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Comptroller General
of the United States

Washington, D.C. 20548

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Decision

Matter of: American Mutual Protective Bureau

File: B-243329.2

Date: June 16, 1994

Donald G. Featherstun, Esq., Pettit & Martin, for the protester.
Emily C. Hewitt, Esq., and Thomas Hawkins, Esq., General Services Administration; and David R. Kohler, Esq., and Susan L. Sundberg, Esq., Small Business Administration, for the agencies.
Christine F. Davis, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Small Business Administration (SBA) properly accepted requirements for guard services, which were a portion of the guard services currently contracted for from a small business, for inclusion in the section 8(a) program, where the SBA determined, in accordance with applicable regulations, that acceptance of the requirements would not constitute an "adverse impact" on the small business.

DECISION

American Mutual Protective Bureau (AMPB), a small business, protests the decision of the General Services Administration (GSA) and the Small Business Administration (SBA) to place a portion of the work encompassed by its guard services contract with GSA into the SBA's section 8(a) program.

We deny the protest.

Section 8(a) of the Small Business Act authorizes the SBA to contract with government agencies and to arrange for performance of such contracts by awarding subcontracts to socially and economically disadvantaged small businesses. 15 U.S.C. § 637(a) (1988 and Supp. IV 1992). Under the Act and its implementing regulations, the SBA may not accept any requirement into the 8(a) program if doing so "would have an adverse impact on other small business programs or on an individual small business." 13 C.F.R. § 124.309(c) (1994).

The SBA must consider "all relevant factors" in determining whether a proposed 8(a) award has an adverse impact, 13 C.F.R. § 124.309(c)(1). However, the SBA will presume adverse impact, and will not accept a procurement into the 8(a) program, when the following circumstances exist: (1) a small business concern has performed a specific requirement for at least 24 months; (2) it is currently performing the requirement or has concluded performance within 30 days of the procuring agency's offer of the requirement for the 8(a) program; and (3) the estimated dollar value of the offered 8(a) award is 25 percent or more of the small business concern's most recent annual gross sales. 13 C.F.R. § 124.309(c)(2).

On April 30, 1991, following a competition restricted to small business concerns, GSA awarded AMPB contract No. GS-09P-91-KSD-0036 to provide security guard services, on a firm, fixed-price basis, for a base year and 4 option years. The contract requires AMPB to provide security guard services at various GSA-administered buildings in the following California regions: (1) San Francisco, Marin and San Mateo Counties; (2) Contra Costa County; (3) Alameda County; and (4) Monterey, Santa Clara and Santa Cruz Counties. GSA had previously fulfilled its requirements for these geographic areas by four separate procurements, but decided to bundle these requirements in AMPB's contract for administrative convenience.

On November 19, 1993, during AMPB's second option year, GSA asked SBA to consider accepting into the 8(a) program those guard services then provided by AMPB. In making this offer, GSA broke up the requirements in AMPB's contract and restored the four original geographic lots, for consideration as separate 8(a) procurements. GSA advised SBA that, "one large contract serving all these areas was almost impossible to administer, so the decision was made by GSA to break up the requirements."

The SBA notified the protester of GSA's proposal by letter dated November 24. The letter requested that AMPB provide SBA with specific financial information, including financial statements for the last 3 fiscal years. The letter stated that SBA would use the information to ascertain whether the award of these requirements to an 8(a) contractor would adversely impact the protester.

The protester provided its financial reports for the preceding 3 fiscal years, as requested. In addition, AMPB furnished a government estimate appraising the value of its contract, and advised that this amount exceeded 25 percent

of AMPB's most recent annual gross sales. This being the case, the protester stated that acceptance of these requirements for 8(a) contracting would per se cause it to suffer an adverse impact.

The SBA rendered its impact determination on January 13, 1994. In making this determination, the SBA considered the estimated base year dollar value of the four requirements and calculated the percentage these requirements represented of AMPB's most recent annual gross sales. This calculation showed that this contract represented 45.3 percent of AMPB's annual gross sales broken down as follows: (1) San Francisco, Marin and San Mateo Counties--14 percent; (2) Contra Costa County--14 percent; (3) Alameda County--4.6 percent; and (4) Monterey, Santa Clara and Santa Cruz Counties--12.7 percent. Because the total contract value was significantly more than 25 percent of AMPB's most recent annual gross sales, the SBA presumed that acceptance of all four requirements into the 8(a) program would have an adverse impact on AMPB. However, the SBA recognized that "since GSA has decided to split the requirement and there will actually be four separate awards for the follow-on services," it could consider whether any of the broken out requirements could be diverted to the 8(a) program. The SBA then determined that it could accept for inclusion in the 8(a) program the requirements for Contra Costa County and Alameda County, which were valued at less than 19 percent of AMPB's most recent gross sales, without causing an adverse impact on AMPB. The SBA notified AMPB of its determination on January 21, and this protest followed.[1]

AMPB argues that the SBA was required to consider the protester's contract as a single entity, rather than considering the individual elements, such that adverse

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[1]AMPB's contract was set to expire while this protest was pending. Shortly before that event, GSA exercised its option to extend the contract for an additional year with the intent of terminating that work designated for the 8(a) program. The protester argues that the exercise of this option manifests GSA's "clear intention to reserve the procurement as a small business . . . set-aside," which precludes SBA's acceptance of these requirements into the 8(a) program under 13 C.F.R. § 124.309(a) and (b). However, as the protester recognizes, the cited regulations apply to pre-award contract actions (e.g., the issuance of a solicitation as a small business set-aside or a Commerce Business Daily announcement of an intended small business set-aside), not to the agency's exercise of an option under an ongoing contract. Thus, we do not agree that the SBA must renounce its acceptance of a portion of AMPB's contract work because of the cited regulations.

impact would be presumed under 13 C.F.R. § 124.309(c)(2). The protester argues that the SBA and GSA improperly evaded the regulatory presumption of adverse impact by breaking out the requirements of AMPB's contract.

The Small Business Act affords SBA and contracting agencies broad discretion in selecting procurements for the 8(a) program. Accordingly, our Office will not consider a protest challenging the 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 may have been violated. Microform Inc., B-244881.2, July 10, 1992, 92-2 CPD ¶ 13; San Antonio Gen. Maintenance, Inc., B-240114, Oct. 24, 1990, 90-2 CPD ¶ 326.

While the protester claims that 13 C.F.R. § 124.309(c)(2) required the SBA to consider the requirements of its incumbent contract as a single entity in making its "adverse impact" determination, it has provided no authority for this proposition and the SBA regulations do not support this claim. The "adverse impact" regulation directs SBA's attention to "proposed procurements" offered for 8(a) contracting, 13 C.F.R. § 124.309, not to existing contracts that no longer reflect how the agency intends to procure its requirements. Consistent with the discretion vested in a contracting agency to structure its requirements as it deems fit, the regulation contemplates that an agency may effect "an expansion or alteration of an existing requirement," and offer a new or different requirement to the SBA.[2] 13 C.F.R. § 124.309(c). The SBA's inquiry is defined by "the procuring agency's offer of the requirement for the 8(a) program," and is concerned with the impact of "the offered 8(a) award." 13 C.F.R. § 124.309(c)(2). Thus, we find that the SBA did not violate the regulation by considering the requirements as they were offered, in four separate lots.

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[2]The regulation provides that, "[t]he 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." 13 C.F.R. § 124.309(c). The concept of adverse impact is designated as not applying to "new" requirements. Id. In this case, the SBA did not treat GSA's restructuring of the requirements in the protester's contract to amount to a "new" requirement in that it performed an impact determination.

We also find no evidence to support the protester's accusations of bad faith, namely, that the SBA and GSA were motivated by a desire to avoid the presumption of adverse impact that would attend if its contract were considered as a single entity. Here, the SBA was advised that GSA found it unduly arduous to administer one large contract serving the disparate geographic areas and wished to procure the requirements separately, as it had previously done. Given that the requirements of AMPB's contract were clearly divisible, we fail to see why GSA could not reasonably restore the previous geographic lots in making its offer to SBA or that either agency's actions were motivated by bad faith. See Information Dynamics, Inc., B-239893; B-239894, Oct. 1, 1990, 90-2 CPD ¶ 262.

The protester further asserts that SBA violated its regulations in another way. While the SBA was not required to presume adverse impact upon accepting two proposed procurements for inclusion in the 8(a) program, i.e., the guard service requirements for Contra Costa and Alameda Counties,[3] 13 C.F.R. § 124.309(c)(1) required the SBA to consider "all relevant factors" in determining whether or not acceptance of these requirements would have an adverse impact upon the protester. The protester contends that the SBA violated this regulation because the SBA "focused on the factors delineated in its internal Standard Operating Procedures to the exclusion of other considerations."

The factors stated in SBA's Standard Operating Procedures No. 80-05, paragraph 78(e), were whether the loss of the requirements would force the incumbent into bankruptcy, require the termination of a large percentage of the incumbent's employees and effect a significant change in the incumbent's future business capability, or significantly impair the value of the firm's assets that had been purchased exclusively for the requirements. The SBA determined that the loss of revenue represented by these requirements would not force AMPB into bankruptcy, as the firm's financial condition was sound. In addition, the SBA found that, while AMPB was likely to lose most of the employees currently performing these requirements to the successor contractor, AMPB would concomitantly reduce its labor and overhead costs, and would therefore not experience a significant change in its business capability. Finally, the SBA determined that a guard service contractor does not

[3]As noted above, the value of these requirements was 18.6 percent of AMPB's most recent annual gross sales, which is below the threshold for a presumptive finding of adverse impact.

invest heavily in assets specific to its contracts and would not suffer a capital loss were its contract terminated. Accordingly, the SBA determined that AMPB would not suffer the adverse impact contemplated under the regulations.

AMPB does not argue that the conclusions drawn by SBA under the above factors were incorrect. Rather, the protester argues that 13 C.F.R. § 124.309(c)(1) does not define what makes a factor relevant to the impact determination, such that "any factor which affects its business . . . is arguably relevant." AMPB proposes several of its own "relevant factors" and claims that, even though it did not present these concerns to SBA at the time it was requested to furnish information pertinent to the impact determination, SBA was required to exhaust any such relevant concerns in its analysis.

We disagree. The responsibility for defining what is and what is not a "relevant factor" under 13 C.F.R. § 124.309(c)(1) belongs to SBA, not the protester.[1] The analysis contemplated by this regulation involves an exercise of discretion on the part of SBA, which must balance various program requirements for different segments of the small business community. See Microform Inc., supra. In this case, SBA, based upon current information submitted by AMPB, determined that the loss of these requirements would neither force the protester into bankruptcy, significantly affect its future business capability, or cause it to suffer a significant capital loss, conclusions which the protester does not dispute. Although AMPB believes that SBA could have done more, the record does not establish that SBA did not make the adverse impact determination required by 13 C.F.R. § 124.309(c)(1). Id.

The protest is denied.

Ronald Berger
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Acting General Counsel

[1]Indeed, SBA states that it considers the factors now advanced by the protester to be irrelevant to an adverse impact determination, and it would not have changed its determination, even if AMPB had presented these concerns in a timely fashion--which it did not.