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**Comptroller General
of the United States**

**United States General Accounting Office
Washington, DC 20548**

Decision

Matter of: Designer Associates, Inc.

File: B-293226

Date: February 12, 2004

Rulon W. Waite for the protester.

Eric Kattner and James B. Howarth, Esq., Department of the Air Force, and John W. Klein, Esq., Small Business Administration, for the agencies.

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

DIGEST

1. Protest that the contracting agency's letter offering requirement to Small Business Administration (SBA) for acceptance into 8(a) program failed to provide SBA with complete and accurate information regarding the proposed offering is denied where the record shows that despite inadequacies in the contracting agency's initial offering letter to SBA, SBA ultimately obtained all of the information required by its regulations and the protester was not prejudiced by the contracting agency's error.
 2. Protest that the contracting agency's decision to alter the traditional duration of its service contract, in order to make a noncompetitive award under the SBA 8(a) program, was made in bad faith is denied where there is no evidence of such bad faith and where the record shows that the agency had a valid reason for its action.
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DECISION

Designer Associates, Inc. protests the decision of the Department of the Air Force and the Small Business Administration (SBA) to place the Air Force requirement for maintenance and repairs services for military family housing at Hill Air Force Base (AFB), Utah, under SBA's section 8(a) business development program for award of a sole-source contract to Creative Times, Inc. Designer Associates contends that the Air Force's decision to offer these requirements to SBA, and SBA's resulting acceptance, were improper.

We deny the protest.

The requirement here is for maintenance and repair services for approximately 1,140 military family housing units at Hill AFB, and involves interior and exterior painting, refinishing and replacement of floors, repair and replacement of appliances, and change of occupancy maintenance. Designer Associates, a small business concern, competed unsuccessfully for the prior housing maintenance contract awarded by the Air Force in 1998, the result of a small business set-aside procurement.¹ Consisting of a base year and four 1-year options, the prior housing maintenance contract had an expiration date of December 31, 2003.

The Air Force is now participating in the Department of Defense (DOD) Military Housing Privatization Initiative. Authorized by Congress as a pilot program, the Military Housing Privatization Initiative has the goal of improving DOD military family housing more economically and more quickly than if the traditional military construction approach were used. This initiative allows private sector financing, ownership, operation, and maintenance of military housing.² National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-06, §§ 2801 *et seq.*, 110 Stat. 186 *et seq.*, codified at 10 U.S.C. §§ 2871-2885 (2000), amended by the National Defense Authorization Act for Fiscal Year 2001, Pub L. No. 106-398, § 2806. Additionally, relevant to this protest, after housing privatization, the military service involved no longer has a requirement for housing maintenance services, as the rights and responsibilities of property ownership then rest with the private-sector developer. One of the bases at which the Air Force is now in the process of privatizing military housing is Hill AFB, with an expected contract award in mid-to-late 2004.

By letter to SBA dated August 29, 2003, the Air Force offered to contract with Creative Times for the Hill AFB military family housing maintenance services under

¹ Designer Associates contends, and the Air Force does not dispute, that the housing maintenance services contracts at Hill AFB have been set aside for award to small business concerns since 1979. Protest, attach. 1, Letter from Designer Associates to GAO, Nov. 1, 2003, at 1.

² Under the housing privatization program, the military service selects a private-sector developer to build, renovate, manage, and maintain family housing communities on the military installations. The developer provides the capital necessary to accomplish these tasks, as well as its expertise in operating successful private-sector communities. The developer assumes ownership of the existing family housing units and receives a long-term lease in the underlying land. The developer's return on the project is expected to come from developing, operating, and managing these housing units, and its main source of revenue will be rents in the amount of a service member's basic allowance for housing paid by each service member living in a privatized unit. See North Am. Mil. Housing, LLC, B-289604, Mar. 20, 2002, 2002 CPD ¶ 69 at 2.

the section 8(a) program. The letter advised SBA that the agency anticipated awarding a fixed-price contract for a base year with one 1-year option at an estimated total value of \$1,537,899.³ The Air Force also represented to SBA as follows:

Public solicitation for the specific procurement has not already been issued under a small business set-aside. It would normally be expected that this program would be awarded to a disadvantaged firm under conventional procedures. Current history shows that this has not been previously awarded to a small business firm.

AR, Tab 5, Letter from Air Force to SBA, Aug. 29, 2003.

SBA accepted the Air Force's offering on behalf of Creative Times on September 3. As part of its acceptance letter to the Air Force, SBA stated, "A determination has been made that acceptance of this procurement will cause no adverse impact on another small business concern." AR, Tab 6, Letter from SBA to Air Force, Sept. 3, 2003. After Designer Associates learned of the agency's intent not to competitively reprocure housing maintenance services here from among small business concerns, and that the Air Force instead planned to noncompetitively award a contract to Creative Times under the 8(a) program, this protest followed.

Designer Associates protests that the Air Force failed to provide SBA with complete and accurate information as part of its section 8(a) program offering. Specifically, Designer Associates contends that the Air Force falsely stated to SBA that the housing maintenance contract had not been previously awarded to a small business firm when in fact the requirement here had been set aside for award to small business concerns since 1979. Designer Associates argues that the Air Force's misinformation resulted in SBA making an improper determination that acceptance of this requirement under the 8(a) program would cause no adverse impact on small business concerns such as itself, and that had SBA been provided with accurate information, SBA would not have made the decision that it did.

The Air Force first contends that Designer Associates' protest should be dismissed because Designer Associates does not qualify as an interested party. An interested party is an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract or by the failure to award a contract, which the protester is required to demonstrate. 4 C.F.R. § 21.0(a) (2003). The Air Force argues that because this procurement action is under SBA's 8(a) program, and

³ The Air Force subsequently acknowledged that the amount of \$1,537,899 represented the estimated value for the base year only. Agency Report at 2. Accordingly, the total estimated value of the agency's offer to the SBA here was \$3,075,798 (2 x \$1,537,899 = \$3,075,798).

the protester is not an 8(a) contractor, Designer Associates is not an interested party to protest the agency's actions in connection with the procurement. Specifically, the Air Force states as follows: "[E]ven though Designer Associates wants to compete and, even if for argument sake, the Air Force were required to compete the requirement under the SBA 8(a) program . . . , Designer Associates is not an 8(a) contractor and is not eligible for an award under either a sole source or competitive 8(a) procurement." Agency Report at 5.

We disagree. Quite simply, the Air Force's argument fails to recognize the nature of Designer Associates' protest. Designer Associates is not asserting that the procurement here should be conducted under the 8(a) program on a competitive basis; instead, the protester is arguing that the decision to place the procurement under the 8(a) program at all, on a noncompetitive basis or otherwise, was improper because it was based on inaccurate information from the contracting agency, to the detriment of small business concerns such as itself that were thus excluded from competing as a result of such action. Thus, Designer Associates, a small business that has previously competed for the maintenance service contract in question, is an interested party because it may have the opportunity to compete for the agency's requirements if it is determined that the decision to place the procurement here under the 8(a) program was improper.

Section 8(a) of the Small Business Act authorizes SBA to enter into contracts with government agencies and to arrange for performance of such contracts by awarding subcontracts to socially and economically disadvantaged small businesses.⁴ 15 U.S.C. § 637(a) (2000). The Act affords SBA and contracting agencies broad discretion in selecting procurements for the 8(a) program; we will not consider a protest challenging a decision to procure under the 8(a) program absent a showing of possible bad faith on the part of government officials or that regulations may have been violated. 4 C.F.R. § 21.5(b)(3); American Consulting Servs., Inc., B-276149.2, B-276537.2, July 31, 1997, 97-2 CPD ¶ 37 at 9; Comint Sys. Corp., B-274853, B-274853.2, Jan. 8, 1997, 97-1 CPD ¶ 14 at 3.

Under the Act's implementing regulations, SBA may not accept any procurement for award as an 8(a) contract if doing so would have an adverse impact on an individual small business, a group of small businesses in a specific geographic location, or other small business programs. 13 C.F.R. § 124.504(c)(1)-(3) (2003). In making decisions regarding 8(a) procurements and to avoid adverse impacts, SBA is entitled to rely on the contracting agency's representations regarding the offered requirement. In this regard, SBA's regulations place the primary responsibility on the procuring agency to submit all relevant information necessary to SBA's decision-

⁴ These subcontracts may be awarded on a competitive or noncompetitive basis, based primarily on the size of the contracts. See Federal Acquisition Regulation (FAR) § 19.800.

making process. 13 C.F.R. § 124.502; Security Consultants Group, Inc., B-276405, B-276405.2, June 9, 1997, 97-1 CPD ¶ 207 at 2; Comint Sys. Corp., *supra*. Additionally, under 13 C.F.R. § 124.502(b)(9), the procuring activity is unambiguously required to include in its 8(a) offering letter to SBA, among other things, the acquisition history, if any, of the offered requirement.

For the reasons set forth below, we conclude that the Air Force's offering letter here did not provide complete and accurate information as required by SBA's regulations. We find that the agency's error, however, did not prejudice Designer Associates.

In its agency report filed with our Office, the Air Force admits that its statement to SBA regarding the history of the requirement here was inaccurate, and acknowledges that the maintenance services here have been accomplished by small business contractors since at least 1993. Agency Report at 3. The Air Force contends that its offering letter to SBA should have instead stated, "Current history shows that this (housing maintenance contract) was never previously awarded to another 8(a) small business firm," *id.*, although even this statement, albeit accurate, fails to provide the information required by SBA's regulations.

Pursuant to a request from our Office, the Air Force provided a copy of its report to SBA for comment. After learning that the Air Force's offering letter was inaccurate insofar as the requirement's acquisition history, SBA performed a new adverse impact analysis.⁵ SBA concluded that acceptance of the requirement here would not have an adverse impact on other small business programs, SBA's Comments, exh. A, SBA Adverse Impact Review, December 11, 2003, a determination that Designer Associates has not challenged.

In light of SBA's subsequent determination, we find that the Air Force's error of failing to provide SBA with complete and accurate information regarding the requirement's acquisition history did not prejudice Designer Associates. Competitive prejudice is an essential element of every viable protest. Diverco, Inc., B-259734, Apr. 21, 1995, 95-1 CPD ¶ 209 at 4; see McDonald-Bradley, B-270126, Feb. 8, 1996, 96-1 CPD ¶ 54 at 3; Statistica, Inc. v. Christopher, 102 F.3d 1577, 1581 (Fed. Cir. 1996). Under these circumstances, there is no basis for questioning the agency's actions.

Lastly, Designer Associates alleges that the Air Force acted in bad faith. Designer Associates argues that the agency's bad faith is evidenced by, among other things,

⁵ The Air Force also separately informed SBA that because of an update to its housing privatization schedule (*i.e.*, the anticipated award date was now July 31, 2004), the requirement here would now be for a term of 6 months with two 6-month option periods, at a total estimated price of \$2,300,476.50. SBA Comments, exh. B, Letter from Air Force to GAO, Dec. 11, 2003.

the fact that the Air Force has changed the traditional duration of the contract here from its normal 5-year length, with an estimated value in excess of \$6 million, to an 18-month contract, having an estimated value of less than \$3 million, thereby permitting a noncompetitive award under the 8(a) program. See FAR § 19.805-1(a)(2). Government officials are presumed to act in good faith and, where a protester contends that contracting officials are motivated by bias or bad faith, it must provide convincing proof, since this Office will not attribute unfair or prejudicial motives to procurement officials on the basis of inference or suppositions. United Coatings, B-291978.2, July 7, 2003, 2003 CPD ¶ 146 at 14. Here, Designer Associates has not provided any proof to support this allegation. Moreover, we are unaware of any law or regulation dictating the “traditional duration” of a contract, see New Technology Mgmt., Inc., B-287714.2 et al., Dec. 4, 2001, 2001 CPD ¶ 196 at 4, and the record shows that the Air Force had valid reasons for limiting the duration of the contract here as it did, including the fact that the maintenance requirement would cease to exist with the privatization of Hill AFB family housing, estimated to occur in July 2004.

The protest is denied.

Anthony H. Gamboa
General Counsel