small businesses have been "denied a reasonable opportunity to compete," the

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[2]These other awards are for support services, research and development, computers, modifications, operation and maintenance services, and small purchases.

[3]The remaining $25 million represented awards under section 8(a).

standard set forth in the statute. The agency states that application of the SDB preference clause in Center procurements has only displaced one apparent awardee, a large business. DynaLantic argues that this does not account for procurements, such as this one, where it and other small businesses have declined to participate due to the preference. While DynaLantic may be correct with regard to itself, it has not submitted any evidence with regard to other small businesses which have allegedly declined to participate. Further, there is no evidence that, had DynaLantic participated in this or other procurements, it would have lost the award due to the application of the preference. In this regard, we find DynaLantic's argument to be speculative and thus an insufficient basis on which to sustain a protest. Independent Metal Strap Co., Inc., B-231756, Sept. 21, 1988, 88-2 CPD ¶ 275. In the absence of information clearly indicating a denial of a reasonable opportunity to compete, there is no requirement in section 2323(e)(3) for the Secretary of Defense to change the percentage. Moreover, even assuming a clear indication, the Secretary's responsibility is to adjust the percentage, not to eliminate the evaluation preference, as argued by the protester. Thus, we have no basis to grant DynaLantic relief on this ground.

DynaLantic also relies on section 2323(e)(5)(E), which provides for the Secretary to ensure that in meeting the 5-percent goal, current levels in the number or dollar value of contracts awarded under section 8(a) and the small business set-aside program (15 U.S.C. § 644(a)) are maintained and that every effort is made to provide new opportunities for contract award to eligible entities. Unlike section 2323(e)(3), which highlights the impact of SDB awards in specific industry categories, section 2323(e)(5)(E) is concerned with the impact of SDB awards on section 8(a) and small business set-aside contracts without regard to a specific industry category. While the protester has attempted to demonstrate that SDBs have won an inordinate amount of the awards in the category of training aids and devices, it has not shown that overall "current levels" of DOD section 8(a) and small business set-aside contracts have decreased as a result of increased SDB awards. Nor has DynaLantic shown that any decrease was the result of the Secretary's failure to establish policies and procedures which "to the maximum extent practicable, will ensure" the maintenance of current levels of contracts in the specified programs. 10 U.S.C. § 2323(e)(5)(E). Thus,

we have no basis to conclude that the use of the 10-percent evaluation preference in this solicitation violates the statute.[4]

The protest is denied.

/s/ Ronald Berger
for Robert P. Murphy
Acting General Counsel

[4]The statute envisions a procedure whereby the Secretary of Defense may be requested to determine whether SDB set-asides by a DOD contracting activity have caused a particular industry category to bear a disproportionate share of the contracts awarded to meet the goal and for the Secretary to take appropriate limiting actions. 10 U.S.C. § 2323(g). The record includes no evidence that the protester has attempted to seek such a determination from DOD.