



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: PI Construction Company

File: B-272174; B-272177

Date: October 2, 1996

Paralee White, Esq., and Joseph A. Zillo, Esq., Cohen & White, for the protester. David R. Kohler, Esq., Small Business Administration, Marian E. Sullivan, Esq., Department of the Air Force, and Maj. Michael J. O'Farrell, Jr., Department of the Army, for the agencies. Linda S. Lebowitz, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Small Business Administration failed to follow its published regulatory implementation of the statutory requirement that 8(a) construction contracts be awarded to 8(a) concerns located within the county or state where the work will be performed by imposing geographic restrictions linking the eligibility of an 8(a) concern to compete for such contracts with the location at which the 8(a) concern maintains its principal place of business, as opposed to a branch office.

DECISION

PI Construction Company protests as unduly restrictive of competition the geographic restriction contained in request for proposals (RFP) No. F04626-96-R-0105, issued by Travis Air Force Base, Department of the Air Force, in California, and RFP No. DABT31-96-R-0003, issued by Fort Leonard Wood, Department of the Army, in Missouri.

We sustain the protests.

The RFPs were issued by the Air Force and Army as competitive small disadvantaged business set-asides under section 8(a) of the Small Business Act, 15 U.S.C. § 637(a) (1994), for construction requirements. In accepting the respective Air Force and Army requirements for competition in the 8(a) program, the SBA directed that competition under the Air Force procurement be limited to 8(a) concerns serviced by eight SBA District Offices and one SBA Branch Office in Arizona, California, Nevada, and Hawaii (SBA Region IX), and that competition under the Army procurement be limited to 8(a) concerns serviced by two SBA District Offices in Missouri (SBA Region VII). The SBA stated that "[a]ll other firms [would be] deemed ineligible to submit offers." In accordance with the SBA's

direction, the Air Force and Army included the specified geographic restrictions in the synopses published in the Commerce Business Daily.

The protester, an 8(a) concern with its principal place of business in Denver, Colorado, but which also maintains a branch office with at least one full-time employee in the appropriate geographic areas in California and Missouri, recognizes that the Small Business Act, 15 U.S.C. § 637(a)(11), requires "[t]o the maximum extent practicable" that 8(a) construction contracts "be awarded within the county or State where the work is to be performed." In this regard, the protester does not question the regulatory authority of the SBA to impose geographic restrictions for construction requirements. However, the protester argues that the SBA's regulatory implementation of this statutory provision provides no basis for the SBA to restrict 8(a) competitions for construction requirements according to an 8(a) concern's principal place of business, defined at 13 C.F.R. § 124.100 (1996) as "the location at which the business records of the [8(a)] concern are maintained and the location at which the individual who manages the concern's day-to-day operations spends the majority of his/her working hours."

In this regard, the protester points out that in June 1995, the SBA promulgated new regulations governing the 8(a) program. These regulations provide as follows:

"Construction competitions. Where a construction requirement offered to the 8(a) program exceeds the \$3 million competitive threshold, SBA will determine, based on its knowledge of the 8(a) portfolio, whether the competition should be limited only to those Program Participants located within the geographical boundaries of one or more SBA district offices, an entire SBA regional office, or adjacent SBA regional offices. Only those Participants located within the appropriate geographical boundaries are eligible to submit offers." 13 C.F.R. § 124.311(g)(3). (Emphasis added.)

The SBA does not define in its new regulations the basis upon which an 8(a) program participant would be considered "located within the appropriate geographical boundaries" in order to be deemed eligible to compete.¹

¹The SBA defines a "[p]rogram [p]articipant" as "a small business concern participating in the [8(a) Program]." 13 C.F.R. § 124.100. A program participant is serviced "in the field office serving the territory in which the concern's principal place of business, as defined in [13 C.F.R.] § 124.100, is located." 13 C.F.R. § 124.203.

The protester also references the SBA's preamble to its regulations, as published in the Federal Register, 60 Fed. Reg. 29,969, 29,971 (June 7, 1995), which addresses the statutory requirement that 8(a) construction contracts be awarded to 8(a) concerns located within the county or state where the work will be performed. The SBA explained in its preamble that competition for 8(a) construction requirements would be limited:

"to those Program Participants within the geographical boundaries of one or more SBA district offices. SBA believes that a Program Participant may be considered as being located within a geographical boundary if it regularly maintains an office which employs at least one full-time individual within that geographical boundary." (Emphasis added.)

In light of the SBA's statement in its preamble, the protester contends that regardless of the fact that it maintains its principal place of business in Colorado, it should be considered eligible to compete under each of the referenced 8(a) solicitations since it regularly maintains a branch office with at least one full-time employee within the appropriate geographic areas in California and Missouri, as designated by the SBA.

The SBA responds that while it announced a "general statement of policy" in the preamble, specifically, that "it might in appropriate cases apply a less restrictive definition of the term 'located within the geographic boundaries'" to include 8(a) concerns which regularly maintain an office with at least one full-time employee within a designated geographic area, it is not required to use this "more expansive" definition in all cases and will do so in its discretion when practicable or when necessary to provide developmental assistance to 8(a) concerns unable to effectively compete on a national basis.

Section 8(a) of the Small Business Act, 15 U.S.C. § 637(a), authorizes the SBA to enter into contracts with government agencies and to arrange for performance through subcontracts with socially and economically disadvantaged small business concerns; Federal Acquisition Regulation § 19.805 (FAC 90-8) and 13 C.F.R. § 124.311 provide for and govern competitively awarded contracts set aside for section 8(a) qualified concerns. Because of the broad discretion afforded to the SBA and the contracting agencies under the applicable statute and regulations, our review of actions under the section 8(a) program is generally limited to determining whether government officials have violated applicable regulations or engaged in bad faith. See Bid Protest Regulations, 4 C.F.R. § 21.5(b)(3) (1996). Here, we conclude that the SBA's decision to link the eligibility of an 8(a) concern to compete for 8(a) construction contracts to the geographic location where the 8(a) concern maintains its principal place of business, as opposed to a branch office, is not consistent with the SBA's published regulatory implementation of the statutory requirement that

such contracts be awarded within the county or state where the work will be performed. Moreover, subsequent internal agency action by the SBA regarding its published regulatory implementation was inconsistent with the notice and comment requirements of the Administrative Procedure Act (APA), 5 U.S.C. § 553, as adopted by the SBA at 13 C.F.R. § 101.108.

There is no question that the SBA has authority to impose geographic restrictions in furtherance of its program needs. See, e.g., Border Maintenance Serv., Inc., 72 Comp. Gen. 101 (1993), 93-1 CPD ¶ 97, recon. denied, 72 Comp. Gen. 265 (1993), 93-1 CPD ¶ 473. Here, the SBA, at 13 C.F.R. § 124.311(g)(3), simply provides that only 8(a) program participants "located within the appropriate geographical boundaries" are eligible to compete for 8(a) construction contracts. In its regulations the SBA does not define this phrase or otherwise place 8(a) concerns on notice that in certain circumstances, as a prerequisite to competing for these contracts, an 8(a) concern may be required to maintain its principal place of business, as opposed to a branch office, in the designated geographic areas where the work will be performed. However, the SBA clearly states in its regulatory preamble that an 8(a) concern "may be considered as being located within a geographical boundary if it regularly maintains an office which employs at least one full-time individual within that geographical boundary." Although the SBA characterizes the definitional language in its preamble as a non-binding, discretionary statement of policy which essentially can be ignored in light of its use of the term "may," we do not agree.

The preamble to a regulation should be considered in construing and in determining the meaning of the regulation. See Wiggins Bros., Inc. v. Dep't of Energy, 667 F.2d 77 (Temp. Emer. Ct. App. 1981). Under federal rules of construction of legislative regulations, definitions in a preamble may not be ignored. Id. While the term "may" in a regulation is generally construed as permissive, rather than mandatory, the construction of such term--whether discretionary or mandatory--is reached in each case on the context of the regulation and on whether it is fairly to be presumed that it was the intention of the agency to confer discretion or to impose an imperative requirement. See United Hosp. Center, Inc. v. Richardson, 757 F.2d 1445 (4th Cir. 1985). Courts have often interpreted "may" as connoting a mandatory meaning. Id.

Despite the SBA's use of the term "may," we conclude that the structure and the context of the regulatory preamble sentence at issue is one of definition, not one creating discretion. This sentence begins with a declaratory phrase, "SBA believes that," followed by the SBA actually defining those 8(a) concerns which it believes are located within a designated geographic area, specifically, not only 8(a) concerns headquartered in these areas, but also 8(a) concerns with branch offices in these

areas.² This preamble language fills the definitional void in the regulations themselves, and it is the preamble which reflects the SBA's intent regarding the basis for a determination of the eligibility of an 8(a) concern to compete for 8(a) construction requirements. We believe the SBA has provided no persuasive reason to ignore the definition in its preamble which supports the protester's position that because it maintains a branch office in each of the designated geographic areas, it should be considered eligible to compete under the referenced 8(a) solicitations.

Moreover, subsequent internal agency action by the SBA belies its position that it has discretion to ignore the definition of the phrase "located within the appropriate geographical boundaries," as provided in its regulatory preamble. In this regard, on August 7, 1995, just 2 months after the effective date of the SBA's new regulations governing the 8(a) program, the SBA issued an internal agency procedural notice stating that:

"[t]he SBA published a final rule in the Federal Register on June 7, 1995, that contained two sentences that should not have appeared. A correction to the June 7, 1995, final rule will be published to delete the following sentences: 'SBA believes that a Program Participant may be considered as being located within a geographical boundary if it regularly maintains an office which employs at least one full-time individual within that geographical boundary.'" (Emphasis added.)³

The SBA reports that its original inclusion of the preamble language under discussion was "inadvertent," and it has not yet issued a subsequent Federal Register notice deleting this language. The SBA explains that it has:

"decided to see whether the subject language [in the preamble] could help it achieve its objective of promoting sufficient competition to assure adequate performance at a fair price within those local buy areas where SBA would otherwise increase the size of the local buy area.

"The Agency has not yet completed its examination of that question. If the language has no substantial affect on our ability to insure sufficient competition to assure adequate performance at a fair price within local buy areas, or if the

²In this sentence, the word "believes," not "may," is the operative verb.

³The second sentence to be deleted addresses the award of sole source 8(a) construction contracts based on the same branch office geographic restriction.

administration of the program with this language in it becomes excessively burdensome or confusing, it is likely that SBA will rescind the language. If, on the other hand, SBA finds that the language stimulates competition and enhances the quality of 8(a) performance in local areas, SBA will likely retain the language."

The SBA's internal implementation of a change to a published regulatory definition which impacts the basis upon which the SBA determines the eligibility of 8(a) concerns to compete for 8(a) construction requirements is inconsistent with the SBA's commitment to follow the public notice and comment procedures of the APA. In this regard, the SBA states that it "will follow the public participation requirements of the [APA], 5 U.S.C. § 553, in rulemakings relating to public property, loans, grants, benefits, or contracts." 13 C.F.R. § 101.108. Public participation requirements include notice and comment procedures. See *Analysas Corp. v. Bowles*, 827 F. Supp. 20 (D. D.C. 1993) (SBA did not justify its failure to comply with the notice and comment requirements of the APA). In other words, absent prior public notice, we do not think that 8(a) concerns, like the protester, could reasonably expect based on the SBA's published regulatory implementation that the SBA would be deciding on a solicitation-by-solicitation basis whether 8(a) concerns with branch offices only in the designated geographic areas would be considered eligible to compete for 8(a) construction requirements.

While we recognize that the SBA has discretion to promulgate a different, less expansive definition of the phrase "located within the appropriate geographical boundaries," even placing 8(a) concerns on notice that if the SBA determines that an appropriate level of competition exists in a designated geographic area, a prerequisite to competing may be a requirement that the 8(a) concern be headquartered in this area, we conclude that such a change in the published regulatory implementation must be accomplished not internally, but rather in accordance with the public rulemaking requirements of the APA, as adopted by the SBA at 13 C.F.R. § 101.108.

For the reasons discussed, and by letter of today to the Administrator of the SBA, we are recommending, based on the SBA's published regulatory implementation, that the SBA afford the protester and other 8(a) concerns similarly situated, that is, those having branch offices as opposed to principal places of business in the designated geographic areas, an opportunity to compete under each of the referenced 8(a) solicitations. The SBA should advise the Air Force and Army to amend the basis for competition for the respective requirements. We also

recommend that the SBA reimburse the protester for the costs of filing and pursuing its protests, including reasonable attorneys' fees.⁴ 4 C.F.R. § 21.8(d).

The protests are sustained.

Comptroller General
of the United States

⁴In its report filed in response to each of these protests, the SBA expressly states that the geographic restrictions in the referenced solicitations are the SBA's, not the Air Force's or Army's.