



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: San Antonio General Maintenance, Inc.

File: B-240114

Date: October 24, 1990

Joan K. Fiorino, Esq., East & Barnhill, for the protester.
David R. Kohler, Esq., Small Business Administration, for the agency.
Richard P. Burkard, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Prior to accepting requirement which previously was set aside for small business into 8(a) program, Small Business Administration (SBA) is required by regulation to determine adverse impact of acceptance on small business concerns based on most recent gross sales. Where SBA fails to consider most recent financial information showing sales information in finding no adverse impact on small business in violation of this regulation, protest is sustained.

DECISION

San Antonio General Maintenance, Inc. protests the determination by the Small Business Administration (SBA) to accept into its 8(a) program a requirement to perform custodial and janitorial services at Randolph Air Force Base (AFB), Texas. Section 8(a) authorizes SBA to enter into contracts with government agencies and to arrange for the performance of such contracts by letting subcontracts to socially and economically disadvantaged small business concerns. San Antonio, the incumbent small business contractor for these services, argues that SBA did not properly perform a study to determine whether accepting the 8(a) award would have an adverse impact on San Antonio.

SBA regulations provide that SBA will presume an adverse impact on small business concerns, and not accept a procurement for the 8(a) program, where a small business concern has performed a specific requirement for at least 24 months, it is currently performing the requirement, and the estimated dollar value of the offered 8(a) award would be 25 percent or more of its most recent annual gross sales,

including those of its affiliates. 13 C.F.R. § 124.309(c)(2) (1990). SBA does not dispute that San Antonio has performed the subject requirement for at least 24 months, or that the protester is currently performing the requirement. SBA states, however, that after analyzing the information given to SBA by the protester, SBA found that the estimated dollar value of the San Antonio's current contract constituted only 23 percent of San Antonio's total revenues.

We sustain the protest.

By letter dated April 26, 1990, SBA notified San Antonio that it was proposing to include the work San Antonio currently was performing at Randolph AFB for award under the 8(a) program. The letter requested that San Antonio provide SBA with specific financial information, including financial statements and income tax statements for the last 3 years. The SBA letter stated that the information was to be provided to SBA by May 11 and would be used to ascertain whether San Antonio would be adversely impacted by awarding the requirement to an 8(a) contractor.

On May 11, 1990, San Antonio provided SBA with financial information. These documents included financial information for 1988, 1989, and 1990. San Antonio also furnished a tax return for 1987, and one for October 1, 1988, to September 30, 1989. The SBA official states that the SBA received San Antonio's financial statements for 1988 and 1989, but that because he did not receive San Antonio's tax returns for 1989, he did not use the 1989 financial information as the basis for finding no adverse impact.^{1/}

With respect to the actual calculation of the ratio of the value of the proposed 8(a) contract to gross sales of San Antonio and its affiliates, the record contains a May 21 memorandum signed by the SBA official. This document shows that SBA calculated San Antonio's 1988 revenues to be more than \$3.3 million. The combined revenues of its two affiliates were determined to be less than \$500,000 for 1988. The SBA official computed, based on information allegedly supplied by the protester, the value of the proposed 8(a) contract to be \$907,200. The memorandum concluded that the dollar value of the proposed 8(a) contract did not exceed 25 percent of most recent and complete gross sales of San Antonio and its affiliates. The SBA found that the proposed contract represented 23 percent of the protester's total sales.

^{1/} Apparently, the SBA official did not recognize that the 1988 tax return included financial data for the period October 1, 1988 to September 30, 1989, which represents San Antonio's tax year.

We will not consider a protest challenging a 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 have been violated. See Development Assistance Corp.--Recon., B-238283.2, Feb. 20, 1990, 90-1 CPD ¶ 296. Here, the issue is whether SBA violated 13 C.F.R § 124.309(c) by not considering the "most recent annual gross sales" as required by the SBA regulation.

We have reviewed the financial information that was provided to SBA for consideration in making its adverse impact determination. The record shows that the SBA did not follow its regulation which provides that in making the adverse impact determination, the SBA consider the potentially impacted company's "most recent gross sales." 13 C.F.R. § 124.309(c). We find that the SBA relied on outdated information despite the fact that it was provided with current and reliable information.

The record shows that San Antonio provided its financial statement for the 12 months of operation ending September 30, 1989, its most recent fiscal year, showing total revenues of approximately \$1.6 million. Contrary to the assertions of the agency, this data was corroborated by San Antonio's income tax return for the period October 1, 1988, to September 30, 1989. The record shows that this tax return showed total sales to be approximately \$1.7 million for the 12 months of operation ending in September 1989. The agency concedes that the protester provided this tax return. Thus, the protester's most recent sales were approximately \$1.7 million and it was unreasonable for SBA to disregard this more recent 1989 information as required by the SBA regulation and to consider only the significantly higher previous year's sales figures. The 1989 financial data shows that San Antonio would be adversely affected by the loss of this contract.

The agency argues that it did not use the most recent data for San Antonio because the agency asserts San Antonio had filed for an extension with the Internal Revenue Service. An affiliate company, General Security Patrol (GSP), did in fact file for an extension for filing its 1989 tax return. The record shows, however, that for 1989, GSP earned \$166,065 in total revenues. For 1988, GSP earned \$391,249 according to financial statements provided. The agency used 1988 data and attributed \$391,647 sales for GSP in conducting its adverse impact determination. There is nothing in the record to show that the information in San Antonio's 1989 financial statement concerning GSP is not credible. Even assuming that the SBA properly used San Antonio's 1988 data for GSP because it did not have a final 1989 tax return for GSP, we do not think that the SBA could properly disregard San Antonio's 1989 sales

figures based on a concern that a small percentage of the most current financial information concerning an affiliate company might not be completely accurate.

Here, the record shows that San Antonio and its affiliates timely provided SBA not only with complete financial statements for 1989, but also San Antonio's 1989 tax return. Clearly, SBA had current financial data verifiable by tax returns which should have been considered. Its failure to do so, in our view, violated the SBA regulation and clearly prejudiced the protester: Using the 1988 affiliate's financial statement of \$391,249 in sales, with San Antonio's 1989 sales, the proposed contract represents roughly 45 percent of San Antonio's total sales.

We recommend that the agency consider the 1989 financial information provided by the protester and its affiliates in conducting the adverse impact analysis. If more current information is now available, that data should be considered. If the SBA concludes that the requirement cannot be reserved for the 8(a) program, the SBA should terminate the 8(a) contract award. Further, we find that San Antonio is entitled to the costs of pursuing this protest, including attorneys' fees. 4 C.F.R. § 21.6(d)(1) (1990).

The protest is sustained.



Acting Comptroller General
of the United States