Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: DGS Contracting Services, Inc.

File: B-276300

Date: June 3, 1997

Richard D. Lieberman, Esq., and J. Randolph MacPherson, Esq., Sullivan & Worcester, for the protester.
James E. Stancil for Bach Security Services, Inc., an intervenor.
Diane D. Hayden, Esq., and Howard B. Rein, Esq., Department of the Navy; and Audrey H. Liebross, Esq., Small Business Administration, for the agencies.
John Van Schaik, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Based on consideration of government estimate, prices submitted by the protester, and prices on another similar contract, agency reasonably determined that the price of a modification to a contract under the 8(a) program represented a fair market price.

2. Protest that actions of contracting agency in offering contract work to the Small Business Administration (SBA) for the 8(a) program violated the "offering letter" rule is denied where SBA officials were aware of protester's incumbency and where SBA assumed, in any event, that incumbent contractor would prefer to continue performance.

3. Protest that decision of the Small Business Administration (SBA) to accept contract work into the 8(a) program violated the "adverse impact" rule is denied where applicable regulations call for presumption of adverse impact on a small business if work at issue represents 25 percent or more of small business's annual gross sales, but SBA reasonably relied on value of the work in the 3-month contract work, rather than taking "annualized-value" approach advocated by protester.

DECISION

DGS Contracting Services, Inc. protests the modification of the contract of Bach Security Services, Inc., contract No. N62472-93-C-4705, awarded by the Small Business Administration (SBA) for security guard services for the Navy.

We deny the protest.

In January 1994, the Navy awarded a contract to DGS for guard services for the Naval Weapons Station Earle, Colts Neck, New Jersey. That contract was for 1 year with 4 option years. During the second option year, the scope of the contract was reduced so that the amount of work required in the third option year was approximately 27 percent less than had been anticipated. Due to the reduced scope of work, instead of exercising the option for the third year, the Navy sought only a 3-month extension of DGS's contract. DGS informed the Navy that it was unable to perform the contract at its existing prices but would agree to an extension of the contract for 3 months for an additional $10,000 in order to cover increased general and administrative expenses resulting from the reduction of the scope of work. No agreement was reached.

DGS's contract expired on February 1, 1997. Military personnel performed the guard services from February 1 until February 10. The Navy reports that it attempted in late January to negotiate a modification to an existing contract with a large business to provide guards at Earle, but failed. In addition, the Navy contacted the SBA several times in late January to request a modification of the Bach contract; that contract had been awarded by SBA under the 8(a) program.[1] The SBA agreed and the modification was issued to Bach on January 31.

DGS first argues that the price of the modification was unreasonable, particularly since DGS was willing to perform the work for more than $100,000 less than Bach. Specifically, DGS notes that the modification issued to Bach was priced at $644,280.23, while DGS submitted two written offers to perform the 3-month extension with only a $10,000 increase in its price, for a total of $544,002. According to DGS, since its price was 16 percent less, the Bach price was unreasonable.

DGS notes that a Navy contract specialist prepared a price reasonableness memorandum that stated that the prices obtained on the modification were reasonable based in part on a $2 per hour wage increase that would apply to DGS's performance of the work. DGS states that no such increase is called for either by the applicable Service Contract Act wage determination or by the applicable collective bargaining agreement. DGS argues that the $2 per hour wage increase credited to DGS's price led the Navy to erroneously believe DGS's price to be $590,002, instead of $544,002, and that the use of the $2 per hour price increase in the contract specialist's memo demonstrates bad faith and that the Navy's price reasonableness determination was arbitrary and capricious.

---

[1]Section 8(a) of the Small Business Act authorizes the SBA to contract with government agencies and to arrange for performance of such contracts by awarding subcontracts to socially and economically disadvantaged small businesses. 15 U.S.C. § 637(a) (1994).

An agency may not award an 8(a) contract if the price of the contract would result in a cost to the government which exceeds a fair market price (FMP). Federal Acquisition Regulation (FAR) § 19.806(b). FMP is defined under FAR § 19.001 as "a price based on reasonable costs under normal competitive conditions and not on lowest possible cost." The procedures for estimating the FMP in 8(a) procurements are set forth in 15 U.S.C. § 637(a)(3)(B) and FAR § 19.807. These provisions require agencies to derive an FMP from a price or cost analysis that may take into account commercial prices for similar services, available in-house cost estimates, cost or pricing data submitted by SBA, and information obtained from any other government agency. Under FAR § 15.805-2, "Price Analysis," the agency also may use one or more of several listed price analysis methods, including comparing the prices received in response to a solicitation and comparison of the prices received with a government estimate. The contracting officer has discretion in determining price reasonableness, General Metals, Inc., B-248446.3, Oct. 20, 1992, 92-2 CPD ¶ 256 at 2, and we will not question an agency's FMP determination unless it is not reasonably based or there is a showing of fraud or bad faith on the part of agency officials. Government Contracting Resources, B-243915, Aug. 15, 1991, 91-2 CPD ¶ 153 at 4; Valley Constr. Co., B-247461.2, Aug. 6, 1992, 92-2 CPD ¶ 79 at 2.

The Navy's determination was based on the contracting officer's consideration of a government estimate of $[deleted] for the work, DGS's price, and the amount being paid to Bach under a similar contract ($644,280). On that basis, as she explains in a declaration submitted in response to the protest, the contracting officer determined that Bach's price for the modification was fair and reasonable. The Navy concedes that the $2 per hour wage increase mentioned in the contract specialist's memorandum "may have been mistakenly considered." Nonetheless, the agency argues that whether DGS's price was $541,002 or $590,000--an 8-percent difference or a 16-percent difference between DGS's price and Bach's price--Bach's price still was reasonable.

The contract specialist's memorandum apparently was in error concerning the $2 per hour increase. Although DGS argues that the determination was made in bad faith, government officials are presumed to act in good faith and we will not attribute unfair or prejudicial motives to procurement officials on the basis of inference or supposition. Grace Indus., Inc., B-261020, July 10, 1995, 95-2 CPD ¶ 9 at 3. In this case, although the Navy offers no defense of the contract specialist's reliance on the $2 per hour increase, the record includes no evidence that the contract specialist deliberately fabricated an erroneous wage increase in order to injure DGS, and we will not assume that she did so.

Moreover, in her declaration, the contracting officer--the agency official responsible for the determination of an FMP--did not expressly rely on the contract specialist's memo. Rather, the contracting officer stated that she reviewed the prices submitted by DGS, in addition to the government estimate and Bach's price under a similar

contract. Under the circumstances it is not clear that the $2 per hour increase had an impact on the contracting officer's determination.

Finally, although DGS argues that the determination was per se unreasonable simply because Bach's price exceeded DGS's by 16 percent, we do not agree. Such a presumption--based on a particular percentage, whether 16 percent or some other percentage--would ignore the discretion given to agencies to determine price reasonableness. General Metals, Inc., supra. In any event, we conclude that the record includes reasonable support for the determination. Although Bach's price exceeded DGS's price by 16 percent, it exceeded the government's estimate by less than 2 percent. In addition, as Bach points out, it was asked to provide these services for only a short period of time without the benefit of option years--which under most contracts would allow a firm to recover its costs for equipment and startup. In addition to the short timeframe, Bach was asked to provide the guard services on an emergency basis. Both of these circumstances in our view would result in a higher price than would be available under normal circumstances. Accordingly, we have no basis to conclude that the FMP determination was unreasonable.

DGS also argues that the Navy and the SBA violated regulations governing the 8(a) program. Specifically, DGS argues that the agencies failed to comply with the "offering letter" and "adverse impact" rules. The offering letter rule states that "[w]hen a requirement is offered to the 8(a) program, the offering letter or notification from the procuring activity shall contain [seventeen items of] information," including a description of the work to be performed or items to be delivered and a copy of the statement of work; the estimated period of performance; the anticipated dollar value of the requirement; the acquisition history of the requirement; the names and addresses of any small business contractors which have performed the requirement during the previous 24 months; any other information that the procuring agency deems relevant or SBA requests. 13 C.F.R. § 124.308(c).

Under the adverse impact rule set forth at 13 C.F.R. § 124.309(c), the SBA will not accept for 8(a) award proposed procurements not previously in the 8(a) program if, among other circumstances,

> "SBA has made a written determination that acceptance of the procurement for 8(a) award would have an adverse impact on other small business programs or on an individual small business, whether or not the affected small business is in the 8(a) program. The adverse impact concept is designed to protect small business concerns which are performing Government contracts awarded outside the 8(a) program."

Under 13 C.F.R. § 124.309(c), in determining whether or not adverse impact exists, SBA is to consider "all relevant factors" and

> "SBA presumes adverse impact to exist when a small business concern has performed a specific requirement for at least 24 months, it is currently performing the requirement or finished such performance within 30 days of the procuring agency's offer of the requirement for the 8(a) program, and the estimated dollar value of the offered 8(a) award is 25 percent or more of its most recent annual gross sales (including those of its affiliates)."

In response to the Navy's request, on January 31, the SBA modified Bach's contract to provide guard services at Earle for 3 months, from February 10 through May 8. Subsequently, by letter dated February 27, the Navy offered the Earle requirement to the 8(a) program for 1 year, starting May 8. The Navy nominated Bach to perform the work, stated that the estimated dollar value of the requirement was $[deleted], and requested that an adverse impact study be performed concerning DGS. By letter of March 5, the SBA rejected the offering as not suitable for the 8(a) program. The letter stated that the 3-month modification was executed as a bridge contract in order to enable the Navy to compete the work as a small business set-aside and that since the work had previously been awarded to DGS using small business set-aside procedures, using the 8(a) procedures at this time was not appropriate.

On March 21, the Navy contracting officer wrote the SBA to request reconsideration of the rejection of the requirement for the 8(a) program. In that letter, the Navy argued that a series of Earle small business set-aside contracts had experienced serious problems for a number of years and, in particular, that DGS had performed inadequately. SBA again rejected the request.

By letter dated April 9, for a third time the Navy asked SBA to accept the requirement into the 8(a) program. In that letter, the Navy argued that reductions in the scope of work and a change from armed to unarmed guards had resulted in a "new" requirement.[2] By letter of May 9, the SBA informed the Navy that the SBA had agreed to a month-to-month extension of the modification "to permit [the Navy] time to issue a solicitation to procure their needed security services." That letter stated:

---

[2]Under 13 C.F.R. 124.309(c), the SBA does not perform adverse impact determinations for "new" requirements for which there is no small business incumbent. Thus, if SBA were to agree that the requirement is new, it would be free to disregard the effect on DGS in deciding whether to accept the requirement into the 8(a) program.

> "Thirty day extensions will only be granted if sufficient effort, in SBA's opinion, is taken by [the Navy] to (1) issue a solicitation, (2) evaluate the solicitation and (3) make an award. A progress report must be submitted to SBA with each extension request. These extensions are not to be construed as acceptance of this requirement into the 8(a) Program. SBA anticipates that your award of this requirement will occur within 90 to 180 days."

We will sustain a protest where an agency letter offering a requirement into the 8(a) program fails to comply with regulatory requirements to provide complete and accurate information. Comint Sys. Corp., B-274853; B-274853.2, Jan. 8, 1997, 97-1 CPD ¶ 14 at 3-5; Korean Maintenance Co., B-243957, Sept. 16, 1991, 91-2 CPD ¶ 246 at 5-6. Here, although DGS argues that the Navy violated the offering letter rule, the only informational deficiency alleged by DGS was the Navy's failure to advise the SBA that DGS had submitted two written offers to perform the work. According to DGS, these offers were an essential part of the acquisition history and should have been furnished to the SBA.

It is not clear whether the SBA was specifically aware of DGS's two written offers to the Navy. Nonetheless, we do not see how this made a difference. The record shows that SBA officials were aware of DGS's incumbency. Moreover, as the SBA explains, it assumes that an incumbent contractor would prefer to continue performance.

Nonetheless, DGS argues that the Navy manipulated the numbers in its requests to the SBA so that the SBA would not perform an adverse impact analysis. According to DGS, the Navy did this by first stating that it intended to award only a 3-month modification and then in subsequent letters seeking to obtain a 12-month modification. In addition, DGS references a series of memos in which SBA officials describe their communications with the Navy concerning the Earle requirement. As DGS notes, according to those memos, after being informed of the 25-percent "rule of thumb" in 13 C.F.R. § 124.309(c)(2), a Navy official inquired as to whether the Navy could request a modification of the Bach contract of a particular dollar value and a particular length of time in order to avoid a determination of adverse impact. One of the memos also states:

> "[A Navy official] mentioned an amount of $750,000 which [the SBA official] acknowledge[d] is 25% of the firm's estimated $3.0 million in sales (i.e. SBA 25% rule of thumb). However, I am uncomfortable with the level and state this is wrong and needs to be lower. She then counters with an offer for a length of 60-90 days at the lower dollar level but wants to be able to come back to SBA with another [modification] of additional time and dollars to the out-of-scope [modification] which in my opinion brings it back to the 25% impact

> point. . . . Later, we [SBA officials] get back to [Navy] and state this is not possible."

DGS argues that the record demonstrates that the Navy was trying to manipulate both the offering letter and adverse impact process to award a contract to Bach and "freeze out" DGS. According to DGS, the Navy always intended to award a contract to Bach for a year or more solely to avoid having DGS bid on and receive award. DGS argues that the Navy's actions amount to bad faith.

The Small Business Act affords SBA and contracting agencies broad discretion in selecting procurements for the 8(a) program; we will not consider a protest challenging a decision to procure under the 8(a) program absent a showing of possible bad faith on the part of government officials or that specific laws or regulations have been violated. Grace Indus., Inc., B-274378, Nov. 8, 1996, 96-2 CPD ¶ 178 at 2; Korean Maintenance Co., supra at 5.

Although the SBA reports that the dollar value of the 3-month requirement "was close to the level where adverse impact would be presumed," SBA, in fact, determined that the bridge contract would not have an adverse impact on DGS. DGS does not challenge the SBA's determination that the estimated value of the work fell below 25 percent of DGS's most recent annual gross sales. Rather, DGS argues that whether there is an adverse impact should be determined based on the annualized amount of the work offered to the 8(a) program. According to DGS, on that basis, even if the amount is not a full 25 percent of DGS's gross sales, under the "all relevant factors" test of the SBA rules, the award to Bach would adversely affect DGS.

Under the regulations, which call for calculation of the 25-percent level for presumption of adverse impact based on the value of the work--not based on an annualized value--a presumption of adverse impact did not apply here since the value of the work for the 3-month period was below the 25-percent threshold. In addition, SBA's determination of no adverse impact included consideration of the fact that the bridge contract was to be followed by a small business set-aside competition under which DGS could compete. Under these circumstances, and given the discretion of the SBA and the contracting agencies to select procurements for the 8(a) program, we think the SBA reasonably accepted the 3 months of work into the 8(a) program.[3]

---

[3]This decision only concerns the original decision to modify Bach's contract for the 3-month period; on April 28 and May 21, DGS filed additional protests challenging the Navy's subsequent offering letters to the SBA and the SBA's May 9 month-to-month extension of the modification. Those protests will be addressed in a later decision.

Concerning DGS's contention that the Navy "manipulated the numbers" and acted in bad faith to "freeze out" DGS, as explained above, government officials are presumed to act in good faith; we will not attribute unfair or prejudicial motives to procurement officials on the basis of inference or supposition. Grace Indus., Inc., supra. The record here shows that the Navy made repeated attempts to convince the SBA to accept the Earle guard services work into the 8(a) program--for up to a year if possible and failing that, for as long a period short of a year as the SBA would accept. Although the Navy aggressively pursued this objective, the record does not show that the Navy presented erroneous or inadequate information to SBA officials. In addition, the SBA determined--consistent with applicable regulations--that a 3-month bridge contract did not have an adverse impact on DGS. Under the circumstances, we will not infer that the Navy acted in bad faith.

DGS also argues that the modification improperly exceeded the scope of Bach's contract since that contract previously did not include guard services at Earle. In response, the Navy and SBA agree that the modification exceeded the scope of Bach's contract but argue that 13 C.F.R. § 124.318(c), which reads in part as follows, permits this out-of-scope modification:

> "A modification beyond the scope of the initial 8(a) contract award is considered to be a new contracting action. As such, if a concern has exited the 8(a) program or is no longer small under the size standard corresponding to the SIC Code for the requirement, the modification cannot be exercised. If, however, the concern is still a Program Participant and is still a small business under the size standard corresponding to the SIC Code for the requirement, the modification may be made provided the estimated fair market price falls below the applicable threshold amount set forth in § 124.311 and other program requirements are met, since the authority exists to enter into a new 8(a) contract to fulfill the requirement."

DGS does not argue that the modification exceeded the threshold in § 124.311; rather, DGS contends that "other program requirements" could not be met since "the Navy deceived SBA into believing that this was a short bridge contract, after which the requirement would be set aside for small business and readvertised." DGS states:

> "Although it is true that the SBA met all of its own program requirements, the defects in the process introduced by the Navy essentially result in a 'fruit of the poisonous tree' result. GAO must conclude that the end result is tainted by the Navy's lack of adherence to regulations and bad faith."

We have no basis to conclude that the Navy or the SBA failed to adhere to applicable regulations and DGS itself concedes that the SBA met its own program

requirements. In addition, we will not infer that the Navy acted in bad faith. Under the circumstances, we have no grounds to conclude that the SBA's decision to accept the 3-month modification into the 8(a) program was improper.

The protest is denied.

Comptroller General
of the United States