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**Comptroller General
of the United States**

**United States Government Accountability Office
Washington, DC 20548**

Decision

Matter of: Tiger Enterprises, Inc.

File: B-294973

Date: January 4, 2005

Lillian K. Mauldin for the protester.

J.R. Cohn, Esq., and Julius Rothlein, Esq., U.S. Marine Corps, and Kenneth Dodds, Esq., and John W. Klein, Esq., Small Business Administration, for the agencies. John L. Formica, Esq., and Guy R. Pietrovito, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that Small Business Administration (SBA) improperly accepted a U.S. Marine Corps requirement for the lease of washers/dryers into the section 8(a) program is denied where the record supports the SBA's determination that the requirement is "new," and as such an adverse impact determination was not required.

DECISION

Tiger Enterprises, Inc. protests the decision of the U.S. Marine Corps and Small Business Administration (SBA) to contract with Class Act under the section 8(a) set-aside program for the lease and maintenance of washers and dryers for certain barracks at Camp Lejeune, North Carolina.¹

We deny the protest.

Camp Lejeune is a Marine Corps training base where marines living in barracks do not have access to commercial laundry facilities. The Marine Corps thus leases washers and dryers for use by marines. The agency explains that "[a] substantial program of construction and renovation of barracks is ongoing at Camp Lejeune,"

¹ Section 8(a) of the Small Business Act, 15 U.S.C. § 637(a) (2000), authorizes SBA to contract with government agencies and arrange for the performance of those contracts by awarding subcontracts to socially and economically disadvantaged small businesses.

and that “Marines must have washers and dryers available in their new quarters.” Agency Report (AR) at 1-2.

Over the past 10 years, the agency has competitively awarded successive contracts to two small businesses for the lease of washers/dryers at Camp Lejeune. AR, Tab 2, Chronology, at 1. A third contract for the washers/dryers was solicited as a small business set-aside; this contract, which was first awarded by the agency in August 2003, has been the subject of a number of protests, and has since been canceled.²

The record reflects that in May and June 2004 four new/renovated barracks at Camp Lejeune became available for use, and the agency offered this requirement to the SBA for performance by a section 8(a) contractor. The Marine Corps explained to the SBA that the requirement was “new” because “no small-business set-aside vendor was working the four barracks,” and that the requirement had not been part of the other solicitations or contracts for the lease and maintenance of washers/dryers at Camp Lejeune. AR, Tab 11, Contracting Officer’s Memorandum (July 28, 2004); Tab 12, Letter from Contracting Officer to SBA (July 28, 2004). The SBA subsequently accepted the requirement into the section 8(a) program, and awarded a contract for the lease of washer/dryers for the four new/renovated barracks through the section 8(a) program to Class Act. AR, Tab 8, Class Act Contract; Tab 13, Letter from Contracting Officer to SBA (July 29, 2004).

Tiger protests that the Marine Corps and SBA violated the regulations governing placement of work under SBA’s section 8(a) program, arguing that contrary to the position of the Marine Corps and SBA, the requirement has effectively been included in the contracts previously awarded to small businesses for the lease and maintenance of washers/dryers at Camp Lejeune. In this regard, Tiger contends that although the four barracks at issue here are new or renovated, the previous contracts and solicitation included a clause providing for the relocation or removal

² In 2003, Tiger protested to our Office that the Marine Corps had improperly failed to terminate a small business set-aside contract for the lease of washers/dryers at Camp Lejeune after the firm awarded the contract was found by the SBA to be other than a small business in response to a timely size protest. We sustained Tiger’s protest in Tiger Enters., Inc., B-292815.3, B-293439, Jan. 20, 2004, 2004 CPD ¶ 19. The agency resolicited the requirement under a different solicitation, and Tiger protested to our Office that the agency’s source selection under that solicitation was not reasonably based. We sustained that protest in Tiger Enters., Inc., B-293951, July 26, 2004, 2004 CPD ¶ 141. In response to that decision, the agency amended the solicitation, and sought revised proposals. Tiger filed a protest with our Office, challenging the terms of the solicitation as amended, and the agency subsequently canceled the solicitation, rendering Tiger’s protest academic. Tiger Enters., Inc., B-293951.2, August 31, 2004.

of washers/dryers, and that requirements for washers/dryers at new or renovated barracks could be met through the use of this relocation or removal clause.

The Small Business Act affords SBA and contracting agencies broad discretion in selecting procurements for inclusion in the section 8(a) program; we will not consider a protest challenging a decision to procure under the section 8(a) program unless the protester alleges possible fraud or bad faith on the part of government officials, or that specific laws or regulations have been violated. 4 C.F.R. § 21.5(c)(2) (2004); C. Martin Co., Inc., B-292662, Nov. 6, 2003, 2003 CPD ¶ 207 at 3.

Under the Act's implementing regulations, SBA will not accept a procurement for award as a section 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) (2004). The purpose of the "adverse impact" concept is to protect other small businesses performing contracts outside the 8(a) program. Id.; Grace Indus., Inc., B-274378, Nov. 8, 1996, 96-2 CPD ¶ 178 at 2 n.2. The "adverse impact" concept, however, does not apply to "new" requirements that have not been previously purchased by the procuring agency. See 13 C.F.R. § 124.504(c)(1)(ii)(A), which explains that:

[w]here a requirement is new, no small business could have previously performed the requirement and, thus, SBA's acceptance of the requirement for the 8(a) [business development] program will not adversely impact any small business.

The SBA states that, because the four barracks at issue here were not among the buildings listed in the previous contracts or solicitations that had been set aside for small businesses, the SBA considered the requirement to be "new" and suitable for inclusion in the section 8(a) program. The SBA explains that the purpose of the adverse impact concept "is to prevent an agency from snatching a procurement opportunity away from small business concerns when such concerns may have already expended time and resources in the pursuit of that opportunity." SBA Report at 4. The SBA adds that, in its view, the relocation/removal clause pointed to by the protester "which would purportedly give the [Marine Corps] the ability to add or relocate machines after award [is] not specific enough to trigger the [regulatory] provisions" requiring a determination of adverse impact, and that, in its view, the "adverse impact" concept and relocation/removal provisions of the previous solicitations or contracts "should not be interpreted to bar the [Marine Corps] from ever awarding a section 8(a) contract for washers and dryers at Camp Lejeune." Id. at 3, 4.

Tiger has not shown that the SBA's interpretation of its regulations is reasonable. As the agency responsible for promulgating the adverse impact regulation, the SBA's interpretation deserves great weight, and we give deference to an agency's reasonable interpretation of its regulations. See The Urban Group, Inc.; McSwain and Assocs., Inc., B-281352, B-281353, Jan. 28, 1999, 99-1 CPD ¶ 25 at 25. Here, as

stated by the SBA, the four barracks listed in Class Act's contract are not among the buildings listed in the previous contracts, or among the 183 buildings listed in the most recent solicitation issued as a small business set-side by the Marine Corps for the lease of washers/dryers at Camp Lejeune. Given this, and our view that the SBA is correct that the relocation/removal clause cannot reasonably be read as applying to each needed washer/dryer at Camp Lejeune regardless of whether the building where the washer/dryer is needed has been previously set aside for performance by small business concerns, we have no basis upon which to object to the placement and acceptance of the requirement in the section 8(a) program by the Marine Corps and SBA.

The protest is denied.

Anthony H. Gamboa
General Counsel