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Comptroller General
of the United States

United States General Accounting Office
Washington, DC 20548

Decision

Matter of: Department of the Army--Request for Modification of Recommendation

File: B-290682.2

Date: January 9, 2003

Frank Moody for the protester.
Capt. Charles K. Bucknor, Ralph J. Frick, Esq., and Raymond M. Saunders, Esq., Department of the Army, and Audrey H. Liebross, Esq., and John W. Klein, Esq., Small Business Administration, for the agencies.
Guy R. Pietrovito, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency request for modification of recommendation in LBM, Inc., B-290682, Sept. 18, 2002, 2002 CPD ¶157, to recognize that the agency may limit the competition to small business holders of indefinite-delivery/indefinite-quantity contracts in conducting a small business set-aside required by Federal Acquisition Regulation § 19.502-2(b) is denied because the Competition in Contracting Act of 1984 provides for full and open competition among eligible small business concerns for acquisitions required to be set aside for small businesses.

DECISION

The Department of the Army requests that we modify the recommendation we made in our decision in LBM, Inc., B-290682, Sept. 18, 2002, 2002, CPD ¶157, in which we sustained LBM's protest of the Army's decision to acquire transportation motor pool services at Fort Polk, Louisiana, under the Logistical Joint Administrative Management Support Services (LOGJAMSS) contracts. We found that the Army's failure to consider whether this requirement should be set aside for exclusive small business participation violated Federal Acquisition Regulation (FAR) § 19.502-2(b) (the so-called "rule of two"), which requires an agency to set aside acquisitions for small businesses where there is a reasonable expectation of receiving fair market price offers from at least two responsible small business concerns. We recommended that the Army consider whether, in accordance with FAR § 19.502-2(b), the transportation motor pool services at Fort Polk should be set aside exclusively for small business participation.

The Army requests that we modify our recommendation "to allow the Army to implement the 'rule of two' among the small business concerns that currently hold LOGJAMSS contracts." Army Request for Modification of Recommendation at 1. That is, the Army proposes to acquire these motor pool services exclusively from small businesses but would limit the competition for these services to the small businesses that hold LOGJAMSS contracts.

We deny the Army's request for modification of our recommendation because limiting the small business competition as proposed by the Army would violate the competition requirements of the Competition in Contracting Act of 1984 (CICA).

Background

1n 1996, the Army instituted a "regionalization" contracting approach to "achieve savings resulting from improved processes and economies of scale." In implementing the Army's contract regionalization plan, the agency developed LOGJAMSS with a broad scope of work encompassing a wide range of logistical functions and supporting tasks. LOGJAMSS are multiple-award, indefinite-delivery/indefinite-quantity (ID/IQ) task order contracts. In 1998 and 1999, the agency awarded nine contracts under LOGJAMSS, five to large businesses, two to small businesses, and two to small disadvantaged businesses. No specific projects at particular locations were identified in the LOGJAMSS solicitation or contracts.

Transportation motor pool services at Fort Polk had been performed exclusively by small businesses, including LBM, under small business set-asides over the last 10 years. In May 2002, the Army decided to instead acquire the Fort Polk's motor pool services using the LOGJAMSS contracts. It solicited proposals from the LOGJAMSS contractors for the award of a fixed-price task order for a base year with 4 option years to perform motor pools services at Fort Polk.[1] The Army did not coordinate with, or notify, the Small Business Administration (SBA) of its intent to withdraw the Fort Polk motor pool services from exclusive small business competition and to transfer these services to LOGJAMSS contracts.

After learning that the Army would not be setting aside the Fort Polk motor pool services for small business competition but would instead acquire the services under the LOGJAMSS contracts, LBM protested to our Office.

The Army requested that we dismiss LBM's protest as a challenge to the proposed award of a task order under an ID/IQ contract, for which a protest is not permitted

[1] The contracting officer estimated that the Fort Polk motor pool services requirement would be approximately $10 million for the total 5-year performance period.

under 10 U.S.C. § 2304c(d) (2000).[2] The Army also argued that, to the extent we viewed LBM's protest as a challenge to the terms of the solicitation for the award of the LOGJAMSS contracts, the protest was untimely. That is, the Army contended that LBM should have been on notice from the LOGJAMSS solicitation that the Fort Polk motor pool services "could" be ordered under the LOGJAMSS contracts and therefore its protest after the award of the LOGJAMSS contracts was untimely.

We found that the limitation on our bid protest jurisdiction in 10 U.S.C. § 2304c(d) did not apply, because, contrary to the Army's arguments, LBM was not challenging the proposed issuance of a task order for these services, but was raising the question of whether work that had been previously set aside exclusively for small businesses could be transferred to LOGJAMSS, without regard to the FAR § 19.502-2(b) requirements pertaining to small business set-asides. This was a challenge to the terms of the underlying LOGJAMSS solicitation and was within our bid protest jurisdiction. LBM, Inc., supra, at 4.

We also found LBM's protest to be timely filed. We found that the LOGJAMSS scope of work was so broad and vague that LBM could not reasonably be aware, and required to protest, at the time the LOGJAMSS contracts were being competed (and apparently years before the Army considered using those contracts for the Fort Polk motor pool services), that the Army would use LOGJAMSS as the vehicle to acquire the motor pool services at Fort Polk without first taking the steps legally required regarding a possible further acquisition of that work under a small business set-aside.[3] Id. at 6.

As to the merits of LBM's protest, we agreed that the Army had violated FAR § 19.502-2(b) (the rule of two). Id. at 7. This section generally requires that a contracting officer set aside for small business all acquisitions exceeding $100,000 if there was a reasonable expectation of receiving fair market priced offers from at least two responsible small business concerns. We found that the Army had not considered whether these services should be set aside exclusively for small business participation before transferring this work to LOGJAMSS, despite the fact that the agency was aware of at least two responsible small business concerns capable of

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[2] 10 U.S.C. § 2304c(d) provides:

> A protest is not authorized in connection with the issuance or proposed issuance of a task or delivery order except for a protest on the ground that the order increases the scope, period, or maximum value of the contract under which the order is issued.

[3] We also noted that "[i]t may be that if the LOGJAMSS solicitation had identified motor pool transportation services at Fort Polk, LBM would have had reasonable notice of its protest allegation." LBM, Inc., supra, at 6 n.5.

competing for the Fort Polk motor pool services. Also, the Army did not contend that there was not a reasonable expectation of receiving fair market priced offers from at least two small businesses. We sustained LBM's protest on this basis, and recommended that the Army consider whether, in accordance with FAR § 19.502-2(b), the transportation motor pool services at Fort Polk should be set aside exclusively for small business participation.

Modification Request

The Army does not challenge the merits of our decision in LBM, Inc., but requests that we modify our recommendation to recognize that the agency may limit the competition under an exclusive small business set-aside to the current small business LOGJAMSS contract holders. Specifically, the Army states that, although pursuant to FAR § 19.502-2(b) the Fort Polk motor pool services should be set aside for small business participation, that section does not specify "how" the set-aside should be implemented. Army Request for Modification at 2. The Army contends that FAR § 19.502-2(b) does not prohibit the agency from implementing a small business set-aside for these services by restricting the competition to the group of small businesses that have successfully competed for LOGJAMSS contracts. Army Brief at 12. The Army argues that modifying our recommendation, as requested by the Army, "is supported by the purpose and intent of Congress in enacting [the Federal Acquisition Streamlining Act of 1994 (FASA)]." Id. at 9. In this regard, the Army contends that under LOGJAMSS the agency has ensured that small businesses have received a fair proportion of the contract orders, whereas denying the Army's request would negatively affect the Army's planned use of LOGJAMSS and contract regionalization goals. Id. at 5, 15-16.

LBM and the SBA oppose the Army's request for modification of our recommendation, arguing that to allow the Army's requested modification would "eviscerate the decision."[4] SBA Brief at 4. Moreover, the SBA argues that restricting a small business set-aside competition for these services to only the small businesses that hold LOGJAMSS contracts would violate CICA and the Small Business Act.

Discussion

The core of the Army's arguments is that there is no legal guidance as to the extent of competition that must be conducted in a small business set-aside. Specifically, the

[4] While we address the Army's request on the merits, we agree with the SBA that adoption of the Army's analysis would essentially reverse our earlier decision. In particular, if it were true that a small business set-aside could properly be limited to small businesses holding LOGJAMSS contracts, LBM, which does not hold one of those contracts, would not be eligible for award and therefore would not be an interested party, so that its protest should have been dismissed on that basis.

Army argues that the "rule of two" does not specify how a small business set-aside should be implemented. As explained below, we disagree with the Army that applicable law and regulations are silent as to competition requirements in a small business set-aside.

CICA generally requires contracting agencies to obtain full and open competition through the use of competitive procedures, absent an exception specified in CICA or other express statutory authority. 10 U.S.C. § 2304(a)(1)(A) (2000). "Full and open competition" is obtained when "all responsible sources are permitted to submit sealed bids or competitive proposals on the procurement." 10 U.S.C. § 2302(3)(D); 41 U.S.C. § 403(6). With respect to small business set-asides, CICA defines "competitive procedures" (that is, procedures under which a contract is entered into pursuant to full and open competition) as including:

> procurements conducted in furtherance of section 15 of the Small Business Act (15 U.S.C. § 644) as long as all responsible business concerns that are entitled to submit offers for such procurements are permitted to compete.

10 U.S.C. § 2302(2)(D); see 10 U.S.C. § 2304(b)(2) (use of competitive procedures after exclusion of other than small business concerns in furtherance of sections 9 and 15 of the Small Business Act). The FAR implements these CICA requirements by providing for full and open competition after the exclusion of one or more sources, such as, for example, business concerns that do not satisfy the size standards in a small business set-aside. See FAR §§ 6.200, 6.203. In short, where a small business set-aside is called for, the law generally provides for full and open competition among eligible small business concerns.

The Army nevertheless argues that because competitive procedures were used to select the LOGJAMSS contract holders, the requirement for full and open competition is not applicable to a decision to procure the Fort Polk motor pool transportation services under a small business set-aside. Army Reply Brief at 13-14. We disagree.

As noted in our prior decision, it was the Army's decision in May 2002 to transfer this work to LOGJAMSS, the scope of which was broad and vague and did not specifically contemplate this work, that violated FAR § 19.502-2(b). That regulation requires the agency to consider setting aside this work for exclusive small business competition. The Army apparently now concedes that under FAR § 19.502-2(b) these services should be set aside for exclusive small business competition. As discussed above, any such competition must be a full and open competition among the eligible small businesses; there is no legal authority in such circumstances to limit this competition to certain designated small businesses. The Fort Polk motor pool work was not called out in the LOGJAMSS solicitation, and the fact that there was full and open competition for the LOGJAMSS contracts is therefore irrelevant to the application of the rule of two to the Fort Polk requirement.

The Army also argues that it has authority under the Federal Acquisition Streamlining Act of 1994 (FASA), 10 U.S.C. §§ 2304a-2304e, to limit the small business set-aside for these motor pool services to the LOGJAMSS small business contract holders.[5] This argument has no merit. FASA codified existing authority to award task and delivery order contracts. With respect to these motor pool services, nothing in FASA provides an exception to the requirements of the Small Business Act and its implementing regulations, which provide for exclusive small business set-asides, or to CICA's competition requirements with respect to conducting a set-aside competition. To the contrary, FASA's legislative history illuminates the need to comply with the CICA competition requirements in conducting acquisitions for multiple award contracts:

> In addition, the conference agreement would provide general authorization for the use of task and delivery order contracts to acquire goods and services other than advisory and assistance services. The conferees note that this provision is intended as a codification of existing authority to use such contractual vehicles. All otherwise applicable provisions of law would remain applicable to such acquisitions, except to the extent specifically provided in this section. For example, the requirements of [CICA], although they would be inapplicable to the issuance of individual orders under task and delivery order contracts, would continue to apply to the solicitation and award of the contracts themselves.

Joint Explanatory Statement of the Committee of Conference, H.R. Conf. Rep. No. 103-712, at 181 (1994).

The Army nevertheless argues that it should be allowed to implement the "rule of two" by limiting a set-aside for these services to its LOGJAMSS small business contract holders because to do otherwise would endanger its use of the LOGJAMSS contracts and contract regionalization approach. The Army also argues that limiting the set-aside in the fashion proposed by the agency should be acceptable because LOGJAMSS already provides a meaningful opportunity for competition to small businesses, either as prime small business contract holders or as subcontractors to other contract holders. In addition, the Army contends that the LOGJAMSS program has a good record of small business utilization in the performance of orders.

As discussed above, what the Army has requested is not consistent with the statutory and regulatory scheme applicable to small business set-asides. The Army is

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[5] The Army does not assert that a limited competition can be justified under any of the exceptions to full and open competition identified in CICA. See 10 U.S.C. § 2304(c).

essentially asking us to waive statutory requirements for what the Army views as strong policy reasons. That we cannot do; that is a decision for the Congress to make. The requirement for full and open competition established by the Congress in CICA cannot be dissolved based only upon an agency's--or our Office's--policy arguments as to why it would be better to limit competition for these services. Furthermore, the fact that the agency may have a very good record of small business participation in performance of LOGJAMSS orders does not in itself provide relief from the requirement to allow full and open competition from eligible small businesses under a small business set-aside. In this regard, the FAR specifically identifies as an insufficient cause for not setting aside an acquisition the fact that "[s]mall business concerns are already receiving a fair proportion of the agency's contracts for supplies and services." FAR § 19.502-5(f); see Library Sys. & Servs./Internet Sys., Inc., B-244432, Oct. 16, 1991, 91-2 CPD ¶ 337 at 4-5.

The request for modification of the recommendation is denied.

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General Counsel