U.S. SMALL BUSINESS ADMINISTRATION
WASHINGTON, D.C. 20416

OFFICE OF GENERAL COUNSEL

August 29, 2013

Via E-mail

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Re: SBA Comments on Protest of Latvian Connection LLC
(B-408633)

Dear Mr. Verchinski:

Your office has requested that the U.S. Small Business Administration (SBA or Agency) provide its comments on the protest of the Department of the Air Force (Air Force) procurement under Request for Quotations Number FA5709-13-T-0039 filed by Latvian Connection LLC (Latvian). Based upon our review of the law in this area, we believe the Air Force failed to comply with its legal obligation to set aside the subject procurement for competition among small business concerns. It is therefore SBA's opinion this protest should be sustained.

BACKGROUND

On August 2, 2013, Latvian filed a pre-award protest of the decision by the Air Force to not set aside the subject procurement for competition among small business concerns. In response, the Air Force moved on August 12, 2013 to dismiss Latvian's protest alleging, *inter alia*, that the Small Business Act (15 U.S.C. § 631 *et seq*.) does not have extraterritorial effect and that SBA's views on this topic are entitled to no deference. GAO invited SBA to provide its comments on this dispute no later than August 29, 2013.

DISCUSSION

In its Request for Dismissal, the Air Force aggressively asserts that SBA has no role in this dispute, that the Agency's views are irrelevant, and that the Agency exists merely to serve as an advisory body for the Office of Federal Procurement Policy (OFPP) and the Federal Acquisition Regulations (FAR) Council. SBA does not concur with this baseless and distorted view of the Agency's authority and mission. Neither does the law.

With the passage of Pub. L. No. 85-536 on July 18, 1958, Congress added the Small Business Act (*hereinafter* the Act) to the United States Code. In so doing, Congress also explicitly designated the executive branch agency that would be responsible for administering the programs and requirements established under that Act:

> In order to carry out the policies of this Act there is hereby created an agency under the name "Small Business Administration" (herein referred to as the Administration), which Administration shall be under the general direction and supervision of the President and shall not be affiliated with or be within any other agency or department of the Federal Government.[1]

Notably, Congress did not give responsibility for implementing the Act to OFPP or the FAR Council as the Air Force has alleged. Instead, as the Court of Appeals for the Ninth Circuit has noted, it is SBA that "is charged with carrying out the policies of the Act and issuing such rules and regulations as it deems necessary."[2]

Among the many policies Congress established under the Small Business Act is that of insuring "that a fair proportion of the total purchases and contracts or subcontracts for property and services for the Government… be placed with small business enterprises."[3] To effectuate this purpose, Congress stipulated that small business concerns shall "receive any award or contract or any part thereof… as to which it is determined… to be in the interest of assuring that a fair proportion of the total purchases and contracts for property and services for the Government in each industry category are placed with small-business concerns…"[4]

One of the primary mechanisms Congress created for implementing this policy of promoting participation in the federal procurement process by small business concerns is the automatic set-aside requirement commonly known as the 'Rule of Two.' This requirement holds that:

> Each contract for the purchase of goods and services that has an anticipated value greater than $2,500 but not greater than $100,000[5] shall be reserved exclusively for small business concerns unless the contracting officer is unable to obtain offers from two or more small business concerns that are competitive with market prices and are competitive

[1] 15 U.S.C. § 633(a).

[2] *Contract Management, Inc. v. Rumsfeld*, 434 F.3d 1145, 1147 (2006).

[3] 15 U.S.C. § 631(a).

[4] *Id*. at § 644(a).

[5] Pursuant to 41 U.S.C. § 431a(a)(1), the application of both the lower limit of this range (*i.e.*, the micropurchase threshold) and the upper limit (*i.e.*, the simplified acquisition threshold) may be adjusted for inflation. Moreover, 41 U.S.C. § 1903(b) further expands this range with regard to procurements made in support of contingency operations.

> with regard to the quality and delivery of the goods or services being purchased.[6]

Notably, 15 U.S.C. § 644(j)(1) contains no language placing geographic limitations or restrictions on its application, either in terms of the location of the procuring activity itself or the place of performance of the contract.

As a broader review of the law makes clear, it is evident that where Congress intends for the small business contracting policies established under the Act to be restricted from applying extraterritorially, it possesses the knowledge and wherewithal to explicitly do so. For example, Congress has expressly stipulated in 15 U.S.C. § 637(d)(2) that those policies promoting the participation of small business concerns as subcontractors which are typically incorporated in federal prime contracts do not apply to contracts which "will be performed entirely outside of any State, territory, or possession of the United States, the District of Columbia, or the Commonwealth of Puerto Rico."

Thus, in the case of § 637(d)(2), Congress considered the issue of whether a particular policy advanced under the Small Business Act should be applied extraterritorially and expressly decided against permitting such an approach. The inference to be drawn, then, is that there is a baseline presumption on the part of Congress that the policies and requirements it established under the Act are to apply all Federal procurements without regard to geography unless specifically indicated otherwise. This reading of the Act and its policies is consistent with the avowed intent of Congress that small business concerns must be afforded "the maximum practicable opportunity to participate in the performance of contracts let by any Federal agency."[7]

The Air Force is correct in noting that the Act is silent with regard to whether the automatic small business set-aside requirement of § 644(j)(1) should apply extraterritorially. However, as the Supreme Court has held, where a "statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statue."[8] While, as noted above, the Air Force has farcically attempted to assert that OFPP is the agency responsible for implementing and administering the policies established under the Act, in point of fact it is instead SBA that is charged with that duty. The automatic set-aside requirement at issue here was established under the Small Business Act. As GAO and various Federal courts have held, where an issue arises regarding the interpretation and administration of a policy or program created under the Act, it is the views of SBA, rather than those of some other agency, which are entitled to considerable deference.[9]

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[6] 15 U.S.C. § 644(j)(1).

[7] 15 U.S.C. § 637(d)(1). See, also, 15 U.S.C. §§ 631(a), 631(j)(1), 644(e)(1), and 644(g)(1)(B).

[8] *National Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 665 (2007) (quoting *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984)).

[9] *Matter of General Services Administration – Reconsideration*, B-406040.2 (Oct. 4, 2012); *Contract Management, Inc. v. Rumsfeld*, 291 F. Supp. 1166, 1177 (D. Hawaii 2003); *McCall Stock Farms, Inc. v. U.S.*, 14 F.3d 1562, 1567 (CAFC 1993); *Young-Robinson Associates, Inc. v. U.S.*, 760 F. Supp. 212, 217 (D.D.C. 1991).

SBA's views on the issue of the automatic small business set-aside requirement are expressed in the Agency's regulation implementing § 644(j)(1), which appears at 13 C.F.R. § 125.2(f)(1). In accordance with that provision contracting officers:

> shall set aside any acquisition with an anticipated dollar value exceeding the Micropurchase Threshold but not exceeding the Simplified Acquisition Threshold… for small business concerns when there is a reasonable expectation that offers will be obtained from at least two small business concerns that are competitive in terms of quality and delivery and award will be made at fair market prices.

Consistent with Congress' decision to refrain from imposing any geographic limitations on the application of 15 U.S.C. § 644(j)(1), SBA elected to not place any location-based restrictions on the application of 13 C.F.R. § 125.2(f)(1). In that regard, the small business set-aside requirement and its implementing regulations are identical to those found in another area of SBA's responsibility, the Certificate of Competency (COC) program. The COC program was also established under the Small Business Act[10] and was implemented by SBA via the Agency's regulations,[11] which then served as the basis for the FAR provisions regarding that program. As is the case with § 644(j)(1), § 637(d)(7)(A) does not include any language prohibiting the extraterritorial application of the requirement it imposes, nor do SBA's implementing regulations.

In a pair of protests that came before GAO involving the Panama Canal Commission (the Commission), GAO conclusively addressed the issue of the extraterritorial application of § 637(d)(7)(A). In the first case, a third party protester alleged that a contracting officer for the Commission improperly relied upon SBA's COC process in awarding a contract calling for the delivery of goods outside the United States.[12] However, the Comptroller General denied the protest, holding instead that: "There is nothing in either the Small Business Act or SBA's regulations implementing the Act that restricts COC procedures to contracts awarded or items to be delivered in the United States."[13] While both the Act and SBA's regulations were thus silent on the issue of the extraterritorial application of § 637(d)(7)(A), the Comptroller General noted that "SBA has informed us that it believes that the COC program is not so limited. We therefore find no basis to object to the COC referral."[14]

Six years after the *Eastern Marine* protest, the Commission asserted before GAO that it did not have to comply with the requirements imposed under § 637(d)(7)(A) due to its belief that the Small Business Act was without force beyond territorial boundaries of the United States.[15] As the Air Force does here, the Commission attempted to hinge its

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[10] 15 U.S.C. § 637(b)(7)(A).
[11] 13 C.F.R. § 125.5.
[12] *Matter of Eastern Marine, Inc.*, 63 Comp. Gen. 551 (1984).
[13] *Id*.
[14] *Id*. at 2.
[15] *Matter of Discount Machinery & Equipment, Inc.*, 70 Comp. Gen. 108 (1990).

position against the extraterritorial application of the Act upon the statement in FAR § 19.000(b) that the small business contracting rules of FAR Part 19 apply only within the United States or its outlying areas. Again, as the Air Force argues here, the Commission claimed that SBA had no role in that dispute and that its views on the matter were not entitled to any deference under the *Chevron* standard of review. It was instead the Commission's view that the FAR and the body that administered it which were the controlling authorities.

GAO did not concur with that assessment. In his decision sustaining the *Discount Machinery* protest, the Comptroller General observed that nothing in § 637(d)(7)(A), nor in any other provision of the Small Business Act, imposed any geographical limitation which would exempt the Commission from having to comply with its procurement requirements.[16] Specifically, the Comptroller General found that: "As evidenced by the language of the Small Business Act, Congress intended the SBA to have broad review authority where an American small business concern is involved."[17] Moreover, it was the Comptroller General's view that:

> Since the Small Business Act evidences an intent to implement a government-wide policy fostering American small business interests, and since the Panama Canal Commission is an executive agency within the meaning of the Act, we see no basis to conclude that the Commission's procurements are exempted from the Act's coverage merely because the agency is physically located in the Panama Canal Zone.[18]

Thus, in two prior protests that involved a procurement requirement imposed under the Small Business Act and implemented by SBA via regulation, GAO found that mere silence on the part of the statute and the accompanying rule with regard to the extraterritorial effect of that requirement was not sufficient basis for concluding that the policy sought to advanced must stop at the water's edge.

The Air Force has correctly observed that the decisions of Congress and the SBA to not place any geographical restrictions upon the application of the automatic small business set-aside requirement are in direct contrast to the approach taken by FAR Part 19. As previously noted, under the express terms of 48 C.F.R. § 19.000(b), the small business set-aside rules of FAR Part 19 apply only within the United States or its outlying areas. However, in both the *Eastern Marine* and *Discount Machinery* protests, GAO concluded that FAR § 19.000(b) must yield where it conflicts with a provision of the Small Business Act and SBA's interpretation and regulatory implementation of that provision. The Court of Federal Claims has similarly concluded that SBA's implementation of a provision of the Small Business Act via regulation must be viewed

[16] *Id*. at 2.
[17] *Id*.
[18] *Id*. at 3.

as controlling where there is an inconsistent FAR rule.[19] As such, it is SBA's interpretation of § 644(j)(1) which must govern here and not FAR § 19.000(b).

Additionally, while the Air Force attempts to buttress its arguments by relying upon the Supreme Court's holding in *EEOC v. Arabian American Oil Co.*[20] that Title VII of the Civil Rights Act of 1964 does not apply extraterritorially to regulate the employment practices of American employers who employ American citizens abroad, SBA believes that case is not controlling in this instance. While the Court did decide against applying Title VII outside the United States on the ground that the statute did not, by its own terms, explicitly apply to extraterritorial conduct, the concerns present in that case are absent with regard to the instant protest.

If the Court had held that Title VII applied abroad, the United States would have been interfering in the regulation of workplace relations in foreign countries. The automatic small business set-aside requirement at issue here poses no such threat to the comity of nations. The government of Oman cannot possibly care whether the U.S. Air Force buys supplies from a large American business or a small American business. That is a decision which solely affects the United States and does not infringe in any way upon the national sovereignty of Oman.

Furthermore, in the *Arabian American Oil Co.* case, the Court noted that "Congress, in enacting Title VII, did not confer upon the EEOC authority to promulgate rules or regulations."[21] As such, the Court did not feel that the EEOC's views regarding the extraterritorial application of Title VII were entitled to much in the way of deference.[22] This is in stark contrast to the Small Business Act, which expressly authorizes the SBA Administrator to "make such rules and regulations as he deems necessary to carry out the authority vested in him by or pursuant to this Act."[23] Therefore, given that the concerns present in *Arabian American Oil Co.* are absent here and that SBA's views are entitled to considerably more deference than were the EEOC's, the case relied upon by the Air Force is of questionable relevance in this instance.

Moreover, even if *Arabian American Oil Co.* were deemed to be controlling with regard to the instant protest, it would still not preclude GAO from holding that § 644(j)(1) applies extraterritorially given the exception that opinion carved out for Lanham Act[24] cases. In *Arabian American Oil Co.*, the Supreme Court noted that it had previously held that the Lanham Act had extraterritorial effect despite the fact the statute itself was silent upon the subject. The Court based this exception to the presumption against extraterritoriality upon the fact that the Lanham Act broadly regulated all commerce. In drafting Title VII, however, Congress employed a much narrower and limited definition

[19] *C&G Excavating, Inc. v. U.S.*, 32 Fed. Cl. 231, 239 (1994).
[20] 499 U.S. 244 (1991).
[21] *Id*. at 257.
[22] *Id*.
[23] 15 U.S.C. § 634(b)(6).
[24] 15 U.S.C. § 1051 *et seq*.

of commerce which the Court felt did "not support such an expansive construction of congressional intent" with regard to extraterritoriality.[25]

Given that § 644(j)(1) applies broadly to each contract let by all executive branch agencies rather than being restricted in its effect to select categories of contracts or to procurements let only by certain agencies, it more closely resembles the Lanham Act than it does Title VII. As such, SBA believes the language employed by Congress in drafting § 644(j)(1) is broad enough to support an expansive construction of congressional intent with regard to that provision's extraterritorial application.

Therefore, for each of the foregoing reasons and given Congress' clear and repeated statements of its desire to assiduously promote the participation of small business concerns in the Federal procurement process, as well as the clearly demonstrated approach Congress has taken in situations where it wishes to limit the extraterritorial application of small business policies, the restrictive reading of the Small Business Act urged by the Air Force in this case would seem contradictory and self-defeating.

CONCLUSION

It is SBA's view that the automatic small business set-aside requirement imposed under 15 U.S.C. § 644(j)(1) and 13 C.F.R. § 125.2(f)(1) applies to this procurement. SBA believes that restricting the application of this requirement solely to contracts that will be awarded and/or performed within the United States and its outlying areas is inconsistent with the intent of Congress, the policies established under the Small Business Act, SBA's implementation of those policies, and GAO and Federal court precedent. As a result, it is SBA's opinion that this protest should be sustained.

Thank you for affording SBA the opportunity to address the issues raised in this protest.

Respectfully submitted,

/s/ Kevin R. Harber

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[25] 499 U.S. at 252.

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