



United States General Accounting Office
Washington, DC 20548

Comptroller General
of the United States

Decision

Matter of: Ocuto Blacktop & Paving Company, Inc.

File: B-284165

Date: March 1, 2000

Stephen L. Walthall, Esq., Kelly & Walthall, for the protester.
Dawn G. Phillips, Esq., and Frances S. Higgins, Esq., Army Corps of Engineers, for the agency.
Ralph O. White, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. The statutory limitation on General Accounting Office bid protest jurisdiction over challenges to the award of a task order under an indefinite-delivery/indefinite-quantity (ID/IQ) contract does not apply where the protester's challenge, in essence, raises the question of whether the solicitation for the underlying ID/IQ contract properly included environmental remediation work at closing military installations in light of a statutory requirement to provide a preference for such work to businesses located in the vicinity of those installations.
2. Despite the requirement that protests alleging improprieties in a solicitation must be filed before the time set for receipt of proposals in response to the solicitation, 4 C.F.R. § 21.2(a)(1) (1999), a protester's challenge to a solicitation is timely where the solicitation did not give sufficient notice to potential offerors that environmental remediation projects for military installations which were closed or realigned as part of the base realignment and closure process were included within the reach of the solicitation, and where the protester filed its challenge within 10 days of learning of the agency's interpretation of its solicitation.
3. Protester's contention that the use of preplaced regional ID/IQ contracts for environmental remediation at closed or realigned military installations violates a statutory requirement to provide a preference, to the greatest extent practicable, for such work to businesses located in the vicinity of such installations is sustained where the record does not show that the agency gave reasonable consideration to the practicability of the statutory preference before awarding such contracts.

DECISION

Ocuto Blacktop & Paving Company, Inc. protests the award of a contract to Cape Environmental Management Inc. by the Army Corps of Engineers for the capping of a landfill at the former Griffis Air Force Base (AFB) in Rome, New York. Ocutu complains that the Corps failed to consider awarding the work to businesses located in the vicinity of Griffis, in violation of section 2912 of the National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, which established a preference for contracting with local, small, and small disadvantaged businesses for work associated with closing or realigning military installations under a base closure law. This preference explicitly includes “contracts to carry out activities for the environmental restoration and mitigation” of such installations, as here. Pub. L. No. 103-160, § 2912(a) (set forth at 10 U.S.C. § 2687 note (1994)).

We sustain the protest.

BACKGROUND

Set forth below is a brief explanation of the posture of this protest; the statutory preference for using local businesses to perform environmental remediation work at closing military installations; and the Corps’s comprehensive approach to using regional task order contracts to perform such work regardless of whether it involves civilian sites, active military installations, or realigned former military installations. At the conclusion of this background, we will review the procedural and substantive issues raised by Ocutu’s protest.

On November 16, 1999, a representative of the Base Realignment and Closure (BRAC) Commission advised Ocutu of a pending award for a contract for capping a landfill at the former Griffis AFB to Cape Environmental, located in Waukegan, Illinois. The landfill capping contract was identified only as project no. JREZ-98-7002. On November 22, Ocutu filed a protest with our Office claiming that the award was made without regard to a statutory preference for the use of businesses located in the vicinity of the closed base.

The statutory preference Ocutu claims should be applied here is codified at 10 U.S.C. § 2687 note, and provides, in relevant part:

(a) Preference required.--In entering into contracts with private entities as part of the closure or realignment of a military installation under a base closure law, the Secretary of Defense shall give preference, to the greatest extent practicable, to qualified businesses located in the vicinity of the installation and to small business concerns and small disadvantaged business concerns. Contracts for which this preference shall be given shall include contracts to carry out activities for the environmental restoration and mitigation at military installations to be closed or realigned.

The regulations implementing this preference provide that before making a small business or small disadvantaged business set-aside determination for acquisitions in support of base closure or realignment, contracting officers shall determine “whether there is a reasonable expectation that offers will be received from responsible business concerns located in the vicinity of the military installation that is being closed or realigned.” Defense Federal Acquisition Regulation Supplement (DFARS) § 226.7103(a). When offers can be expected from local businesses, the regulation prohibits the use of set-asides of any kind, unless an offer is expected from a local business within the set-aside category.¹ Id. § 226.7103(c).

On December 1, the Corps asked that our Office dismiss Ocuto’s protest, explaining that the alleged pending “contract” challenged by Ocuto is, in fact, the first intended task order under a not-yet-awarded indefinite-delivery/indefinite-quantity (ID/IQ) contract for environmental remediation throughout the geographic area of Environmental Protection Agency (EPA) Region II. The Corps states that it intends to award both the base ID/IQ contract, and the first task order for the landfill cap, simultaneously.

The Corps’s ID/IQ contract here is part of a joint program where the Corps provides contracting support to help the EPA meet its needs for hazardous, toxic, and radioactive waste remediation efforts at civil or military locations. Agency Report (AR) at 1; Acquisition Plan at 1. The Corps explains that until the mid-1990s it attempted to accomplish this work through site-specific contracts, but concluded that a site-specific approach was “unacceptable to the government in terms of cost, staff resources, and time.” AR, Cover Letter, at 1. Thus, the Corps now uses regional preplaced ID/IQ remedial action contracts (PRAC) for environmental remediation projects. Id. The Corps explains that although BRAC environmental remediation projects may be performed under any of the PRACs, none of them are limited to BRAC projects.²

¹ The statute creates a preference not just for local businesses (as Ocuto argues) but also for small, and small disadvantaged businesses. However, the statute does not establish a priority among the three preferences. The DFARS resolves this ambiguity in favor of local businesses by barring set-aside decisions unless a local business is within the set-aside category. The DFARS resolution of this ambiguity appears consistent with the limited legislative history of this provision, which was added as a floor amendment to the Fiscal Year 1994 Defense Authorization Bill in the House of Representatives. 139 Cong. Rec. H6637 (daily ed. Sept. 13, 1993) (statement of Rep. Snowe).

² An example of the Corps’s approach to implementing the statutory preference for using local businesses to perform environmental remediation work at closing or realigned military installations prior to using regional ID/IQ contracts is available in our decision in GZA Remediation, Inc., B-272386, Oct. 3, 1996, 96-2 CPD ¶ 155. In

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The Corps issued three solicitations for PRACs that are relevant here. All three solicitations cover EPA Region II³ and the Northwest Division of the Corps of Engineers.⁴ One solicitation was issued on an unrestricted basis (No. DACW41-98-R-0012), the second was set aside for small businesses (No. DACW41-98-R-0013), and the third was reserved for small disadvantaged businesses involved in the Small Business Administration's section 8(a) set-aside program (No. DACW41-98-R-0014). The landfill project at the former Griffis AFB is to be ordered under one of two contracts under the 8(a) set-aside solicitation (contract no. -0014).⁵ Award of this ID/IQ contract has not been made.

PROCEDURAL ISSUES

Jurisdiction

The Corps first argues that our Office has no jurisdiction over Ocuto's protest because Ocuto is challenging the award of a task order under an ID/IQ contract. 10 U.S.C. § 2304c(d) (1994), provides that "[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."

While we recognize that Ocuto's challenge, on its face, focuses on the landfill project at the former Griffis AFB, Ocuto's complaint, in essence, raises the question of whether the solicitation for the underlying ID/IQ contracts properly includes environmental remediation work at closing military installations in light of the statutory requirement to provide a preference for such work to businesses located in the vicinity of these installations. Thus, Ocuto is mounting a challenge to the terms of the underlying solicitation, not--as the Corps argues--a challenge to a delivery order, and the limitation on our bid protest jurisdiction in 10 U.S.C. § 2304c(d)

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that procurement, the Corps included an evaluation factor in the solicitation related to geographical location to implement the statutory preference. Id. at 4-5.

³ EPA Region II includes New Jersey, New York, and the territories of Puerto Rico and the U.S. Virgin Islands. AR at 1.

⁴ The Corps's Northwest Division includes Washington, Oregon, Idaho, Montana, Wyoming, North Dakota, South Dakota, Nebraska, Kansas, Missouri, and parts of Minnesota, Colorado, Iowa, Nevada, and Utah. Id.

⁵ Of the two contracts to be awarded pursuant to the 8(a) set-aside solicitation, one covered the Corps's Northwest Division; this contract has already been awarded. The other--the contract at issue here--will cover EPA Region II. AR at 2.

therefore does not apply. Since we are charged by statute with reviewing protests alleging that a solicitation does not comply with applicable procurement statutes and regulations, see 31 U.S.C. §§ 3552, 3554(b)(1) (1994), we conclude that Ocuto's protest is properly within our bid protest jurisdiction.

Timeliness

The Corps also argues that, to the extent we are inclined to view Ocuto's protest as a challenge to the solicitation, Ocuto's protest is untimely. The Corps states that Ocuto was included on its bidders' list for all three of the ID/IQ solicitations, that a copy of each solicitation was mailed to Ocuto, and that the solicitations should have put Ocuto on notice that BRAC environmental remediation projects were covered by the solicitations. Under our Bid Protest Regulations, a protest based upon alleged improprieties in a solicitation which are apparent prior to the time set for receipt of initial proposals must be filed before the time set for receipt of such proposals. 4 C.F.R. § 21.2(a)(1) (1999). Since proposals in response to the solicitation for the ID/IQ contract here were due not later than May 19, 1998, the Corps contends that Ocuto cannot now challenge the terms of the solicitations for these ID/IQ contracts for environmental remediation. We disagree.

While Ocuto claims that it does not recall receiving any of the three solicitations at issue here, we need not reach a conclusion on whether Ocuto received them (or had constructive notice of them), as we do not believe that the solicitations gave sufficient notice to potential offerors that BRAC environmental remediation projects covered by section 2912 of Pub. L. No. 103-160 were included within their reach. All three solicitations stated, in relevant part:

This contract for environmental response actions and associated investigation and removal activities will include service and construction activities mandated by the Defense Environmental Restoration Program (DERP), Superfund, Formerly Used Sites Remedial Action Program (FUSRAP), and other environmental laws and regulations requiring support activities for military installations, Corps' civil works projects, and work for other agencies. The DERP projects will include Installation Restoration Program (IRP) activities on active Army and Air Force installations and on Formerly Used Defense Sites (FUDS).

RFP DACW41-98-R-0014, at C-1. The listed programs identified in these solicitations--DERP, Superfund, and FUSRAP--do not explicitly include remediation work associated with the closure or realignment of military installations under the base closure laws.⁶ Thus, the solicitations here do not provide clear notice that the

⁶ The programs specifically identified in the solicitation are distinct from environmental cleanups associated with installations that are being closed or
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Corps will use these contracts to procure environmental remediation work at BRAC sites. Under these circumstances, we will not conclude that Ocuto should have been aware of the agency's interpretation of these solicitations, and the protest will be considered timely as it was filed within 10 days of when Ocuto became aware of its basis of protest. 4 C.F.R. § 21.2(a)(2); see, e.g., Vitro Servs. Corp., B-233040, Feb. 9, 1989, 89-1 CPD ¶ 136 at 3 n.1.

ANALYSIS

As stated above, Ocuto argues that the Corps's use of regional ID/IQ contracts to perform environmental remediation projects at closing or realigned military installations is inconsistent with the statutory preference for businesses located in the vicinity of these facilities. In addition, Ocuto argues that the Corps's actions violate the DFARS subpart 226.71 procedures established to implement the preference. In response, the Corps argues that the statute does not require a preference, but states only that a preference should be provided "to the greatest extent practicable." Section 2912(a), Pub. L. No. 103-160 (set forth at 10 U.S.C. § 2687 note). The Corps essentially argues that implementing the statutory preference for businesses located in the vicinity of closing or closed military installations in the award of ID/IQ contracts is impracticable. The Corps maintains that it is satisfying the terms of the statute by requiring that Cape Environmental subcontract with local businesses in completing the landfill capping project.⁷ In this regard, the Corps notes that a district court has previously ruled that implementing the preference for local contractors in any given case is a discretionary duty assigned to the Secretary of Defense, not a mandatory one. Ocuto Blacktop and Paving Co., Inc. v. Perry, 942 F.Supp. 783, 787 (N.D.N.Y. 1996).⁸

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realigned under the BRAC process. See Environmental Cleanup: Defense Funding Allocation Process and Reported Funding Impacts, (GAO/NSIAD-99-34, Nov. 16, 1998) at 1.

⁷ The Corps offers no response to Ocuto's allegation that the agency is violating the DFARS subpart 226.71 regulations, although Ocuto raised this contention in its initial protest, in response to the agency request for dismissal, and in its comments on the agency report.

⁸ The Corps also argues that the court decision resolves the substance of this protest, and should control the outcome of our decision here. We disagree. The court dismissed Ocuto's mandamus action on the basis that the district courts will not use their mandamus jurisdiction to compel discretion to be exercised in a particular manner, but will rather compel the official to carry out his or her duty to exercise such discretion. Ocuto Blacktop and Paving Co., Inc. v. Perry, *supra*. Given other contracting opportunities available to local businesses in the vicinity of the former Griffis AFB, the court was unable to conclude that mandamus jurisdiction was

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Although it is true, as the Corps argues, that the statutory preference for local businesses is not mandatory, the statute does require that the Corps give reasonable consideration to the practicability of the statutory preference. In our view, where Congress directs that a preference be given to the greatest extent practicable, an agency must either provide the preference or articulate a reasoned explanation of why it is impracticable to do so. Here, the Corps has done neither.

Specifically, while the Corps's procurement strategy may address the statute's other goals of preferences for small and small disadvantaged business concerns, there is nothing in this record to indicate that the Corps considered any of the various possible methods for implementing the statutory preference for local businesses. For example, with respect to the possibility of "breaking out" the BRAC-related work and contracting for it separately (the solution that Ocuto advocates), the Corps has not (as explained below) provided an adequate explanation of why that alternative is not practicable. In addition, even if the Corps could show that "breaking out" the work is not practicable, we believe the statute required the Corps to consider whether other alternatives could maximize the use of local businesses. These alternatives might include, for example, creating a schedule of regional ID/IQ contractors, to include local businesses that would receive a preference when the agency procures work at nearby BRAC sites, without those businesses having to commit to performing work in other locations; or including a contractual requirement in the ID/IQ contracts directing contractors to subcontract with local business for a significant part of the BRAC-related work. Without a reasoned analysis of the various possibilities, however, we cannot find that the Corps satisfied its duty to give a preference to local businesses in the BRAC-related work to the greatest extent practicable.

We recognize that the Corps could conclude, after reasoned analysis, that all of these potential solutions (and others) are impracticable. That analysis would presumably address factors such as the agency's budgeting and staffing constraints, the degree of local business interest and capability, and the number of projects subject to the statutory preference for which the Corps expects to award contracts. None of these considerations, however, are addressed in the current record.

In its sweeping rejection of Ocuto's proposed solution to the statutory preference--that the Corps contract separately for its BRAC-related work--the Corps contends that it lacks sufficient personnel to hold a separate competition for each of the environmental remediation projects for which it contracts. This response overstates

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appropriate. 942 F.Supp. at 788. We also note that the court was not reviewing the Corps's subsequent decision to use regional ID/IQ contracts to meet its need for these services because any other solution was deemed impracticable.

the reach of Ocuto's complaint. The ID/IQ contracts at issue here cover a broad range of environmental remediation efforts. These contracts are available to the Corps and the EPA for hazardous, toxic, and radioactive waste remediation efforts at any civil or military location anywhere in EPA's Region II--i.e., New York, New Jersey, the U.S. Virgin Islands, or Puerto Rico. (In future cases, when the Corps does not use the 8(a) set-aside contract at issue here, orders can also be placed for sites anywhere in the Corp's Northwest Division.) Thus, the universe covered by these regional ID/IQ PRACS would appear to be significantly larger than the subset of remediation projects on closed or realigned military installations covered by the BRAC process. Without providing any evidence indicating what share of the overall scope of this procurement consists of BRAC-related work, we think the Corps cannot establish that the preference here is impracticable.⁹

In this regard, we note that the Corps's use of ID/IQ PRACs will never result in local businesses receiving preferential consideration for the award of a contract for environmental remediation at a closed or realigned military installation. This is because the preplaced regional ID/IQ contracts will have already been awarded, and because the award decision was made without regard to the location of the contractor.¹⁰ Moreover, the Corps's practice will never result in a local business receiving the award of such a contract, except by happenstance. Under these circumstances, we fail to see how these solicitations comply with either the letter, or the spirit, of the statutory scheme requiring a preference for using local businesses to provide such work, and it is inconsistent with the statutory scheme to use these solicitations without consideration of alternative approaches that could create a more meaningful preference for local businesses.

In addition, the Corps's approach of having the contracting officer require the ID/IQ contractor to use local subcontractors in performing this particular task order does not resolve this solicitation challenge. There is no requirement in the solicitations, or in the resulting ID/IQ contracts, to ensure a preference for local subcontractors in future cases where the agency is ordering environmental remediation work at closed or realigned military installations. We note that the Corps's willingness to mandate the use of local subcontractors does suggest, however, that the agency does not consider such an approach impracticable.

⁹ Even if it could show that the BRAC work represents a large proportion of the work covered by these solicitations, the agency would still have failed to consider alternative solutions that, in our view, must be considered when a statute directs an agency to provide a preference "to the greatest extent practicable."

¹⁰ We note that, at this juncture, the Corps may not even be aware of future orders for environmental remediation at military installations that are closed or closing as a result of the BRAC process that will be placed against its ID/IQ contracts.

As a final matter, the Corps's approach to procuring environmental remediation services at closed or closing military installations does not comply with the requirements of DFARS subpart 226.71. As stated above, DFARS § 226.7103(a) requires contracting officers to determine whether there is a reasonable expectation of offers from businesses located in the vicinity of the military installation being closed or realigned. There is nothing in the record here to indicate that the contracting officer attempted to make any such finding. If Ocuto's interest had been considered by the contracting officer, the regulation would have prohibited the use of the 8(a) set-aside ID/IQ contract for the remediation project here, unless there was also a local small disadvantaged business interested in performing this work. DFARS § 226.7103(c).

RECOMMENDATION

We recommend that the Corps review its approach in these procurements in order to comply with the requirements of DFARS subpart 226.71 and with the statutory mandate that it give preference, to the greatest extent practicable, to qualified local businesses in contracting for environmental remediation work at military installations being closed or realigned pursuant to the BRAC process. If, after due consideration to alternative methods of implementing such a preference, including those discussed above, the Corps concludes that it is not practicable to give any preference to local businesses, that conclusion must be documented in a reasoned analysis. If the Corps concludes that it is feasible to implement the statutory preference for local businesses, it should revise the solicitations to incorporate the preference.

We also recommend that the protester be reimbursed the reasonable costs of filing and pursuing its protest, including attorneys' fees. 4 C.F.R. § 21.8(d)(1). In accordance with 4 C.F.R. § 21.8(f)(1), Ocuto's certified claim for such costs, detailing the time expended and the costs incurred, must be submitted directly to the agency within 60 days after receipt of this decision.

The protest is sustained.

Comptroller General
of the United States