



G A O

Accountability * Integrity * Reliability

**Comptroller General
of the United States**

**United States Government Accountability Office
Washington, DC 20548**

Decision

Matter of: Latvian Connection General Trading and Construction LLC

File: B-408633

Date: September 18, 2013

Keven L. Barnes for the protester.

Behn M. Kelly, Esq., Col. Barbara E. Shestko, Skye Mathieson, Esq., Capt. Marc P. Mallone, Department of the Air Force; and Kevin R. Harber, Esq., Small Business Administration, for the agencies.

Peter D. Verchinski, Esq., and Guy R. Pietrovito, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protester's contention that the Small Business Act, 15 U.S.C. § 644(j)(1) (2006), requires agencies to set aside for small businesses located outside the United States and its outlying areas procurements valued under the simplified acquisition threshold, unless the agency is unable to obtain offers from two or more small business concerns at fair market prices, is denied where the Act is silent on its application outside the United States, and where the Federal Acquisition Regulation (FAR) expressly provides that the set-aside provisions of the Act apply only in the United States or its outlying areas; given the silence of the Act on its implementation outside the United States--and the silence of the Small Business Administration's regulations on the issue--we will not conclude that the validly-promulgated, long-standing regulation found at FAR § 19.000(b) is inconsistent with, or contrary to, the Small Business Act.

DECISION

Latvian Connection General Trading and Construction LLC, of Kuwait City, Kuwait, a veteran-owned small business, protests the terms of request for quotations (RFQ) No. FA5709-13-T-0039, issued by the Department of the Air Force for armored cable. Latvian contends that the Air Force was required to set aside the RFQ for small business concerns.

We deny the protest.

BACKGROUND

This protest concerns the Federal Acquisition Regulation's (FAR) implementation of certain set-aside provisions of the Small Business Act. The issue here involves an Air Force procurement, but has been raised in challenges to procurements conducted by other agencies contracting outside the United States and its outlying areas. In resolving this protest, we have sought the views of the procuring agency, the Small Business Administration, and the protester.

The RFQ was issued pursuant to the simplified acquisition procedures of Federal Acquisition Regulation (FAR) Part 13 by the Air Force's 405th Expeditionary Contracting Squadron in Oman. The RFQ sought quotations from vendors for brand name or equal armored cable to be used at Thumrait Air Base, Oman. The solicitation was not set aside for small businesses.

Prior to the closing time for receipt of quotations, Latvian protested to our Office the Air Force's decision not to conduct this procurement as a small business set-aside.

DISCUSSION

Latvian argues that, given the dollar value of this procurement, the Air Force was required under the Small Business Act to issue the RFQ as a set-aside for small businesses. Specifically, Latvian cites section 644(j) of the title 15 of the United States Code, which states in pertinent part:

(1) Each contract for the purchase of goods and services that has an anticipated value greater than \$2,500 but not greater than \$100,000¹ shall be reserved exclusively for small business concerns unless the contracting officer is unable to obtain offers from two or more small business concerns that are competitive with market prices and are competitive with regard to the quality and delivery of the goods or services being purchased.

15 U.S.C. § 644(j)(1) (2006). The Small Business Administration (SBA) implemented this statutory provision in a regulation stating that contracting officers:

shall set aside any acquisition with an anticipated dollar value exceeding the Micropurchase Threshold but not exceeding the Simplified Acquisition Threshold . . . for small business concerns when there is a reasonable expectation that offers will be obtained

¹ The Federal Acquisition Regulatory Council has, pursuant to 41 U.S.C. § 1908, increased the dollar threshold. The Air Force informs us that the value of this procurement is less than \$100,000.

from at least two small business concerns that are competitive in terms of quality and delivery and award will be made at fair market prices.

13 C.F.R. § 125.2(f)(1) (2013).

The Air Force responds that pursuant to FAR § 19.000(b) the agency is not required to set the RFQ aside for small businesses, because the procurement is outside the United States and its outlying areas. Air Force Dismissal Request at 1-2. FAR § 19.000(b) states:

This part [Part 19-Small Business Programs], except for subpart 19.6 [Certificates of Competency], applies only in the United States or its outlying areas.² Subpart 19.6 applies worldwide.

The SBA disagrees with the Air Force and argues that the Small Business Act, 15 U.S.C. § 644(j)(1), requires the agency to set aside the RFQ for small businesses, even though the procurement is outside the United States and its outlying areas.³ With respect to the FAR § 19.000(b) limitation of the requirement to set aside certain procurements for small businesses to procurements in the United States and outlying areas, the SBA argues that this regulatory “statement of policy” does not properly implement the Small Business Act requirements. SBA Comments, B-407391, at 3-4.

While the SBA acknowledges that § 644(j)(1) and its own implementing regulation, 13 C.F.R. § 125.2(f)(1), are silent as to their application outside the United States, it nonetheless argues that these set-aside provisions cannot be limited to the United States and outlying areas, as implemented in the FAR. See SBA Comments, B-408633, at 4; see also SBA Comments, B-407391, at 3-4. The SBA also notes that elsewhere the Small Business Act exempts certain provisions from applying outside the United States. See, e.g., 15 U.S.C. § 637(d)(2)(B). The SBA argues that the silence of § 644(j)(1) with respect to its application outside the United States indicates that Congress intended that this section of the Act would apply outside the United States. Id. at 4.

Our analysis begins with the interpretation of the relevant statute. In matters concerning the interpretation of a statute, the first question is whether the statutory

² The definition of “outlying areas” does not include Oman. See FAR § 2.101.

³ We asked that the SBA provide its views on the protest and the Air Force’s dismissal request. We also considered the SBA’s views that were provided with respect to Latvian’s earlier protest (B-407391), raising similar arguments, but which we dismissed on other grounds.

language provides an unambiguous expression of the intent of Congress. If it does, our analysis ends there, for the unambiguous intent of Congress must be given effect. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984); International Program Group, Inc., B-400278, B-400308, Sept. 19, 2008, 2008 CPD ¶ 172 at 5. If, however, the statute is silent or ambiguous with respect to the specific issue, deference to the interpretation of an administering agency is dependent on the circumstances. Chevron, 467 U.S. at 843-45; United States v. Mead Corp., 533 U.S. 218, 227-37 (2001).

Where an agency interprets an ambiguous provision of a statute through a process of rulemaking or adjudication, deference will be given to the agency's interpretation, unless the resulting regulation or ruling is procedurally defective, arbitrary, or capricious in substance, or manifestly contrary to the statute. Mead, 533 U.S. at 227-31; Chevron, 467 U.S. at 843-44. However, where the agency's position reflects an informal interpretation, Chevron deference is not warranted; in these cases, the agency's interpretation is "entitled to respect" only to the extent it has the "power to persuade." Gonzales v. Oregon, 546 U.S. 243, 255-256 (2006); Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944); see also Mead, 533 U.S. at 226-27.

The Small Business Act, enacted in 1953, states as its declared policy that:

the Government should aid, counsel, assist, and protect, insofar as is possible, the interests of small-business concerns in order to preserve free competitive enterprise . . . to insure that a fair proportion of the total sales of Government property be made to [small businesses].

See 15 U.S.C. § 631(a). The Small Business Act, as amended, created the SBA, which was given broad authority for promoting the Act's policies and taking actions to assure that small businesses obtain their fair share of contracts awarded by the U.S. government. Pursuant to this authority, the SBA has promulgated regulations implementing the Small Business Act, including 13 C.F.R. § 125.2(f)(1), which implements section 644(j)(1).

As stated above, and as the SBA recognizes, both the Small Business Act and its own regulation are silent with respect to the application of § 644(j)(1) and 13 C.F.R. § 125.2(f)(1) outside the United States and its outlying areas. Moreover, we are unaware of any relevant legislative history, and the parties have not directed us to any despite multiple opportunities to brief these issues, addressing the application of these provisions to procurements overseas.

Unlike the Small Business Act and the SBA's regulations, FAR § 19.000(b) specifically addresses the applicability of § 644(j)(1) outside the United States and its outlying areas.⁴ The FAR is promulgated under the authority of the Office of Federal Procurement Policy Act (OFPP), which directs the Administrator of the OFPP to prescribe procurement policies that are implemented in a single government-wide regulation (the FAR). See 41 U.S.C. § 1121(b). Pursuant to this authority, the government has established the Federal Acquisition Regulatory Council to issue and maintain the FAR. See 41 U.S.C. § 1303(a). The limitation here has been in the FAR since its inception and has existed in prior regulations since at least 1959. See Armed Services Procurement Regulation (ASPR) § 1.700 (the small business set-aside rules of the Small Business Act applied only in the United States, its possessions, and Puerto Rico); 24 Fed. Reg. 3,584 (May 5, 1959).

In accordance with the Court's guidance in *Chevron* and its progeny, we give deference to an agency's regulatory implementation of a statute, unless the regulation is procedurally defective, arbitrary, or capricious in substance, or manifestly contrary to the statute. See *Mead*, 533 U.S. at 227-31; *Chevron*, 467 U.S. at 843-44. Given the silence of the Small Business Act with respect to the application of § 644(j)(1) outside the United States and its outlying areas, we cannot say that the validly-promulgated, long-standing regulation found at FAR § 19.000(b) is inconsistent with, or contrary to, the Small Business Act. This FAR provision is also not inconsistent with the SBA's own regulation implementing § 644(j)(1). Although the SBA disagrees with how the Federal Acquisition Regulatory Council has interpreted the Small Business Act in this regard, and states that our Office is required to give deference to the SBA's interpretation of the Act, the SBA's interpretation reflects its informal legal opinion. The SBA's view of the statute-- which is not reflected in its own implementing regulation despite the existence of the government-wide FAR rule for decades--does not overcome the deference accorded to the FAR.

We conclude that the Air Force acted reasonably in relying upon FAR § 19.000(b) to

⁴ The SBA previously asked the Federal Acquisition Regulatory Council to amend FAR § 19.000(b) to provide for application of the Small Business Act to overseas acquisitions, which the Council unanimously rejected. See SBA Comments Addressing SBA Inspector General Report No. 12-04, Nov. 2, 2011, at 2.

determine that it was not required to set aside the RFQ for small business concerns.⁵

We deny the protest.⁶

Susan A. Poling
General Counsel

⁵ Latvian and the SBA contend that we earlier determined that the Small Business Act applies overseas despite the limitation in FAR § 19.000(b), citing Discount Mach. & Equip., Inc., B-240525, Nov. 23, 1990, 90-2 CPD ¶ 420 at 3. That decision, however, involved the SBA's certificate of competency program and not whether a procurement outside the United States must be set aside for small businesses.

⁶ In response to the Air Force's dismissal request, Latvian challenged other aspects of the RFQ. We dismiss these other objections to alleged apparent solicitation improprieties (such as the alleged failure of the RFQ to comply with Defense FAR Supplement § 236.274), because they were untimely filed after the closing time for receipt of quotations. 4 C.F.R. § 21.2(a)(1) (2013).