DECISION

THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

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FILE: B-185330, B-185331, B-185776 DATE: May 27, 1976

MATTER OF: Park Manufacturing Company
Century Tool Company

DIGEST:

1. Prior decision that GSA Temporary Regulation published in Federal Register permits GSA to give preference to small business set-aside over labor surplus area set-aside is affirmed, since error of fact or law has not been alleged and demonstrated.

2. GAO request to agency for report on protest does not represent final GAO decision on merits of any contention raised by protest.

We have been requested to reconsider that part of our decision Park Manufacturing Company, Century Tool Company, B-185330, B-185331, B-185776, April 16, 1976, 76-1 CPD ___, wherein we concluded that the General Services Administration was not required to accord a preference to partial labor surplus area set-asides over total small business set-asides, where both types were appropriate for a procurement. While the protesters argued that such a labor surplus set-aside preference was set out in the Federal Procurement Regulations, we held that a Temporary Regulation issued by GSA and published in the Federal Register permitted GSA to apply total small business set-aside procedures irrespective of labor surplus considerations.

Our decision concerned protests against three invitations for bids issued by GSA, all three of which were totally set-aside for small business participation. The protests under B-185330 and B-185331 were filed in November 1975, and the protest under B-185776 was filed in January 1976. The awards under B-185331 were made on January 26, 1976, and awards under the other two protested solicitations were withheld pending our decision.

In contending that the FPR set out a preference for partial labor surplus area set-asides over total small business set-asides, the protesters placed considerable emphasis not only on the FPR provisions dealing with labor surplus areas, but also the relationship of those provisions to the FPR subpart on small business policies. In our decision, we commented on these FPR provisions, in pertinent part, as follows:

"The provisions in subparts 1-1.7 and 1-1.8 of the FPR require implementation of socio-economic policies and procedures with respect to aiding small businesses and labor surplus area concerns. The small business policies in § 1-1.702 of the FPR provide, in part, that procurements be set aside for exclusive participation by small business concerns. Under § 1-1.706-5(a) the entire amount of individual procurements must be set aside for exclusive small business participation where there is a reasonable expectation of sufficient competition so that awards will be made at reasonable prices and in the absence of such expectation a partial set-aside for a portion of the procurement must be considered. Concomitantly, section 1-1.802-2 of the FPR requires that best efforts be used to award negotiated contracts to labor surplus area concerns pursuant to procedures in section 1-1.804. Set-asides for labor surplus areas, by definition, can and must be made only if a procurement is severable into two or more parts, and therefore the set-aside must be partial. Applicable procedures in FPR 1-1.804 mandate an apportionment of each procurement deemed severable into two or more production runs or reasonable lots if a labor surplus area concern is expected to be able to furnish a severable portion at a reasonable price. There is no exception to this requirement which would permit a total set-aside for small business concerns. In addition, FPR 1-1.802(b)(1)(1964 ed.) provides that where either a set-aside for labor surplus area concerns or a partial set-aside for small business appropriately can be made for any given procurement, the set-aside shall be made for surplus area concerns."

FPR § 1-1.802-2(b)(1)(1964 ed.) was amended by GSA in October 1975 to "more clearly" reflect the intent of the section that labor surplus set-asides should be preferred over small business set-asides. However, the amendment was suspended by GSA's publication of Temporary Regulation (TR) 35 in November 1975 in the Federal Register (40 Fed. Reg. 55350 (1975)). While TR 35 stated that contracting agencies, including GSA, had not been interpreting the FPRs to provide a preference for labor surplus set-asides, it concluded that any change in this interpretation would result in an undesirable change in the method of awarding contracts.

On this basis, we did not consider it necessary to interpret the meaning of the regulation currently contained in FPR. Rather, we concluded that TR 35 reflected GSA's desire to continue to allow contracting agencies to apply a preference to small business set-asides over labor surplus area set-asides. In reaching this conclusion we considered it significant that "the existing preference for labor surplus area concerns is essentially a matter of executive contract policy." We accordingly stated that it would be inappropriate for us to object to GSA's actions.

The protesters submit that our decision is clearly erroneous as a matter of law and rests upon a plain misreading of TR 35. If our decision construed TR 35 as suspending FPR § 1-1.802-2(b)(1) (1964 ed.), then the protesters contend that this construction is clearly wrong since TR 35 suspended only the October amendment, not the underlying regulation on which the protesters rely. If, however, our decision is to be read as permitting GSA to act contrary to an otherwise effective FPR § 1-1.802-2(b)(1)(1964 ed.), then it is alleged that the conclusion is also wrong, "for no Federal agency may proceed irrespective of its regulation so long as they remain in effect." The protesters contend that our decision should be reconsidered since it "condones an agency proceeding with procurements irrespective of existing regulations." Moreover, it is suggested that our decision, by not interpreting the FPR provisions themselves, failed to comply with the request by the United States District Court for the District of Columbia that we decide these protests and file a copy of our decision with the court concerning a related action (Century Tool Company, Inc. v. Jack M. Eckerd, et al., Civil Action No. 76-0104).

In our prior decision we viewed TR 35 as temporarily sanctioning deviations from the policy expressed in GSA's October 1 notice. TR 35 contains GSA's recognition that the FPRs were being widely implemented to provide a preference for small business set-asides, which was contrary to the intended preference for labor surplus area set-asides. GSA expressly stated, however, that clarification of the FPR in accord with its original intent would be "undesirable, pending a study of the related facts to determine what the policy should be regarding the relationship of small business and labor surplus area set-asides."

The protesters call our attention to paragraph 5 of TR 35, which authorizes agencies to operate under the FPR provisions as they existed before GSA's October notice, and claims that agencies were only authorized to act in accordance with the dictates of the regulations. The protesters submit that our decision failed to consider the question raised by this provision as to the actual meaning of the FPR, and whether GSA acted in accordance with it. However, GSA clearly acknowledges in paragraph 4 of TR 35 that the FPRs, prior to October, were being interpreted as expressing a preference for small business set-asides. Moreover, since GSA had determined that a change in policy was undesirable, it is clear that GSA was authorizing agencies to continue their interpretation of the FPRs. Accordingly, we do not consider our prior decision to constitute an authorization for GSA to act in disregard of the Federal Procurement Regulations.

The protesters also question whether our April 16, 1976, decision represents a reversal of our view regarding the effect of TR 35. By letters of November 20 and December 19, 1975, GSA responded to our request for a report and suggested that the protesters' contentions on labor surplus set-asides were moot due to the issuance of TR 35. The protesters suggest that our letter of January 12, 1976, requesting GSA's comments on the protests represented a rejection of GSA's position. However, a request for a report under section 20.3(c) of our Bid Protest Procedures is designed to develop both factual information and the agency's legal position regarding a protest. It does not represent a final decision of the Office on the merits of any of the contentions raised by the parties. See, e.g., Marina Social Security Building Committee, B-183421, August 8, 1975, 75-2 CPD 95. Accordingly, our January 12, 1976, letter may not be considered as an initial rejection of the position ultimately expressed in our April 16 decision.

Finally, Park and Century question whether our April 16 decision complies with the spirit and letter of the court's request for our decision. The protesters believe that this Office was to decide the correct interpretation of FPR § 1-1.802 (1964 ed.). However, the court's Order (concerning a matter to which this Office is not a party) contemplated "a final decision by the General Accounting Office on plaintiff's pending protest." It is clear that our April 16, 1976 decision was in accord with the court's request.

Since the protesters have not alleged and demonstrated any error of fact or law in our prior decision, that decision is affirmed. National Flooring Company, B-183844, August 21, 1975, 75-2 CPD 122.

Deputy Comptroller General
of the United States