



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Callejas & Ross, Inc.

File: B-281237

Date: January 14, 1999

Marshall J. Doke, Jr., Esq., Gardere & Wynne, for the protester.
John W. Klein, Esq., and Kenneth Dodds, Esq., Small Business Administration, and
Gregory W. Vanagel, Esq., Department of the Army Corps of Engineers, for the
agencies.
Christina Sklarew, Esq., and Paul Lieberman, Esq., Office of the General Counsel,
GAO, participated in the preparation of the decision.

DIGEST

Small Business Administration (SBA) reasonably determined that protester was ineligible for award of 8(a) construction contract where protester failed to provide sufficient information during SBA's investigation to show that it established and maintained a qualifying office (other than office space provided by the government) staffed with at least one full-time employee within the geographic area specified in the solicitation.

DECISION

Callejas & Ross, Inc. protests the determination by the Small Business Administration (SBA) that the firm is ineligible for an award under invitation for bids (IFB) No. DACA21-98-B-0036, issued by the Savannah District Corps of Engineers (Corps) for a construction project on Pope Air Force Base, North Carolina, because Callejas does not satisfy the geographic restriction contained in the solicitation. Callejas asserts that SBA's determination is unreasonable because the protester does maintain a qualifying office within the geographical area called for under the IFB.

We deny the protest.

By letter dated March 11, 1998, the Corps offered the construction requirement for extensive renovations to a family services center on the Air Force base to SBA for award through the 8(a) Business Development program. Because the value of the requirement exceeded the applicable competitive threshold amount,¹ the Corps

¹SBA's regulations require that a contract opportunity offered to the 8(a) program be awarded on the basis of a competition restricted to eligible participants where
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offered the requirement to SBA as a competitive 8(a) contract opportunity. Under this program, SBA executes contracts with other government agencies to provide goods or services, and subcontracts the performance of the contracts to small business concerns that are owned and controlled by individuals determined by SBA to be socially and economically disadvantaged. Competition for the contract is conducted by the procuring agency, while SBA makes the 8(a) eligibility determinations. 13 C.F.R. § 124.311(e). By statute, 8(a) construction contracts must be awarded "to the maximum practicable extent" within "the county or State where the work is to be performed." 15 U.S.C. § 637(a)(11) (1994). Under 13 C.F.R. § 124.311(g)(3), SBA determines, based on its knowledge of the 8(a) portfolio, whether the competition should be limited to only those firms within the geographical boundaries of one or more SBA district offices, an entire SBA regional office, or adjacent SBA regional offices. Only those concerns located within the appropriate geographical boundaries are eligible to compete.

SBA accepted the requirement as a competitive small disadvantaged business set-aside under section 8(a) of the Small Business Act, 15 U.S.C. § 637(a), and issued the IFB with the following provision on its initial page:

THIS CONSTRUCTION REQUIREMENT IS SUBJECT TO LOCAL BUY RESTRICTIONS. ONLY 8(a) COMPANIES MEETING LOCAL BUY CRITERIA FOR CONSTRUCTION PROJECTS IN NORTH CAROLINA WILL BE ELIGIBLE TO COMPETE.

The Corps received six bids by the time set on July 30 for bid opening, of which Callejas's bid was the lowest. Callejas's principal place of business is Wichita Falls, Texas. By letter dated August 18, SBA's Charlotte North Carolina District Office requested further information from Callejas concerning its local buy eligibility for North Carolina, stating:

Please forward copies of documents that will demonstrate North Carolina local buy eligibility for Callejas & Ross, Inc. Examples of documentation include the pay records of the full time employee(s), lease agreements for North Carolina business location(s), copies of letterhead identifying North Carolina business location(s) and records of telecommunications agreements in the name of Callejas & Ross, Inc. for its North Carolina site(s).

¹(...continued)

there is a reasonable expectation that at least two eligible program participants will submit offers and award can be made at a fair market price; and the anticipated award price exceeds \$3 million for non-manufacturing contracts. 13 C.F.R. § 124.311(a) (1998).

In response, Callejas submitted the following:

copies of payroll forms referring to "the payment of the persons employed by Callejas and Ross, Inc. on the Protective Coating Maintenance, Pope AFB, NC" project for pay periods between December 31, 1997 and August 11, 1998;

a sheet of letterhead paper listing an address and phone number for Callejas in Hope Mills, North Carolina;

an unemployment tax rate assessment from the Employment Security Commission of North Carolina (listing Callejas at its Wichita Falls, Texas address);

an insurance binder listing Callejas, at its Texas address, as the insured for a dwelling in Hope Mills, North Carolina;

a mortgage application form on which Callejas, at its Texas address, applies for a mortgage loan for property at the Hope Mills address; and

several monthly bills for a cellular phone, listing Callejas at its Wichita Falls, Texas address.

The business opportunity specialist (BOS) in the SBA Charlotte, North Carolina District Office determined that Callejas was ineligible for the award because it could not demonstrate that it maintained a branch office in North Carolina (other than government-furnished office space) prior to March 16, the date on which the contract opportunity was accepted from the Corps. The BOS noted that the firm had not provided sufficient documentation to show that Callejas was the tenant of the alleged Hope Mills branch office, such as utility bills or non-mobile telephone service receipts. Memorandum of Sept. 8, 1998 from BOS to Match/Contract File.

On September 11, SBA informed the Corps that Callejas was ineligible for the 8(a) contract opportunity because it failed to meet the local buy restrictions. Accordingly, the Corps awarded the contract to the next low bidder, and this protest followed.

Callejas alleges that SBA's determination of ineligibility was improper because it considered the question of whether Callejas had a branch office as of the date the contract opportunity was accepted into the 8(a) program (March 16, 1998), pursuant to SBA Procedural Notice 8000-483, instead of making its determination as of the date of Callejas's initial offer including price (July 30, 1998), as required by 13 C.F.R. § 124.311(e)(4)(iii). SBA subsequently acknowledged in its report to our Office that the procedural notice did not satisfy the applicable C.F.R. standard, but states that it subsequently used the correct date to determine eligibility as required

under the C.F.R., and determined that Callejas is not eligible for award under the local buy restriction.

Section 8(a) of the Small Business Act, 15 U.S.C. § 637(a), authorizes SBA to enter into contracts with government agencies and to arrange for performance through subcontracts with socially and economically disadvantaged small business concerns. FAR § 19.805 and 13 C.F.R. § 124.311 provide for and govern competitively awarded contracts set aside for 8(a) qualified concerns. Because of the broad discretion afforded to SBA and the contracting agencies under the applicable statute and regulations, our review of actions under the 8(a) program is generally limited to determining whether government officials have violated applicable regulations or engaged in bad faith. See Border Maintenance Serv., Inc. B-250489, Feb. 3, 1993, 93-1 CPD ¶ 97 at 5, recon. denied, B-250489.4, June 21, 1993, 93-1 CPD ¶ 473. Here, we find unobjectionable SBA's determination that Callejas did not maintain a branch office which satisfies the IFB's geographic restriction, thus rendering the firm ineligible for award.

Implementing 15 U.S.C. § 637(a)(11), the applicable SBA regulation, 13 C.F.R. § 124.311(g)(3), provides that only 8(a) program participants "located within the appropriate geographical boundaries" are eligible to compete for 8(a) construction contracts. The regulations do not define this phrase or otherwise describe the circumstances under which SBA considers a participant "located within the appropriate geographical boundaries." However, the preamble to the regulations explains that "SBA believes that the 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." 60 Fed. Reg. 29,969, 29,971 (June 7, 1995).² On August 7, 1997, SBA issued an internal agency procedural notice stating that for purposes of 8(a) competitive award of construction contracts, a firm with a "branch office" located within the geographic boundaries of the relevant competitive area where the work is to be performed is eligible for award of the contract. That notice further stated that a "branch office" means an office with at least one full-time employee that:

- (1) is other than a firm's principal place of business for determining 8(a) eligibility;
- (2) is established and maintained by the firm for conduct of one or more business activity(ies) as an on-going business concern (space provided by the government shall not be used to market other procurements and shall not be considered an office);

²See PI Constr. Co., B-272174, B-272177, Oct. 2, 1996, 96-2 CPD ¶ 128 at 4, recognizing the legal significance of that regulatory preamble and SBA's implementation of its regulations pertaining to geographic limitations for construction contracts.

(3) was established and operational on or before the date the instant requirement was accepted into the 8(a) program; and (4) is staffed by one or more full time employee(s) on the date that the instant requirement was accepted into the 8(a) program.

Regarding the date that should be used for determining an offeror's eligibility, SBA concedes in its report to our Office that the conflict between this internal procedural notice and the C.F.R. must be resolved in favor of the C.F.R. While SBA now acknowledges that it initially applied an inappropriate deadline for eligibility, it explains that it subsequently assessed the 8(a) local buy eligibility of Callejas as of the date of Callejas's offer, and reached the same conclusion when applying the correct standard.

Based on the documentation that Callejas submitted to SBA, we have no basis to object to SBA's determination that Callejas did not have a branch office on July 30, as required in order to be eligible for award. As SBA points out in its protest report, Callejas did not submit a lease agreement or telecommunication agreement evidencing a North Carolina office, as specifically requested. While the unemployment tax forms and certified payroll records show that Callejas maintains paid employees in the state of North Carolina, it does not show that these employees work in a branch office, as opposed to working in the office space provided by the government on Pope Air Force Base; these records, as well as the cellular phone bills submitted, all list Callejas's Texas address. The only documentation showing a North Carolina address consisted of letterhead stationery with a Hope Mills address; an insurance contract for a dwelling in Hope Mills; and a real estate loan disclosure/mortgage application form for a dwelling in Hope Mills. However, the stationery and the other two forms list two different addresses in Hope Mills. Moreover, the address on the stationery, a property purchased by Callejas in May 1998, is also the payroll address of record of one of Callejas's supervisory employees. While that employee submitted a statement to the SBA office in Fort Worth, Texas (by letter of August 31, 1998) asserting that a "[r]egional office was established at [a third address, in Raeford, North Carolina] which was within my residence" and stating that "Mr. Callejas raised my salary to compensate the office in my home," no written agreement (or accounting, tax, or insurance records, or any other documentation) was submitted to support this, nor does this letter refer in any way to the Hope Mills addresses that appear on the other documents, or explain what the current situation is. The protester offers no explanation regarding the three separate North Carolina addresses that appear in the submitted documents, either in the submissions or in its protest filings. The agency report states that as of August 17, 1998, no telephone listing for Callejas could be obtained from directory assistance for the Fayetteville, North Carolina area. None of the other miscellaneous papers later submitted by Callejas--post office box receipts, federal express mail receipts, credit card receipts for Internet service and travel expenses, and billing paperwork--show a North Carolina business address.

Accordingly, we agree with SBA that, notwithstanding its initially erroneous use of the March 16 date in making its ineligibility determination, SBA properly determined on the basis of the submitted documentation that Callejas failed to show that it maintained a branch office in North Carolina as of July 30, 1998, the date on which Callejas submitted its offer.

In its comments, Callejas does not provide any explanation for the conflicting addresses or gaps in the record, discussed above. Rather, Callejas inaccurately characterizes the position as finding Callejas "ineligible because [Callejas] had purchased its Hope Mills office after the date that the SBA accepted the requirement into the 8(a) program, and [because Callejas] did not have a listing for a stationary commercial telephone in [North Carolina]," ignoring the numerous other factors that SBA took into account in its eligibility analysis.³ Protester's Surrebuttal of December 3, 1998 at 1. Callejas then contends that "if [the SBA BOS] had applied the correct regulatory criteria, he would have found that [Callejas] owned a branch office in North Carolina as of the date that [Callejas] submitted its bid," Id. at 2, in an assertion that is wholly unsupported by the record and contradicts the SBA conclusions, discussed above. Regarding SBA's determination that cellular phone records showing a Texas address do not evidence a North Carolina branch office, Callejas asserts that "[i]n the absence [of] any other basis for the SBA's determination, the lack of a stationary commercial telephone line is completely

³While Callejas mentions that the agency report "lists several other bases [considered in the eligibility determination] that were not part of its original determination," Protester's Surrebuttal of December 3 at 5, Callejas views these bases as irrelevant because they were not cited in SBA's initial eligibility determination. Callejas contends that it is improper during a post-award bid protest for the agency to substitute completely new bases for its determination, and therefore does not address these bases at all. We find this argument misplaced. In these circumstances, where SBA has recognized that the submitted documentation must be analyzed in relation to a different date than the date upon which its initial analysis was based, its resulting analysis is not invalid simply because it is made during the course of a protest. In this case, unlike Intellectual Properties, Inc., B-280803, Nov. 19, 1998, 98-2 CPD ¶ 115, cited by the protester, SBA's analysis did not consist of a hypothetical exercise to show that no prejudice resulted from its miscalculation. Rather, as the cognizant, statutorily authorized agency, SBA reviewed the facts before it applying a corrected cut-off date. Moreover, SBA's role in determining eligibility (as opposed to choosing a vendor with which to enter a contractual relationship) means that it is not subject to the pressures of an adversarial process in the same way that a contracting agency might be. Further, in light of the broad discretion granted to SBA under Section 8(a) of the Small Business Act, 15 U.S.C. § 637(a), we generally limit our review of actions under the 8(a) program to determining whether government officials have violated applicable regulations or engaged in bad faith. See Border Maintenance Serv., Inc., supra.

inadequate to support a finding that [Callejas] did not have a North Carolina branch office." Id. at 2. Again, Callejas ignores the fact that SBA considered the various other factors in its eligibility determination, and Callejas mistakenly presumes that SBA is required to affirmatively prove that the bidder does not have a branch office, when in fact it is the bidder claiming eligibility based on a branch office that is required to provide documentation establishing that office's existence. Further, we find without merit Callejas's essential argument that mobile phone records--billed to a Texas office--somehow demonstrate the existence of an established North Carolina branch office. We do not view payment of a phone that is not linked to any fixed location as providing any evidence of a branch office. Moreover, in light of the fact that Callejas has employees working in government-provided space on a North Carolina Air Force Base (which cannot be considered as a branch office), even if the phone records demonstrated that the phone was operated exclusively by a Callejas employee, it would not establish that the phone was used by a branch office.

In sum, we see no basis to question the propriety of SBA's determination that Callejas failed to establish that it had a branch office in North Carolina.

The protest is denied.

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