



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Aalco Forwarding, Inc., et al.--Reconsideration

File: B-277241.26

Date: January 6, 1999

Alan F. Wohlstetter, Esq., and Stanley I. Goldman, Esq., Denning & Wohlstetter, for the protesters.

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DIGEST

Request for reconsideration is denied where small business set-asides of some entire traffic channels (geographical portions) of a solicitation for interstate and international moving and storage services do not constitute a partial set-aside of the entire procurement but are properly considered total set-asides.

DECISION

Aalco Forwarding, Inc. and 56 other firms request that we reconsider that portion of our decision in Aalco Forwarding, Inc., et al., B-277241.20, B-277241.21, July 1, 1998, 98-2 CPD ¶ 1, in which we denied their protests that the small business set-aside of request for proposals (RFP) No. DAMT01-97-R-3001, issued by the Department of the Army, Military Traffic Management Command (MTMC), failed to make maximum use of small business capacity.¹ The RFP is for a pilot program

¹The protesters are: Aalco Forwarding, Inc.; AAAA Forwarding, Inc.; A Advantage Forwarders, Inc.; Air Van Lines International, Inc.; Allstates Worldwide Movers; Aloha Worldwide Forwarders, Inc.; Alumni International, Inc.; American Heritage International Forwarding, Inc.; American Shipping, Inc.; American World Forwarders, Inc.; Apollo Forwarders, Inc.; Arnold International Movers, Inc.; Astron Forwarding Company; BINL Incorporated; Burnham Service Company, Inc.; Cavalier Forwarding, Inc.; Classic Forwarding, Inc.; Davidson Forwarding Co.; Deseret Forwarding International, Inc.; Foremost Forwarders, Inc.; Great American Forwarders, Inc.; Hi-Line Forwarders, Inc.; International Services, Inc.; Island Forwarding, Inc.; Katy Van Lines, Inc.; Lincoln Moving & Storage; Miller Forwarding, Inc.; Northwest Consolidators; Ocean Air International, Inc.; Senate Forwarding, Inc.; Sentinel International Forwarding, Inc.; Shoreline International, Inc.; Stevens Forwarders, Inc.; T.R.A.C.E. International, Inc.; Von Der Ahe International, Inc.; Wold International, Inc.; Zenith Forwarders, Inc.; Acorn International Forwarding Company; AAA Systems, Inc.; A.C.E. International Forwarders; Apex Forwarding

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reengineering the Department of Defense's current interstate and international program for shipping and storing the personal property of its military service members and civilian employees.

We deny the request.

The RFP requested proposals for 53 designated traffic channels (origin state-to-destination region) and originally set aside 12 percent of the traffic volume on 27 designated high volume channels for exclusive small business participation. The reasonableness of that partial set-aside was protested by many of the parties requesting reconsideration here. We sustained those protests in Aalco Forwarding, Inc., et al., B-277241.16, Mar. 11, 1998, 98-1 CPD ¶ 75, because the record did not evidence that the set-aside would ensure an economic production run or reasonable lot of shipments for small business concerns, as required by the regulation governing partial set-asides, Federal Acquisition Regulation (FAR) § 19.502-3. We recommended that the agency reexamine its partial set-aside determination to ensure that any set-aside portions represented economic production runs or reasonable lots, which reexamination might include deciding to set aside some entire channels for small business concerns. Aalco Forwarding, Inc., et al., B-277241.16, supra, at 15-16.

In response to our decision, the agency decided to eliminate the previous partial set-aside and to designate 17 of the channels as 100-percent small business set-asides. This set-aside decision was challenged by many of the same protesters, who argued that MTMC failed to establish that all of the set-aside channels constituted economic production runs or reasonable lots and that the set-aside decision lacked a reasonable basis.

In Aalco Forwarding, Inc., et al., B-277241.20, B-277241.21, supra, we denied these protests, finding that the new set-aside determination was not a partial set-aside of the entire procurement under the applicable regulation but a total set-aside of each restricted channel. We concluded that the set-aside had a reasonable basis and was in accord with the applicable regulation governing total set-asides, FAR § 19.502-2, which does not require a total set-aside to constitute an economic production run or reasonable lot. Aalco Forwarding, Inc., et al., B-277241.20, B-277241.21, supra,

¹(...continued)

Company, Inc.; Armstrong International, Inc.; Art International Forwarding, Inc.; Coast Transfer Company, Inc.; Crystal Forwarding, Inc.; CTC Forwarding Company, Inc.; Diamond Forwarding, Inc.; Dyer International, Inc.; Harbour Forwarding Company, Inc.; HC&D Forwarders International, Inc.; Jag International, Inc.; The Kenderes Group, Inc.; Pearl Forwarding, Inc.; Rainier Overseas, Inc.; Rivers Forwarding, Inc.; Ryans's World; and Sequoia Forwarding Company, Inc.

at 8-9. We also found reasonable the agency's determination not to totally set aside the 10 highest volume channels, id. at 9-10, and that the protesters did not timely contend that the 10 highest volume channels should be partially set aside because the contention was not made in, nor was it within the scope of, the initial protests, but instead was first raised in comments filed after receipt of the agency report, well after the time proposals were due. Id. at 10 n.11.

In requesting reconsideration, the protesters assert that our decision is inconsistent with our recommendation in Aalco Forwarding, Inc., et al., B-277241.16, supra, at 15-16, which anticipated retaining a partial set-aside in some format. The protesters further argue that we erroneously concluded that the total set-aside regulation was applicable with respect to the channels set aside for small business, with the result that we improperly failed to consider MTMC's duty to maximize the participation of small business in the procurement.

The details of implementing our protest recommendations for corrective action are within the sound discretion and judgment of the contracting agency. QuanTech, Inc., B-265869.2, Mar. 20, 1996, 96-1 CPD ¶ 160 at 2. We will not question an agency's ultimate manner of compliance, so long as it remedies the procurement impropriety that was the basis for the decision's recommendation. Id. Irrespective of the precise wording in our recommendation in Aalco Forwarding, Inc., et al., B-277241.16, supra, at 15-16, MTMC essentially overruled its previous partial set-aside determination, the inadequacy of which formed the basis of our recommendation. MTMC decided to proceed with a set-aside determination that we found, in Aalco Forwarding, Inc., et al., B-277241.20, B-277241.21, supra, at 8, can only reasonably be characterized as making a total set-aside of each of the restricted channels, an action that was within the agency's discretion.

We considered each restricted channel as a total set-aside because a partial set-aside entails setting aside a portion of a quantity of items (or a class of items) exclusively for small business, and may only be utilized when, among other things, the requirement is severable into two or more economic production runs or reasonable lots. See FAR § 19.502-3(a). Further, a partial set-aside contemplates that only offerors who submit acceptable offers on the non-set-aside portion of the requirement are eligible to receive awards for the set-aside portion, whereas a total set-aside has no such prerequisite. FAR §§ 19.502-2, 19.502-3(c)(2)(i), 52.219-7(b)(4). Here, MTMC did not sever individual channels into separate portions, and did not require small business offerors responding to the RFP to submit proposals on the non-set-aside channels in order to be eligible for the set-aside ones--instead, offerors were free to submit offers on any or all traffic channels. Accordingly, notwithstanding that the restricted channels constituted only a portion of the entire procurement, we believe we correctly characterized each traffic channel set aside in its entirety as a total set-aside.

In reaching our conclusion, we were guided by several prior decisions of our Office, which the protesters allege are not apposite. One of these decisions was 38 Comp. Gen. 744 (1959), which involved a solicitation for air transportation services with 15 items of service. In that decision, we held that one of the items, set aside exclusively for small business, constituted a total set-aside under the circumstances of that case because the contracting agency's needs under that item "were independent of, and quite unrelated to, the needs described under the remaining fourteen items." Id. at 746.

The protesters contend that here, in contrast, the elements of the solicitation are interrelated and the traffic channels set aside exclusively for small business are not independent of, and unrelated to, the remaining channels, and thus do not constitute total set-asides. These assertedly interrelated elements include the solicitation of offers for 53 channels under the same terms and conditions, the potential award of a single contract to each awardee that would include either multiple set-aside channels or both set-aside and non-set-aside ones, and a \$25,000 minimum guarantee per contract regardless of the number of channels awarded to the contractor.

We continue to find the decision at 38 Comp. Gen. 744 persuasive precedent. That case involved a solicitation for additional transportation requirements issued to holders of existing agreements fixing terms and conditions (other than prices, routes, and quantities) for the performance of commercial airlift services. The set-aside item in question requested prices for transportation of a certain quantity of cargo from one specified location to another during given time periods. Since this set-aside item included all of the contracting agency's additional cargo needs for the periods in question on the route specified (and appeared to be the only transportation requirement for this route in the entire solicitation), we found that the needs under this item were "independent of, and quite unrelated to," the needs described under the remaining items, and thus properly treated as a total set-aside, notwithstanding that the set-aside item constituted only a portion of the entire procurement.

Here, as with the items at issue in the decision at 38 Comp. Gen. 744, the fact that not all channels were restricted to small businesses does not in itself render the set-aside of particular channels a partial set-aside of the entire procurement. Although each contractor is subject to the same terms and conditions, each of the 53 channels encompasses a different origin state-to-destination region, on which prices, routes, and quantities of services are based, and thus, like the set-aside item in the decision at 38 Comp. Gen. 744, each traffic channel is "independent of, and quite unrelated to," the needs represented by the other channels. As with the set-aside item in the decision at 38 Comp. Gen. 744, the agency did not sever the individual channels themselves into set-aside and non-set-aside portions, as it would in a partial set-aside, but set aside each restricted channel in its entirety.

We note that the protesters' arguments as to why the set-aside traffic channels are not independent of and unrelated to, each other directly contradicts their June 3 comments on the agency report responding to their protests, in which they urged our adoption of exactly the opposite position--that each channel be considered a separate acquisition for set-aside purposes--as follows:²

[E]ach channel is a separate acquisition for application of the small business set-aside provisions of the FAR For the purpose of contract award, each channel is separately competed with offers on a channel evaluated against each other, independently of the offers on other channels. . . . Further, the solicitation specifically provides for separate evaluations of an offeror's responsibility for each channel on which the offeror submits an offer. . . . The fact that the agency will evaluate offers and make contract awards by channel demonstrates . . . that each channel is a separate acquisition. The agency's combination of 53 channels in a single solicitation for administrative convenience does not result in one single acquisition. Otherwise form would prevail over substance.

The protesters assert that the other precedent cited in our prior decision to support our conclusion, Midland Transp. Co., B-201319, Aug. 4, 1981, 81-2 CPD ¶ 89, aff'd, B-201319.2, Dec. 11, 1981, 81-2 CPD ¶ 459, did not hold that a set-aside of a geographical portion of a procurement constitutes a total set-aside. The solicitation in Midland was for packing, crating, unpacking and storage services for Department of Defense personnel's property being shipped within each of several geographical areas, somewhat similar to the services involved in and the traffic channel approach of the MTMC solicitation. As here, bids were required on all services within an area of performance and award was to be made by geographical area, some of which were set aside entirely for small business, with the remainder of the procurement being unrestricted. We found that, as here, the procurement could not properly be considered as constituting a partial set-aside because the agency did not intend to sever any areas of performance into set-aside and non-set-aside portions, but intended to set aside certain areas in their entirety, and offerors were not required to submit proposals for the unrestricted portion of the requirement (the non-set-aside items), as they are required to do for a partial set-aside. The Midland case is clearly a relevant precedent.

The protesters also have not persuaded us that we erred in concluding that MTMC reasonably did not set aside the 10 highest volume channels in their entirety. As we pointed out in Aalco Forwarding, Inc., et al., B-277241.20, B-277241.21, supra,

²The protesters' contention is also inconsistent with our earlier holding in Aalco Forwarding, Inc., et al., B-277241.16, supra, that the sufficiency of the former partial set-aside should be determined on a per channel basis.

at 9-10, MTMC decided not to set aside the highest volume channels given the agency's concerns about small business capabilities to handle the pilot program's new requirements and traffic volumes and, as supplemented by a review of the offers received, the agency's concerns about the very high daily capacities offered by some small businesses over the various channels and the carrier affiliations that might render some of the offerors ineligible for award. The protesters' mere disagreement with our conclusion that MTMC's decision was reasonable does not warrant reconsidering our decision. RGII Techs., Inc.--Recon. and Protest, B-278352.2, B-278352.3, Apr. 14, 1998, 98-1 CPD ¶ 130 at 3.

Finally, the protesters maintain that, even if we properly accepted MTMC's determination that setting aside any of the 10 highest volume channels for small business represented an unacceptable risk, we improperly concluded that they did not timely protest that those channels should have been the subject of partial set-asides. The protesters point out that they had argued that the RFP's set-aside of the 17 designated channels did not make maximum use of small business capability under FAR § 19.502-3(b), which they contend effectively constituted a protest of MTMC's failure to partially set aside the 10 highest volume channels. We disagree. The initial protests simply did not contend that the 10 highest volume channels should each be partially set aside, but primarily argued that the 17 set-aside channels did not constitute economic production runs or reasonable lots based on the protesters' position that the designated set-aside channels constituted a partial set-aside of the procurement which, as discussed above, is not the case.

The prior decision is affirmed.

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