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Comptroller General
of the United States

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Decision

Matter of: Executive Protective Security Service, Inc.

File: B-299954.3

Date: October 22, 2007

David M. Thomas II, Esq., Balch & Bingham LLP, for the protester.

Holly A. Roth, Esq., McDermott Will & Emery, for Security Consultants Group, Inc., an intervenor.

Audrey H. Liebross, Esq., Department of Homeland Security, for the agency.

Louis A. Chiarella, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging agency's determination under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. § 5150, regarding eligibility of firm selected to receive task order is sustained where the agency unreasonably concluded that the firm was doing business primarily in the designated set-aside location.

DECISION

Executive Protective Security Service, Inc. (EPSS) protests the issuance of a task order to Security Consultants Group, Inc. (SCG) pursuant to request for quotations (RFQ) No. HSFEHQ-07-Q-0039, issued by the Federal Emergency Management Agency (FEMA), Department of Homeland Security (DHS), for armed guard services for FEMA housing sites in the state of Mississippi. EPSS argues that the agency's determination, pursuant to the Robert T. Stafford Disaster Relief and Emergency Assistance Act, as amended, 42 U.S.C. § 5121 *et seq.* (2000) (the Stafford Act), that SCG was a firm doing business primarily in the state of Mississippi, and therefore was eligible for selection, was unreasonable.

We sustain the protest.

BACKGROUND

The RFQ, issued on April 11, 2007, to holders of General Services Administration (GSA) Federal Supply Schedule (FSS) contracts for guard services, contemplated the

issuance of a time-and-materials type task order with fixed unit prices and quantities specified by the agency for a 2-month base period with nine 6-month options and one 3-month option. The solicitation included a statement of work, instructions to vendors regarding submission of quotations, and the evaluation factors for award. The RFQ established four technical evaluation factors, in descending order of importance--technical approach, management plan, personnel, and past performance--as well as price. The technical factors, when combined, were significantly more important than price. The agency would select the vendor whose quotation represented the overall best value to the agency, all factors considered. RFQ amend. 5, Instructions to Vendors, at 11-13. Also, under the authority of the Stafford Act, the RFQ set aside the procurement for firms residing or primarily doing business in Mississippi. Id. at 1-2.

Six vendors, including EPSS and SCG, submitted quotations by the May 22 closing date. The agency conducted technical, price, and Stafford Act eligibility evaluations of the vendors' quotations. The agency's final evaluation ratings of the quotations submitted by EPSS and SCG were as follows:

Factor	EPSS	SCG
Technical Approach	Unsatisfactory	Very Good
Management Plan	Unsatisfactory	Very Good
Personnel	Satisfactory	Very Good
Past Performance	Neutral	Satisfactory
Overall	Unsatisfactory	Very Good
Stafford Act Eligible	Yes	Yes
Price	\$135,403,695	\$85,154,115

Agency Report (AR), Tab 9, Consensus Report, at 10; Tab 10, Consensus Technical Report, at 3-16. The agency subsequently determined that SCG's quotation, which was the only technically acceptable quotation submitted by an eligible vendor, was reasonably priced and represented the best value to the agency.¹ Id., Tab 8, Source Selection Decision, at 1. This protest followed.

¹ The agency determined that three other vendors that had submitted quotations were not Stafford Act eligible, Contracting Officer's Statement, Aug. 2, 2007, at 1, and the quotation of the remaining vendor, found to be Stafford Act eligible, was considered technically unacceptable. AR, Tab 9, Consensus Report, at 10.

DISCUSSION

EPSS challenges FEMA's determination that, for purposes of the Stafford Act, SCG was a firm doing business primarily in the state of Mississippi.² Among other things, the protester points to the fact that SCG is a Tennessee company that did not establish a permanent office in Mississippi until October 1, 2005—over 1 month after Hurricane Katrina occurred—and argues that such “carpet bagging” is contrary to both the spirit and purpose of the Stafford Act. Protest, July 16, 2007, at 5. EPSS contends that had FEMA evaluated SCG's Stafford Act eligibility properly, it would have found SCG ineligible for award here.³

Pursuant to the authority of section 307 of the Stafford Act, 42 U.S.C. § 5150, amended by the Post Katrina Emergency Management Reform Act, Pub. L. No. 109-295, § 694, 120 Stat. 1355 (2006), and the SAFE Port Act, Pub. L. No. 109-347, § 611, 120 Stat. 1943 (2006), agencies may provide a preference to or set aside disaster relief recovery contracts for individuals or firms either residing or doing business primarily in the designated location. In its entirety, the Stafford Act provision at issue here states:

² EPSS also originally protested that SCG could not perform the services specified in the RFQ for the proposed price of \$85,154,115, and that FEMA's technical evaluation of EPSS's quotation was unreasonable. We dismissed the first issue for failing to state a valid basis for protest, GAO Facsimile to Parties, July 31, 2007, and the second issue as untimely, as it was not part of an agency-level protest that EPSS filed with FEMA and also was not filed with our Office within 10 days of when the basis of protest was or should have been known. GAO Facsimile to Parties, Aug. 14, 2007.

³ As a preliminary matter, we conclude that EPSS is an interested party to pursue its protest here even though its quotation was found technically unacceptable. In order for a protest to be considered by our Office, a protester must be an interested party, which means that it must have a direct economic interest in the resolution of a protest issue. 4 C.F.R. §§ 21.0(a)(1), 21.1(a) (2007); Cattlemen's Meat Co., B-296616, Aug. 30, 2005, 2005 CPD ¶ 167 at 2 n.1. A protester is generally an interested party to challenge the evaluation of the selected firm's quotation where there is a reasonable possibility that the protester's quotation would be in line for selection if its protest were sustained. Joint Mgmt. & Tech. Servs., B-294229, B-294229.2, Sept. 22, 2004, 2004 CPD ¶ 208 at 9. However, since SCG was determined to be the only eligible vendor that had submitted an acceptable quotation, if the protest were sustained, SCG would not be eligible for award and the agency would be faced with resoliciting the requirement. Since EPSS would be eligible to compete on such a resolicitation, EPSS is an interested party. See PDS Consultants, Inc., B-297890, Apr. 4, 2006, 2006 CPD ¶ 59 at 2 n.2.

Use of Local Firms and Individuals

(a) Contracts or Agreements With Private Entities-

(1) In General – In the expenditure of Federal funds for debris clearance, distribution of supplies, reconstruction, and other major disaster or emergency assistance activities which may be carried out by contract or agreement with private organizations, firms, or individuals, preferences shall be given, to the extent feasible and practicable, to those organizations, firms, and individuals residing or doing business primarily in the area affected by such major disaster or emergency.

* * * * *

(3) Specific Geographic Area – In carrying out this section, a contract or agreement may be set aside for award based on a specific geographic area.

(b) Implementation

* * * *

(3) Formation of Requirements – The head of a Federal agency, as feasible and practicable, shall formulate appropriate requirements to facilitate compliance with this section.⁴

42 U.S.C. § 5150.

The RFQ here was limited to firms residing or primarily doing business in Mississippi, and incorporated the clause at Federal Acquisition Regulation (FAR) 52.226-3, “Disaster or Emergency Area Representation.”⁵ RFQ amend. 5, at 66-67.

⁴ For a description of the process by which the federal government provides assistance generally under the Stafford Act, see AshBritt Inc., B-297889, B-297889.2, Mar. 20, 2006, 2006 CPD ¶ 48 at 3-4.

⁵ The language of both the RFQ here and FAR clause 52.226-3 does not precisely correspond to that of the Stafford Act provision itself. Specifically, while the Stafford Act states in relevant part that qualified firms are ones “doing business primarily” in the designated set-aside location, both the FAR clause and the solicitation instead use the phrase “primarily doing business.” FAR clause 52.226-3; RFQ amend. 5, Instructions to Vendors, at 1. For purposes of our decision, we refer generally to the term “doing business primarily,” as set forth in the statute.

Further, the solicitation provided vendors with additional “guidance on what constitutes a firm residing or primarily doing business in the State of Mississippi.”⁶ Id., Instructions to Vendors, at 1-2. The RFQ stated that “[i]f these factors establish by a preponderance of the evidence that the firm in question resides or primarily does business in the State of Mississippi, then said firm shall be categorized as such.” Id. at 2.

SCG’s quotation included the required volume addressing its Stafford Act eligibility, setting forth its ties to the state of Mississippi and containing a copy of its central contractor registry filing. AR, Tab 7, SCG’s Quotation, vol. III, Stafford Act Evidence, at 1-9. SCG’s quotation represented that the company, while incorporated and headquartered in Tennessee, had, among other things, a Mississippi state business license since June 2, 1997 and “privilege licenses” with various Mississippi cities, continuously provided security guard services in Mississippi since 2001, and maintained a permanent office in Mississippi since October 1, 2005. Also, SCG attributed 24 percent of its fiscal year (FY) 2006 gross revenues--the single largest source by state of the firm’s revenues--to work performed in Mississippi, and asserted that its 144 permanent employees in Mississippi represented its largest security workforce in any one state in which it does business.⁷ Id.

The agency subsequently determined that SCG was Stafford Act eligible. AR, Tab 12, Consensus Report, at 11. As set forth in its report to our Office, FEMA contends that it reasonably concluded that SCG was Stafford Act eligible because it was doing

⁶ The RFQ’s guidance on what constitutes a firm residing or doing business primarily in Louisiana consisted of a non-exclusive list of factors to be considered by the agency that essentially restated the criteria set forth in FAR clause 52.226-3. For example, the list included location of the firm’s permanent office, existing state licenses, and record of past work in the designated area.

⁷ SCG’s quotation included tables detailing its FY 2006 gross revenues sources and current security guard workforces on a state-by-state basis. For example, SCG stated that the sources of its gross revenues, by percentage, were as follows: Arkansas (1.5); Florida (4); Georgia (1); Kansas (1); Mississippi (24); Montana (3); New York (3); North Carolina (5.5); North Dakota (1); Oklahoma (8); Rhode Island (4); South Carolina (5); South Dakota (1); Tennessee (7); Texas (19); West Virginia (8); Illinois (2); and Montreal, Canada (2). AR, Tab 7, SCG’s Quotation, vol. III, Stafford Act Evidence, at 4. We note that SCG’s quotation represented in one instance that the firm currently employed 144 permanent employees in Mississippi, and in a second instance stated that it currently provided approximately 138 security guard officers in Mississippi. Id. at 3-4. Notwithstanding this discrepancy, in comparison to its total represented number of employees, no more than 16 percent of SCG’s security guard workforce was located in Mississippi ($144/917 = .157$, or $138/911 = .151$).

business primarily in Mississippi (FEMA states that it did not find that SCG was a firm residing in Mississippi). AR, Sept. 12, 2007, at 2. The agency acknowledges that its “doing business primarily” determination regarding SCG was based entirely on the fact that the vendor’s current gross revenues and number of employees were higher in Mississippi than in any other state.⁸ The agency essentially interprets “doing business primarily” to refer to the location where the single largest amount--as opposed to a majority or even a predominant amount--of a firm’s work occurs. AR, Sept. 12, 2007, at 2.

EPSS argues that FEMA’s interpretation of “doing business primarily” as meaning the area where the largest single portion of a firm’s work is performed, regardless of how large a percentage that work represents relative to the company’s overall work, is inconsistent with the purpose of the Stafford Act, which is to benefit truly local business concerns. The protester argues by example that, if one accepts FEMA’s interpretation here, a business that has only 2.1 percent of its revenues from 1 state but 1.998 percent of its revenues from each of the remaining 49 states, would still be “doing business primarily” in the first state despite its insignificant presence in that location. EPSS also points out the recent nature of SCG’s presence in the state: it is only work that the firm has performed since Hurricane Katrina that now makes Mississippi the single largest geographic source of this “foreign corporation’s” revenues. Comments, Sept. 12, 2007, at 1-2.

Based on our review of the record, we conclude that FEMA’s determination that SCG was a firm “doing business primarily” in Mississippi for purposes of the Stafford Act was not reasonable. As noted above, the record reflects that FEMA’s determination here was based entirely on the fact that SCG’s gross revenues and number of employees in Mississippi were higher there than in any other state. The agency does not challenge the fact that a substantial majority of SCG’s work (representing 76 percent of its gross revenues and 84 percent of its employees) takes place in locations other than Mississippi, nor does FEMA dispute that its interpretation of “doing business primarily” could result in firms with even smaller percentages of

⁸ In a statement filed with FEMA’s report to our Office, the contracting officer stated that, in accordance with the non-exclusive list of factors provided in FAR clause 52.226-3, she reviewed all evidence submitted by SCG to determine if the firm was residing or primarily doing business in Mississippi, including that the vendor held a DHS contract for armed security guard services in Mississippi, had established a permanent office in Mississippi on October 1, 2005, and held a Mississippi state business license since 1997 (as well as the sources of SCG’s gross revenues and locations of its employee workforce). Contracting Officer’s Statement, July 29, 2007, at 1. The agency makes clear, however, that its determination that SCG was Stafford Act eligible was based on the “doing business primarily” prong, as evidenced by the fact that the firm’s gross revenues and number of employees were higher in Mississippi than in any other state. AR, Sept. 12, 2007, at 2.

their overall business in the designated set-aside area being found eligible. Rather, in support of its position, FEMA contends that the Stafford Act, as well as the FAR, does not preclude its interpretation here. AR, Sept. 12, 2007, at 2. For the reasons set forth below, we find FEMA's interpretation of the Stafford Act here to be unreasonable.

In matters concerning the interpretation of a statute, the goal is clear: to determine and give effect to the intent of the enacting legislature. Philbrook v. Glodgett, 421 U.S. 707, 713 (1975). In furtherance thereof, the first question is whether the statutory language provides an unambiguous expression of the intent of Congress. If it does, then the matter ends there, for the unambiguous intent of Congress must be given full effect. See, e.g., Connecticut National Bank v. Germain, 503 U.S. 249, 253-54 (1992). In this case, while the Stafford Act requires a showing that an entity is either "residing or doing business primarily" in the designated area, 42 U.S.C. § 5150, neither the language of the statute nor the legislative history defines the terms "primarily" or "doing business primarily."⁹ Without specific statutory definitions to guide our review, we look to the plain meaning of the words used in the statute. See Mallard v. United States District Court for the Southern District of Iowa, 490 U.S. 296, 301 (1989); State of California v. Montrose Chem. Corp., 104 F.3d 1507, 1519 (9th Cir. 1997); GAO, Principles of Federal Appropriations Law, vol. 1, at 2-89 (3d ed. 2004).

While not entirely without ambiguity, we think the ordinary and commonly understood meaning of the phrase "doing business primarily" contemplates a determination of where a firm does the majority of its business. See, e.g., The American Heritage Dictionary of the English Language (4th Ed. 2004) ("primarily" means "chiefly" or "mainly"); Random House Unabridged Dictionary (1997) ("primarily" means "essentially," "mostly," "chiefly," or "principally"); Merriam-Webster's Dictionary, <http://www.merriam-webster.com/dictionary/primarily> ("primarily" means "for the most part" or "chiefly"). Thus, FEMA's interpretation of the term to mean that the single largest location of a firm's business activities is determinative of where the firm is "doing business primarily," irrespective of the magnitude of the work in that area relative to the firm's business overall, is not consistent with the ordinary and commonly understood meaning of the term.

Further, as detailed below, we think the legislative history of the Stafford Act's procurement provision—which clearly indicates that the congressional intent was to foster the use of local firms and individuals in the affected area—both reinforces our view of the ordinary and commonly understood meaning of the phrase here and does

⁹ Similarly, while the FAR establishes a non-exclusive list of factors to be considered as part of an agency's determination regarding whether a firm is eligible under either prong of the Stafford Act, it does not define the term "doing business primarily." See FAR § 2.101, Subpart 26.2, clause 52.226-3.

not support the agency's interpretation of the statute.¹⁰ Section 5150 of Title 42 was first enacted, in substantially similar form, as section 204 of the Disaster Relief Act of 1970. Pub. L. No. 91-606, 84 Stat. 1744, 1748. The Senate Committee on Public Works, the committee that proposed the language, crafted this provision to favor the use of local businesses to perform debris clearance. The committee's report on the bill explained the provision as follows:

Section 204 provides that in the expenditure of Federal funds, for example, for debris clearance and reconstruction of public facilities, preference is to be given to persons or firms who work or do business in the disaster area. One outstanding feature of the aftermath of a great disaster is the lack of ready cash. A Federal assistance program should be designed to revitalize the community by infusions of cash through the use of local people and business firms.

S. Rep. No. 91-1157, at 12 (1970) (emphasis added). Likewise, when the statute here was recently amended, adding section 307(b)(3), the Conference Report stated, "The Conferees note that in response to Hurricane Katrina, Federal agencies tended to hire large contractors to perform broad responsibilities over the entire disaster area, which made it difficult for smaller, local firms to compete." H.R. Conf. Rep. No. 109-711, at 107 (2006) (emphasis added). As a final matter, we note that the title of section 5150 of Title 42, quoted above, is "Use of Local Firms and Individuals."

In our view, the legislative history of the Stafford Act makes clear that the congressional intent here was to benefit local people and businesses in disaster-affected areas. The legislative history also makes clear that FEMA's interpretation of the phrase "doing business primarily" does not give effect to this express congressional intent.¹¹ As mentioned above, the agency's interpretation of "doing

¹⁰ Analysis of legislative history is useful to illuminate congressional intent and to confirm a statute's plain meaning. Conroy v. Aniskoff, 507 U.S. 511, 514, 516 (1993) (although it found the statute to be "unambiguous, unequivocal, and unlimited," the Court examined legislative history to confirm that its reading of the statute was not absurd, illogical, or contrary to congressional intent).

¹¹ While FEMA also argues that its interpretation of the Stafford Act is entitled to deference, AR, Sept. 25, 2007, at 4, it is only when, employing the traditional tools of statutory construction, the congressional intent on the precise question at issue cannot be ascertained that an agency's interpretation is entitled to any degree of deference. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 n.9 (1984). Moreover, deference is not appropriate with respect to an agency's interpretation, as here, of a statute of general applicability, particularly since FEMA's interpretation is not the result of a rulemaking process or formal adjudication. See United States v. Mead Corp., 533 U.S. 569, 572 (1966); Adams v. SEC, 287 F.3d 183, (continued...)

business primarily” would permit a firm to qualify no matter how small a portion of its total work occurs in the designated area, so long as it is greater than the amount of work performed in any other single location. For example, consistent with the protester’s argument, if a company did 2.1 percent of its business in Mississippi and 97.9 percent of its business in other states and/or countries, but had no one other single location greater than or equal to 2.1 percent, then under FEMA’s interpretation here the firm would be doing business primarily in Mississippi. That a firm could still be determined to be “doing business primarily” in a designated area even though it is not doing a majority, or even a substantial portion, of its total work in that area is, in our opinion, a reading of the Stafford Act inconsistent with its congressional intent: to provide federal assistance to affected communities in the aftermath of a disaster, via the award of contracts (and the resulting “infusions of cash,” S. Rep. No. 91-1157, supra) to local businesses in the designated set-aside area.¹²

Here, as detailed above, SCG attributes but 24 percent of its current gross revenues to work performed in Mississippi, with the remaining 76 percent of its revenues resulting from business it performs in 17 other states and Canada. Similarly, SCG has less than 16 percent of its total workforce in Mississippi, with the remaining 84 percent in locations outside of the designated set-aside area. Quite simply, SCG has made a business decision not to concentrate its work in any one particular state, instead broadly diversifying the geographic locations in which it does work. We think that it is simply not reasonable to conclude that the Stafford Act’s intent of “jump starting” communities affected by major disasters by channeling funds to local businesses is properly served if the statute is interpreted in a way as to deem eligible a firm with such a minor presence in the designated area.

RECOMMENDATION

We conclude that the agency’s determination that SCG was a firm doing business primarily in Mississippi, and therefore eligible to compete under the RFQ, was unreasonable. Since SCG was the only firm found eligible whose quotation also was considered technically acceptable, we recommend that the agency cancel the RFQ and reissue it without the Stafford Act set-aside. In the alternative, since the agency

(...continued)

190 (D.C. Cir. 2002); Contractor’s Sand & Gravel v. Federal Mine Safety & Health Comm’n, 199 F.3d 1335, 1339 (D.C. Cir. 2000).

¹² The FAR Council is now considering a change to the FAR that would define “doing business primarily” to refer to the area where a majority of a firm’s gross revenues are earned and a majority of its employees are located. See Federal Acquisition Circular 2005-21/FAR Case 2006-014, Local Community Recovery Act of 2006, Sept. 17, 2007, at 4 (draft). Accordingly, by letter of today, we are providing the FAR Council with a copy of our decision here.

concluded that two of the vendors (EPSS and another firm) were Stafford Act eligible, but found their quotations technically unacceptable as submitted, the agency may consider conducting discussions with those vendors, requesting and evaluating revised quotations, and then relying on that revised evaluation to make a new source selection under the RFQ. We also recommend that EPSS be reimbursed the costs of filing and pursuing this protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d)(1) (2007). EPSS should submit its certified claim for costs, detailing the time expended and cost incurred, directly to the contracting agency within 60 days after receipt of this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

Gary L. Kepplinger
General Counsel