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United States General Accounting Office
Washington, DC 20548

Comptroller General
of the United States

Decision

Matter of: LBM, Inc.

File: B-290682

Date: September 18, 2002

Frank Moody for the protester.

Capt. Charles K. Bucknor, Ralph J. Frick, Esq., and Raymond M. Saunders, Esq., Department of the Army, and Audrey H. Liebross, Esq., and John W. Klein, Esq., Small Business Administration, for the agencies.

Guy R. Pietrovito, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. The statutory limitation on General Accounting Office's bid protest jurisdiction over challenges to the award or proposed award of a task order under an indefinite-delivery/indefinite-quantity contract does not apply to a protest challenging the transfer to that contract vehicle of an acquisition for services that had been previously set aside exclusively for small businesses without regard to the Federal Acquisition Regulation § 19.502-2(b) requirements pertaining to small business set-asides; this is a challenge to the terms of the underlying solicitation.

2. Protest that the transfer of the acquisition of motor pool transportation services at a particular installation to a multiple-award, indefinite-delivery/indefinite-quantity (ID/IQ) task order contract violates the requirement in Federal Acquisition Regulation § 19.502-2(b) to set aside acquisitions for small businesses where there is a reasonable expectation of receiving fair market price offers from at least two responsible small business concerns is sustained, where the record shows that the agency did not consider the application of this regulation in transferring the acquisition of these services to the ID/IQ contract, even though this work had been set aside for small businesses, and there were at least two small businesses who have performed these services.

DECISION

LBM, Inc., a small business concern, protests the decision of the Department of the Army Atlanta Contracting Center (AACC) to acquire transportation motor pool services at Fort Polk, Louisiana, under the Logistical Joint Administrative

Management Support Services (LOGJAMSS) contracts, which are multiple-award, indefinite-delivery, indefinite-quantity (ID/IQ) task order contracts. LBM complains that these services, which were previously provided exclusively by small business concerns, should be set aside for small business competition.

We sustain the protest.

Transportation motor pool services, including among other things dispatching and operating vehicles and minor maintenance, have been performed exclusively by small businesses, including LBM, under small business set-asides at Fort Polk over the last 10 years. The most recent contract for these services was awarded to another small business concern in 1997 and expired on July 31, 2002 (after the date this protest was filed).

In 1996, the Army instituted a “regionalization” contracting approach to “achieve savings resulting from improved processes and economies of scale.” Contracting Officer’s Statement at 1; see <www.forscom.army.mil/contract/force_xxi_cont.htm>. Under this approach, the Army established contracting centers to regionalize the award of contracts over \$500,000 and to award consolidated or master contracts. The AACC is a contracting center for various Army facilities, including Fort Polk.¹

In implementing the Army’s contract regionalization plan, the AACC developed LOGJAMSS as “a fast and flexible contract vehicle for logistical services.” Contracting Officer’s Statement at 2. According to the Army, “[t]he LOGJAMSS scope of work encompasses a wide range of logistical functions and supporting tasks,” and the “16 task areas [comprising LOGJAMSS] are broad in scope due to the inherently uncertain nature of requirements and to provide flexibility in determining the exact tasks associated with a logistical function.” Id. at 4. For example, the task areas included services ranging from storing, issuing, and inventorying supplies to acquiring, supporting, and maintaining office automation systems and supporting local and wide area networks. Agency Report, Tab 10, LOGJAMSS Task Areas. However, no specific projects at particular locations were identified. In 1998 and 1999, the AACC awarded nine contracts under LOGJAMSS to five large businesses, two small businesses, and two small disadvantaged businesses. In making awards

¹ The AACC solicits and awards contracts in support of Headquarters, U.S. Army Forces Command (FORSCOM); Headquarters, Third U.S. Army; Headquarters, First U.S. Army; and Headquarters, U.S. Army Reserve Command. The AACC also provides support for the U.S. Army Garrisons at Forts McPherson (East Point) and Gillem (Forest Park), Georgia, and reimbursable customers in Atlanta, Georgia (Army Research Laboratory, located at Georgia Tech). Finally, the AACC provides centralized contracting support for FORSCOM activities nation-wide and will provide regionalized support for Fort Dix, New Jersey; Fort Irwin, California; Fort Polk, Louisiana; and Fort McCoy, Wisconsin. <www.forscom.army.mil/aacc>.

under LOGJAMSS, the Army coordinated with the Small Business Administration (SBA), whose procurement center representative accepted “for competition in the 8(a) Program [the Army’s] offer for [LOGJAMSS].”² Agency Report, Tab 8, Small Business Coordination Record (Mar. 3, 1998).

As part of the Army’s regionalization plan, the follow-on requirement for Fort Polk’s motor pool services was forwarded to the AACC for procurement. “Through coordination between the [Directorate of Contracting], Fort Polk and [the AACC], Fort Polk agreed to transfer the requirement to [the AACC] for regional processing under LOGJAMSS.” Contracting Officer’s Statement in Support of Army’s Motion for Summary Dismissal (June 14, 2002) at 1. During April and May 2002, the contracting officer evaluated whether these services should be transferred to the LOGJAMSS contracts. The contracting officer concluded that the motor pool services were within the scope of the LOGJAMSS statement of work and that “the LOGJAMSS suite of contract[s] would result in the best-qualified contractor at a fair and reason[able] price.” Agency Report, Tab 7, Findings and Determination to Place Polk Transportation Motor Pool under LOGJAMSS (June 14, 2002), at 3. She further found that “adding the [transportation motor pool] requirement did not increase the overall value of the LOGJAMSS contract nor increase the period of its performance.” Contracting Officer’s Statement in Support of Army’s Motion for Summary Dismissal (June 14, 2002) at 2. The contracting officer estimated that the Fort Polk motor pool services requirement would be approximately \$10 million for the total 5-year performance period.³ Contracting Officer’s Statement at 6. This is in contrast to the more than a quarter of a billion dollars that has already been ordered under the LOGJAMSS contracts. Agency Report, Tab 13, Agency Chart Showing the Value of LOGJAMSS Orders.

Having decided to transfer the Fort Polk work to the ID/IQ contracts, on May 31, the AACC solicited proposals from the LOGJAMSS contractors for the award of a fixed-price task order for a base year with 4 option years to perform motor pools services at Fort Polk with a June 26 closing date for receipt of proposals. Agency Report, Tab 4, Electronic Mail (E-mail) from the AACC to LOGJAMSS Contractors

² The SBA notes that, in concurring with the Army’s decision to enter into LOGJAMSS contracts, the SBA did not know that LOGJAMSS would include the performance of transportation motor pool services. SBA Report (July 25, 2002) at 10.

³ The LOGJAMSS contracts provide that for task orders under \$3 million, the contracting officer may direct award to any contractor, for task orders between \$3 million and \$7 million the contracting officer may set aside the requirement for small business or section 8(a) contractors or conduct a competition among the nine contractors, and for task orders over \$7 million the contracting officer would ordinarily conduct a competition among the nine contractors.

(May 31, 2002). The Army did not coordinate with, or notify, the SBA of its intent to withdraw the Fort Polk motor pool services from exclusive small business competition and to transfer these services to LOGJAMSS contracts. SBA Report (July 25, 2002) at 2.

Meanwhile, on June 5, 2002, LBM, realizing the current small business set-aside contract would shortly be expiring, contacted the Army to ask when a new solicitation would be issued for the motor pool services at Fort Polk. LBM was informed “that the [Fort Polk motor pool transportation services] was now a part of the . . . LOGJAMSS [contracts].” Agency Request for Dismissal (June 17, 2002) at 2. LBM protested to our Office on June 11.

The crux of LBM’s complaint is that the Army should have continued to set aside the transportation motor pool services requirement at Fort Polk exclusively for small businesses, and that the Army improperly failed to coordinate with the SBA in deciding to withdraw these services from exclusive small business participation and instead to transfer the services to the LOGJAMSS contracts.

The Army requests dismissal of the protest because, in its view, the protest challenges the proposed award of a task order under a ID/IQ contract. Under 10 U.S.C. § 2304c(d) (2000):

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.

LBM responds that it is not challenging the issuance or proposed issuance of an order under the LOGJAMSS contracts, but is complaining that the Fort Polk motor pool services requirement should be set aside for exclusive small business competition and that the requirement should not have been removed from exclusive small business competition without coordination with the SBA.

We agree with LBM that the limitation on our bid protest jurisdiction in 10 U.S.C. § 2304c(d) does not apply here. Contrary to the Army’s arguments, LBM is not challenging the proposed issuance of a task order for these services, but is raising the question of whether work that had been previously set aside exclusively for small businesses could be transferred to LOGJAMSS, without regard to the Federal Acquisition Regulation (FAR) § 19.502-2(b) requirements pertaining to small business set-asides. This is a challenge to the terms of the underlying LOGJAMSS solicitation and is within our bid protest jurisdiction. See N&N Travel & Tours, Inc. et al., B-285164.2, B-285164.3, Aug. 31, 2000, 2000 CPD ¶ 146 at 6. In our view, the limitation on our bid protest jurisdiction was not intended to, and does not, preclude protests that timely challenge the transfer and inclusion of work in ID/IQ contracts without complying with applicable laws or regulations, but was to preclude protests in connection with the actual or proposed issuance of an individual task or delivery

orders under those contracts. This view is consistent with the legislative history to this particular section, which was enacted in the Federal Acquisition Streamlining Act of 1994 (FASA), Pub. L. No. 103-355, 108 Stat. 3243, 3253. Specifically, the Joint Explanatory Statement of the Committee of Conference states:

In addition, the conference agreement would provide general authorization for the use of task and delivery order contracts to acquire goods and services other than advisory and assistance services. The conferees note that this provision is intended as a codification of existing authority to use such contractual vehicles. All otherwise applicable provisions of law would remain applicable to such acquisitions, except to the extent specifically provided in this section.

H.R. Conf. Rep. No. 103-712, at 181 (1994). The requirements of the Small Business Act and its implementing regulations, including the predecessor regulation to FAR § 19.502-2(b), were applicable to acquisitions prior to the enactment of FASA, and nothing in that statute authorizes the transfer of acquisitions to ID/IQ contracts in violation of those laws and regulations.

The Army argues nevertheless that LBM's protest of the transfer of the Fort Polk motor pool services to the LOGJAMSS contract should be dismissed as untimely. The Army believes that LBM should have been on notice from the LOGJAMSS solicitation that the Fort Polk motor pool services "could" be ordered under the LOGJAMSS contracts and therefore its protest after the award of the LOGJAMSS contracts is untimely. We disagree.

We have recognized that the increasing use of ID/IQ contracts with very broad and often vague statements of work may place an unreasonable burden upon potential offerors, who may be required to guess as to whether particular work, for which they are interested in competing, will be acquired under a particular ID/IQ contract. See Valenzuela Eng'g, Inc., B-277979, Dec. 9, 1997, 98-1 CPD ¶ 51 (Letter to the Acting Sec'y of the Army, Jan. 26, 1998, at 2). This burden may be particularly problematic for small businesses. Id. In our view, it is unreasonable to require a small business that believes that one specific acquisition should continue to be set aside for small businesses to identify the possibility, at the time proposals for ID/IQ contracts to perform a broad and undefined scope of work are solicited, that the specific, and relatively small, acquisition it is interested in may ultimately be transferred to the ID/IQ contracts.

The breadth and vagueness of the LOGJAMSS scope of work illustrate this, since it encompassed a "wide range of logistical functions and supporting tasks" and was undefinitized at the time the LOGJAMSS contracts were solicited.⁴ Accordingly, we

⁴ At the time the Army conducted the acquisition that resulted in the awards of LOGJAMSS contracts the agency did not know what specific tasks would be

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conclude that LBM could not reasonably be aware, and required to protest, at the time the LOGJAMSS contracts were being competed (and apparently years before the Army considered using those contracts for the Fort Polk motor pool services), that the broad and nonspecific scope of work in the LOGJAMSS solicitation could be improperly used as a vehicle for the agency to perform the motor pool services at Fort Polk without first taking the steps legally required regarding a possible further acquisition of that work under a small business set-aside.

Our conclusion regarding the timeliness of the protest is buttressed by the fact that the Fort Polk motor pool services at issue here have been acquired as a total small business set-aside for the last 10 years, so that, in our view, LBM could reasonably expect that the Army would comply, as is required, with applicable regulations in determining whether these motor pool services at Fort Polk (as opposed to other locations that may or may not have been set aside exclusively for small businesses) would continue to be acquired by means of a total small business set-aside.⁵ The record shows that the Army itself did not decide to transfer these services at Fort Polk to the LOGJAMSS contracts until more than 3 years after the award of the first of the LOGJAMSS contracts. See Agency Report, Tab 7, Findings and Determination to Place Polk Transportation Motor Pool under LOGJAMSS (June 14, 2002). It was only at the point that the agency decided to withdraw the Fort Polk motor pool services from the small business set-aside program and to transfer them to the LOGJAMSS contracts that the analysis required by applicable regulations, that is, as discussed below, FAR § 19.502-2(b), became relevant. Until this time, LBM could have every expectation that the Army would comply with applicable law and regulations in deciding whether to continue to set aside these services for small businesses.

In sum, we find, given the breadth and vagueness of the LOGJAMSS scope of work and given that the Fort Polk motor pool services had previously been exclusively set-aside for small businesses, that LBM cannot reasonably be viewed as on notice that the Army would transfer this work to LOGJAMSS without consideration of FAR § 19.502-2(b). Where an alleged solicitation impropriety is not apparent, a protest filed within 10 days of when the protester becomes aware, or should have become

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acquired under the contracts. See Agency Report, Tab 8, LOGJAMSS Acquisition Plan, at 5 (“Specific tasks required are currently unknown; therefore, [the agency] will address cost issues for the task orders to be issued under this contract by establishing fixed rates and/or fixed loaded rates, requiring approved cost accounting systems for those task orders that require that level of support, and reviewing and approving subcontract arrangements.”)

⁵ It may be that if the LOGJAMSS solicitation had identified motor pool transportation services at Fort Polk, LBM would have had reasonable notice of its protest allegation.

aware, of its protest basis is timely.⁶ See N&N Travel Tours, Inc., *supra*, at 7; Ocuto Blacktop & Paving Co., Inc., B-284165, Mar. 1, 2000, 2000 CPD ¶ 32 at 6; see also Vitro Servs. Corp., B-233040, Feb. 9, 1989, 89-1 CPD ¶ 136 n.1 (protest filed within 10 days of the date the protester learned of an agency's interpretation of a latent solicitation ambiguity is timely). A protester need not protest until it has knowledge that the agency is intending action that is believed to be incorrect or inimical to the protester's interests. Dock Express Contractors, Inc., B-227865.3, Jan. 13, 1988, 88-1 CPD ¶ 23 at 6. Moreover, we resolve doubts over issues of timeliness in favor of protesters. See Complere Inc., B-257946, Nov. 23, 1994, 94-2 CPD ¶ 207 at 4 n.3.

Here, the record shows that LBM first learned the basis of its protest on June 5, 2002, when it became aware that the agency would be transferring the Fort Polk motor pool transportation services to LOGJAMSS, and LBM timely protested this action to our Office within 10 days of that date. 4 C.F.R. § 21.2(a)(2) (2002); Valenzuela Eng'g, Inc., B-277979, Dec. 9, 1997, 98-1 CPD ¶ 51 at 4-5.

With respect to LBM's contention that the motor pool services at Fort Polk should have been set aside exclusively for small businesses, we agree.

Contracting officers generally are required to set aside for small business all "acquisitions" exceeding \$100,000 if there is a reasonable expectation of receiving fair market price offers from at least two responsible small business concerns. FAR § 19.502-2(b); N&N Travel & Tours, Inc. et al., *supra*, at 8. We regard such a determination as a matter of business judgment within the contracting officer's discretion, which we will not disturb absent a showing that it was unreasonable. Neal R. Gross & Co., Inc., B-240924.2, Jan. 17, 1991, 91-1 CPD ¶ 53 at 2. However, a contracting officer must make reasonable efforts to ascertain whether it is likely that offers will be received from at least two small businesses capable of performing the work. Mortara Instrument, Inc., B-272461, Oct. 18, 1996, 96-2 CPD ¶ 212 at 3. Our Office will review the record in a protest to determine whether a contracting officer has made such efforts. Library Sys. & Servs./Internet Sys., Inc., B-244432, Oct. 16, 1991, 91-2 CPD ¶ 337 at 7.

Here, there is no evidence in the record that the agency considered whether these services should be set aside exclusively for small business participation. Moreover,

⁶ To the extent that our decision in Hospital Klean, Inc., B-286791, Dec. 8, 2000, 2000 CPD ¶ 205, could be read to require small business offerors to protest the terms of a general and nonspecific statement of work in an ID/IQ procurement solicitation in order to raise a timely challenge to the potential transfer of work at a particular facility under that broad statement of work without compliance with applicable small business regulations, that case will no longer be followed.

the Army does not dispute that there are at least two responsible small business concerns capable of competing for the Fort Polk motor pool services, nor does it contend that there was not a reasonable expectation of receiving fair market price offers. In fact, the record reflects that there are at least two responsible small business concerns capable of performing, that is, LBM and the small business contractor that most recently performed the services under a set-aside contract.

Nevertheless, the Army argues that FAR § 19.502-2(b) (the so-called “rule of two”) does not apply to task orders issued under FAR Subpart 16.5, but only to acquisitions under FAR Parts 13, 14, and 15. See Army Response to SBA Report (Aug. 2, 2002) at 4-7. In the agency’s view, FAR § 19.502-2 only applies “in the contract formation part of the acquisition process,” and not to “a post-award ordering action.” Id. at 4, 7. The agency also argues that, in any event, the “rule of two” would not apply because “under LOGJAMSS the agency has already exceeded its small business goal of 23% by a wide margin.” Id. at 7. The Army finally argues that because the SBA representative approved LOGJAMSS, it did not need to comply with any further SBA requirements.

We find unpersuasive the Army’s arguments, which mischaracterize the protest as a challenge to the proposed award of a task order under the existing LOGJAMSS contracts. As explained above, LBM’s challenge is to the agency’s acquisition planning in deciding to transfer the Fort Polk motor pool transportation services to LOGJAMSS without considering applicable law and regulation pertaining to small businesses.

Also, contrary to the Army’s arguments, we believe that FAR § 19.502-2(b) applies to the Army’s acquisition of the motor pool services at Fort Polk. By its express terms, FAR § 19.502-2(b) states that “the rule of two” is applicable to “any acquisition over \$100,000.” Acquisition is defined by the FAR to mean:

the acquiring by contract with appropriated funds of supplies or services (including construction) by and for the use of the Federal Government through purchase or lease, whether the supplies or services are already in existence or must be created, developed, demonstrated, and evaluated. Acquisition begins at the point when agency needs are established and includes the description of requirements to satisfy agency needs, solicitation and selection of sources, award of contracts, contract financing, contract performance, contract administration, and those technical and management functions directly related to the process of fulfilling agency needs by contract.

FAR § 2.101. Under this broad definition, the agency’s purchasing the Fort Polk motor pool services by contract with appropriated funds is an “acquisition,” subject to FAR § 19.502-2(b), regardless of the fact that the agency anticipated acquiring those services through their transfer to the LOGJAMSS scope of work. See

Valenzuela Eng'g, Inc., supra (Letter to the Acting Sec'y of the Air Force, Jan. 26, 1998, at 2-3 n.1). Had the agency complied with the requirements of FAR § 19.502-2(b), it might have concluded that the LOGJAMSS contracts were not the appropriate vehicle for this acquisition. Whatever the outcome of the FAR § 19.502-2(b) analysis, though, the agency's intent to use a task order under LOGJAMSS as the contract vehicle did not eliminate the legal requirement that the agency undertake that analysis.

We also do not agree with the Army that it was not required to comply with FAR § 19.502-2(b) because the agency has already met or exceeded its small business participation goals. As noted by the SBA in its report, the percentage of an agency's contracts that small businesses are receiving is not relevant to whether FAR § 19.502-2(b) applies. We are unaware of any provision in law or regulation (and the Army has not cited any authority to us) that permits an agency to ignore FAR § 19.502-2(b), based upon the agency's belief that its small business goals have already been satisfied. In fact, FAR § 19.502-5(f) specifically identifies as an insufficient cause for not setting aside an acquisition the fact that "[s]mall business concerns are already receiving a fair proportion of the agency's contracts for supplies and services."

Finally, the fact that the SBA "accepted" some aspects of LOGJAMSS did not exempt the Army from its obligations under FAR. These particular Fort Polk motor pool services, added more than 3 years later, were not specifically contemplated to be included under LOGJAMSS and the SBA did not advise the Army that these services did not need to be set aside. See Valenzuela Eng'g, Inc., supra (Letter to the Acting Sec'y of the Air Force, Jan. 26, 1998, at 4).

In short, we find that Army violated FAR § 19.502-2(b) when the agency did not consider continuing to acquire the Fort Polk motor pool services under a total small business set-aside, and we sustain LBM's protest on this basis.⁷

⁷ LBM also complains that transferring the Fort Polk motor pool services to the LOGJAMSS contracts is improper bundling under the Small Business Act and that the Army improperly "bundled" without notifying the SBA. Given that there are four small business concerns that hold LOGJAMSS contracts and that can compete for the Fort Polk motor pool services, we are unable to find that consolidating these services into the LOGJAMSS contracts would make it "likely to be unsuitable for award to a small-business concern," as required by the Small Business Act. See 15 U.S.C. § 631(j)(3); FAR § 2.101 (definition of bundling); Phoenix Scientific Corp., B-286817, Feb. 22, 2001, 2001 CPD ¶ 24 at 7. For the same reason, we also do not find any statute or regulation that specifically requires the Army to notify the SBA of the addition of these motor pool services to the LOGJAMSS contracts. Such notification is required where "a proposed procurement includes in its statement of work goods or services currently being performed by a small business, and if the proposed procurement is in a quantity or estimated dollar value the magnitude of

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We recommend that the Army consider whether, in accordance with FAR § 19.502-2(b), the transportation motor pool services at Fort Polk should be set aside exclusively for small business participation. We also recommend that LBM be reimbursed the reasonable costs of filing and pursuing the protest. 4 C.F.R. § 21.8(d)(1). LBM should submit its certified claim for costs, detailing the time expended and costs incurred, directly to the Army within 60 days after receipt of this decision.

Anthony H. Gamboa
General Counsel

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which renders small business prime contract participation unlikely . . .” See 15 U.S.C. § 644(a); see also FAR § 19.202-1(e)(1). As noted above, we are unable to find here that small business participation is unlikely. While it is true that the Small Business Act requires procuring agencies to cooperate, and consult, with the SBA in carrying out the requirements of the Small Business Act, see 15 U.S.C. § 644(k)(8), we find no specific statute or regulation requiring notification of the SBA in this case.