



United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: All Seasons Apparel, Inc.

File: B-401805; B-401805.2

Date: November 4, 2009

Ruth E. Ganister, Esq., Rosenthal and Ganister, for the protester.
Vera Meza, Esq., Department of the Army, for the agency.
Sharon L. Larkin, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency's cancellation of solicitation for Army combat shirts, which was set aside for Historically Underutilized Business Zone (HUBZone) small business concerns, is reasonable, where cancellation was due to disagreement between GAO and Executive Branch on interpretation of authorizing statutes for small business programs, agency was faced with threat of litigation, and another procurement vehicle was available to meet at least part of the agency's needs while the agency decides how best to meet its remaining needs.

DECISION

All Seasons Apparel, Inc. (ASA), of Post Falls, Indiana, a Historically Underutilized Business Zone (HUBZone) certified small business concern, protests the cancellation of request for proposals (RFP) No. W911QY-09-R-0024, issued as a HUBZone small business set-aside, by the U.S. Army Research, Development and Engineering Command, Natick Contracting Division, for Army combat shirts.

We deny the protest.

Prior to the RFP at issue here, the agency sought to procure Army combat shirts through a solicitation that was set aside for section 8(a) small business concerns.¹ However, due to certain decisions issued by our Office (discussed below) that

¹ Section 8(a) of the Small Business Act authorizes procurements to be set aside for socially and economically disadvantaged small businesses. 15 U.S.C. § 637(a) (2006).

indicated to the agency that set-asides for HUBZone small business concerns took priority over set-asides under the 8(a) program, the agency canceled that solicitation and issued the RFP here as a set-aside for HUBZone small business concerns. Contracting Officer's Statement ¶ 2. The RFP was issued on June 29, 2009 and established a proposal due date of August 24.

On August 20, before the due date for receipt of proposals, the agency canceled the RFP. The cancellation notice stated that cancellation was "due to the unresolved issues attending parity of small business programs, and conflicting guidance from GAO [Government Accountability Office] and OMB [Office of Management and Budget] regarding priority of the HUBZone program relative to SBA's [Small Business Administration's] 8(a) Business Development Program." Agency Report at 1; RFP amend. 5.

In this regard, as noted by the agency, our Office has interpreted the applicable statutes authorizing the HUBZone and 8(a) programs to require an agency to set aside a solicitation for HUBZone small business concerns where the standards of that program are satisfied prior to setting aside the solicitation for 8(a) small business concerns. As stated in our decisions, the plain language of the statute authorizing the HUBZone program is mandatory and requires that an agency set aside a procurement when certain criteria are met, whereas the plain language of the authorizing statute for the 8(a) program leaves the agency with discretion to set aside the procurement. See Mission Critical Solutions, B-401057, May 4, 2009, 2009 CPD ¶ 93 at 3-8, recon. denied, Small Business Admin.–Recon., B-401057.2, July 6, 2009, 2009 CPD ¶ 148 at 5. In contrast, the SBA has taken the position that all small business programs are co-equal in status and one does not take priority over another—that is, the SBA asserts that there is "parity" in the programs.

On July 10, OMB advised agencies that the Executive Branch (through the Department of Justice (DOJ)) was undertaking a "review of the legal basis underlying the GAO's decisions." OMB reminded agencies that GAO decisions "are not binding on Federal agencies," and stated that our decisions in this area "are contrary to regulations promulgated by the [SBA] that provide for 'parity' among . . . small business programs." OMB directed that agencies "should not, as a result of GAO's decisions, be compelled to prioritize HUBZone small businesses over [other small business programs]." OMB Memorandum, July 10, 2009, at 1-2.

On August 21, DOJ issued a "Memorandum Opinion" stating that it disagreed with GAO's decisions and concluded that the Small Business Act "does not compel SBA to prioritize the HUBZone Program in the manner GAO determined to be required." DOJ Memorandum Opinion, Aug. 21, 2009, at 2. DOJ instructed that "the SBA's regulations . . . are reasonable [and are] binding on all Executive Branch agencies, notwithstanding any GAO decisions to the contrary," and reminded agencies that GAO decisions are not binding on the Executive Branch. Id. at 13.

Thereafter, the agency was contacted by the SBA, OMB, and senior officials in the Department of the Army, who expressed the view that setting aside the requirement for HUBZone contractors was in “direct violation of OMB guidance.” Agency Memorandum on Supplemental Protest at 1. The agency also was contacted by an attorney representing an 8(a) firm who suggested that the firm might seek injunctive relief to prevent the agency from awarding the contract under the current RFP. Id. Because of the threat of litigation and the “unresolved issues attending parity of small business programs,” the agency decided to cancel the RFP and consider other vehicles to procure Army combat shirts. Contracting Officer’s Statement ¶ 1. On September 9, the agency issued a delivery order for a portion of the quantity included in the RFP to the National Industries for the Blind (NIB), in accordance with the Javits-Wagner-O’Day Act, 41 U.S.C. §§ 46-48c (2006), and the rules of the Committee for Purchase from People Who are Blind or Severely Disabled, 41 C.F.R. ch. 51 (2009). Contracting Officer’s Statement ¶ 7.

ASA contends that the agency’s decision to cancel the solicitation was unreasonable. In a negotiated procurement, such as the one here, a contracting agency has broad discretion in deciding whether to cancel a solicitation and need only establish a reasonable basis for doing so. ESM Group, Inc., B-400298.2, Oct. 14, 2008, 2008 CPD ¶ 190 at 2. For example, we have found the cancellation of an RFP to be reasonable where the agency determines that it no longer has a requirement for the item solicited, Peterson-Nunez Joint Venture, B-258788, Feb. 13, 1995, 95-1 CPD ¶ 73 at 4, where the agency discovers that an existing contract for its requirement would be more advantageous to the government than continuing with the procurement, Brian X. Scott, B-310970, B-310970.2, Mar. 26, 2008, 2008 CPD ¶ 59 at 3, or where, as a result of questions by cognizant officials, the agency reasonably determines that it needs to further review its requirements before proceeding with the planned procurement. Kenco Assocs., Inc.; Air Prods. and Chems., Inc., B-297503, B-297503.2, Jan. 25, 2006, 2006 CPD ¶ 24 at 2-5.

Here, the agency has advanced a reasonable basis for canceling the RFP. Given the conflicting views expressed in GAO’s legal decisions and the Executive Branch directives, the threat of litigation from competing small business interests, and the availability of another procurement vehicle to meet at least some of the agency’s requirements while it decides how to procure the remaining items,² we find nothing improper in the agency’s decision to cancel the RFP here.

ASA also challenges the placement of the delivery order with the NIB, but provides no basis on which our Office could find this order improper. In this regard, effective on August 17, 2009, Army combat shirts were added to the Federal Procurement List maintained by the Committee for Purchase from People Who are Blind or Severely

² The Army indicates that it is exploring whether it can order the rest of the RFP requirements from the NIB.

Disabled, which makes the NIB a “mandatory source” for the item. 41 C.F.R. § 51-1.2 (2009); Supplemental Agency Report, exh. 1, Notice of Change to Procurement List. While ASA contends that the agency did not adequately consider the impact to 8(a) contractors that had previously provided the items, before placing the order with the NIB, ASA cites no legal authority that requires such consideration. In any case, ASA is not an interested party eligible to protest the adequacy of any such impact study because ASA is not an 8(a) contractor. See 4 C.F.R. § 21.0(a)(1).

The protest is denied.

Lynn H. Gibson
Acting General Counsel