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Comptroller General
of the United States

United States General Accounting Office
Washington, DC 20548

Decision

Matter of: Intermark, Inc.

File: B-290925

Date: October 23, 2002

John N. Ford, Esq., and John M. Manfredonia, Esq., McAleese & Associates, for the protester.
Col. Michael R. Neds and Capt. Ronald D. Sullivan, Department of the Army, for the contracting agency.
Jeffrey B. Rosen, Esq., for the Department of Education.
John W. Klein, Esq., and Kenneth Dodds, Esq., for the Small Business Administration.
Scott H. Riback, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency improperly withdrew small business set-aside in favor of full and open competition on basis that Randolph-Sheppard Act (RSA) State Licensing Agency (SLA), which is not a small business concern, expressed interest in requirement, and agency is required to consult with Secretary of Education with a view to making award to SLA under the RSA if its proposal is in competitive range; there is no basis for eliminating the set-aside altogether, since agency can serve the purpose of the RSA by issuing a solicitation that is generally restricted to small businesses but also provides for participation by the SLA in the procurement.

DECISION

Intermark, Inc. protests the terms of request for proposals (RFP) No. DABT01-02-R-0003, issued by the Department of the Army to acquire full food services at Fort Rucker, Alabama. Intermark maintains that the agency has improperly issued the solicitation on an unrestricted basis rather than as a small business set-aside.

We sustain the protest.

The agency has in the past procured this requirement using small business set-aside procedures and Intermark, a small business, is the incumbent contractor. On February 21, 2002, the Army issued a presolicitation notice indicating that the requirement would again be satisfied using small business set-aside procedures.

Subsequent to this initial notice, however, the Randolph-Sheppard Act (RSA) State Licensing Agency (SLA)[1] for the State of Alabama received notice of the requirement, and expressed interest in competing for the contract. Since the SLA was, by definition, not a small business because it is not an entity operated for profit, see 13 C.F.R. § 121.105(a) (2002), the agency concluded that it was required to withdraw the small business set-aside, and issue the solicitation using full and open competitive procedures, in order to permit the SLA to compete. On June 4, the agency issued the RFP on an unrestricted basis. This protest followed.

Intermark maintains that the agency improperly issued the solicitation on an unrestricted basis because the requirement had previously been successfully fulfilled using a small business set-aside, and because the requirements for a small business set-aside were met--the agency reasonably could anticipate receiving proposals at fair market prices from at least two responsible small businesses. Intermark notes that Federal Acquisition Regulation (FAR) § 19.502-2 states that an agency "shall" set aside an acquisition under these circumstances.

The agency does not dispute that the conditions under which a small business set-aside normally is required are present; rather, it argues only that, because the RSA requires that it afford the SLA an opportunity to compete, and because the SLA is not a small business, it cannot set the acquisition aside.

We agree with the protester that there was no proper basis for withdrawing the small business set-aside here. Although the preference embodied in the RSA takes precedence over small business preferences, see Department of the Air Force--Recon., B-250465.6 et al., June 4, 1993, 93-1 CPD ¶ 431 at 13; see also Automated Communication Sys., Inc. v. United States, 49 Fed. Cl. 570, 578 (2001), the small business set-aside here need not be eliminated altogether in order to give effect to the RSA. Rather, we see no reason why the solicitation cannot be fashioned to accommodate both preferences. This approach is consistent with the Court of Federal Claims' (COFC) recent decision in Automated Communication. Sys., Inc. v. United States, supra, in which the court considered the interrelationship between the preferences afforded by the RSA and the Historically Underutilized Business Zone (HUBZone) Act, 15 U.S.C. §657a (2000); FAR subpart 19.13.

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[1] Pursuant to the terms of the RSA, 20 U.S.C. § 107 et seq., (2000), each state has a state licensing agency (SLA), designated by the Secretary of Education, which licenses blind business concerns within the state. 20 U.S.C. § 107a. Where an acquiring activity has a requirement for cafeteria services (including full food services such as those required here), the agency is required to invite the SLA to compete for the requirement. 20 U.S.C. § 107d-3 (e); 34 C.F.R. § 395.33 (b)(2001). If the SLA's proposal is found to be within the competitive range, the regulations contemplate that the acquiring agency will consult with the Secretary of Education with a view to making award to the SLA. 34 C.F.R. § 395.33.

The court stated:

> There is no "conflict" requiring the [contracting officer] to reconcile competing provisions. [The protester] will receive the [10 percent] price preference to which it is entitled [as a qualified HUBZone concern], and should [the SLA] submit a bid and the [contracting officer] decide to conduct negotiations, the [SLA] will be given its priority should it qualify for the competitive range. Contrary to [the protester's] contentions, the preferences are not incompatible. Each preference can be given its due. The fact that the RSA preference or priority, if triggered, is superior to the others, does not mean that the various preferences conflict. The fact that one preference is of greater value than the others does not mean that each cannot be fully applied before the contract award is made. The court finds that such is the case here, and there is no inherent conflict between the competing preferences.

Id. at 578. We recognize that the current case is in one sense distinguishable from the case before the court. In Automated Communication Systems, the Court was reconciling the 10 percent price evaluation preference afforded HUBZone concerns with the priority afforded SLAs under the RSA within the context of a full and open competitive acquisition. Here, the Army was faced with the challenge of reconciling the priority afforded SLAs with the limitation of potential competitors afforded in a small business set-aside that would generally exclude SLAs. Nonetheless, we think the court's broad conclusion is applicable to the facts here; simply stated, there is no inherent conflict in applying the two preferences or priorities. The solicitation can include a "cascading" set of priorities or preferences whereby competition is limited to small business concerns and the SLA, with the SLA receiving award if its proposal is found to be within the competitive range and consultation with the Secretary of Education results in agreement that award should be made to the SLA; otherwise, award will be made to an eligible small business in accordance with the RFP's evaluation scheme. Such an approach would preserve the SLA's superior preference, while according small businesses a preference vis-à-vis large businesses (other than the SLA), to which they are entitled under the Small Business Act and applicable regulations.[2]

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[2] In the solicitation at issue in Automated Communication Systems, giving the HUBZone concerns' proposals the benefit of the 10 percent price evaluation preference could be viewed as potentially affecting the ability of the SLA proposal to be included in the competitive range. In contrast, under the "cascading" approach recommended here, the preference afforded the SLA is undiluted because there will be no price evaluation preference, and there is no risk that its chances for being within the competitive range will be hurt by limiting the competition to the SLA and small business concerns (on the contrary: eliminating the participation of large businesses may improve the SLA's proposal's chances in this regard). The approach

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The agency cites in support of its position our decision in Department of the Air Force--Recon., supra, in which we found that the agency properly withdrew a section 8(a) (small disadvantaged business) set-aside for a dining facility requirement where it determined that the acquisition was subject to the RSA, and that the preference in favor of the SLA applied. However, there is no requirement that agencies set aside any particular acquisition for inclusion in the section 8(a) program. See FAR § 19.800(b) ("Contracts may be awarded to the [Small Business Administration] for performance by eligible 8(a) firms . . . ." (emphasis supplied)). Since the agency in that case therefore was not required to set the procurement aside for section 8(a) firms in the first place, there was no basis for objecting to the elimination of the set-aside once the agency became aware of the applicability of the RSA. In contrast, small business set-asides (and the HUBZone price evaluation preference--the subject of the COFC's Automated Communication Systems decision) are mandatory where, as here, the specified conditions are present. FAR §§ 19.502-2(b), 19.1307. Where this is the case, and it is possible to accommodate the RSA requirement in the context of a small business set-aside, we believe that agencies must do so.

We solicited the views of both the Small Business Administration (SBA) and the Department of Education (DOE) (the agency responsible for administering the RSA) in connection with this case. SBA shares our view that the two statutes are not incompatible, and that both preferences can be given effect by structuring the solicitation as discussed above. (SBA also agrees with our view, discussed above, that small business set-asides, because they are mandatory where the necessary conditions are present, warrant a different approach than where a non-mandatory section 8(a) set aside is involved.) In its submission, DOE understandably focuses on the RSA and states that, in its view, if the only way to satisfy the requirements of that statute is through opening the procurement to unrestricted competition, then the Army acted properly here. Because we believe, as explained above, that the RSA requirements can be satisfied in the context of a solicitation limited to small businesses and the SLA, we believe our conclusion is consistent with the logic of DOE's analysis.

In view of the foregoing, we sustain this aspect of the protest.

Intermark also asserts that, in order for the competition to be conducted on an equal basis, the SLA should be required to perform the contract using a small business blind licensee. Intermark further contends that the small business licensee should be required to meet the limitation on subcontracting requirements applicable to small business concerns, FAR § 52.219-14, namely, that it should be required to

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we are recommending thus preserves the priority of the RSA preference vis-à-vis the Small Business Act preference.

expend at least 50 percent of the contract labor cost for its own employees. Intermark maintains that these requirements apply because the regulations implementing the RSA require that the SLA's proposal be evaluated using the same established criteria under which all proposals will be judged. 34 C.F.R. § 395.33(b).

This argument is without merit. The RSA is designed to enlarge economic opportunities for the blind, and includes no limitation on the size of the entity that will perform a contract awarded pursuant to the RSA. 20 U.S.C. § 107 et seq. This being the case, subjecting SLAs to requirements designed to ensure contract performance by small business concerns would be inconsistent with the underlying purpose of the RSA, and would tend to negate the RSA preference's precedence over small business preferences. See Department of the Air Force--Recon., supra.

Additionally, the regulation to which Intermark refers, 34 C.F.R. § 395.33(b), does not require that the SLA be bound by small business requirements such as the limitation on subcontracting, but states only that:

> [s]uch solicitations for offers shall establish criteria under which all responses will be judged. Such criteria may include sanitation practices, personnel, staffing, menu pricing and portion sizes, menu variety, budget and accounting practices.

This regulation relates to the substantive, comparative bases under which proposals will be evaluated; it does not provide that the SLA's eligibility for award is subject to requirements of the Small Business Act.

We recommend that the Army amend the solicitation so that the acquisition is generally set aside for small businesses, but also permits the SLA to compete and be afforded the priority in consideration for award required by RSA and its implementing regulations. We also recommend that Intermark be reimbursed the costs of filing and pursuing its protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d)(1) (2002). Intermark's certified claim, detailing the time spent and the costs incurred, should be submitted to the agency within 60 days of receiving this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

Anthony H. Gamboa
General Counsel