

MEMORANDUM FOR ALL MAJOR SUBORDINATE COMMAND, DISTRICT  
COMMAND, FIELD OPERATING ACTIVITY & LABORATORY COUNSELS

SUBJECT: CECC-C Bulletin No. 00-12, Lessons Learned from Ocuto Blacktop & Paving Co., Inc., B-284165

1. On March 1, 2000, the Comptroller General sustained a pre-award protest by Ocuto Blacktop & Paving Co., Inc. (Ocuto) against award of a contract for the capping of a landfill at the former Griffiss Air Force Base (AFB) in Rome, New York. Ocuto alleged that the U.S. Army Corps of Engineers (USACE) failed to comply with a statutory requirement that government agencies give preference, to the maximum extent possible, to contracting with local, small, and small disadvantaged businesses for work associated with closing military installations under a base closure law. The Comptroller General held that the USACE solicitation for a regional environmental remediation indefinite delivery/ indefinite quantity (IDIQ) contract failed to give reasonable consideration to the practicability of providing a preference to local contractors.

2. In 1993, the Base Realignment and Closure (BRAC) Commission nominated Griffiss for decommissioning under the BRAC Act, and the base officially closed in September 1995. Section 2912 of the National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, which is codified at 10 U.S.C. § 2687 note, established the following preference for businesses located in the vicinity of base closure and realignment work:

- (a) Preference required. -- In entering into contracts with private entities as part of the closure or realignment of a military installation under a base closure law, the Secretary of Defense shall give preference, to the greatest extent practicable, to qualified businesses located in the vicinity of the installation and to small business concerns and small disadvantaged business concerns. Contracts for which this preference shall be given shall include contracts to carry out activities for the environmental restoration and mitigation at military installations to be closed or realigned.

The statutory preference is implemented in the Defense Federal Acquisition Regulation Supplement (DFARS) at § 226.7103(a). The DFARS provides that a contracting officer (CO) must determine “whether there is a reasonable expectation that offers will be received from responsible business concerns located in the vicinity of the military installation that is being closed or realigned,” before making a small business or small disadvantaged business (SDB) set-aside determination. The regulations prohibit the use

of set-asides when the CO's market research indicates that local business offers can be expected, unless an offer is expected from a local business within the set aside category.<sup>1</sup> If offers from businesses in the vicinity are not expected, the CO should continue with section 8(a) or set-aside consideration as stated in DFARS Part 219.<sup>2</sup> In other words, the regulation establishes a priority for awarding to local businesses over 8(a) or other small businesses.

3. Upon request from Region II of the Environmental Protection Agency (EPA), USACE established pre-placed remedial action contracts (PRAC) for environmental remediation actions for civil or military projects within the geographic boundaries of EPA Region II and the Northwestern Division. These combined areas cover 15 states and two U.S. territories. The PRAC work will include projects at any current or former military installations within the established area, however none of the PRAC contracts are limited to BRAC projects. Griffiss AFB is in the BRAC program and BRAC funds will be used to cap the landfill as part of a Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) remediation required by EPA.

4. Until the mid-1990s, the District had endeavored to accomplish this type of work through site specific contracts, but determined that method of contracting to be against the Government's interests of cost, staff resources, and time. Experience showed that it cost the District approximately \$200,000 to \$500,000 for each small acquisition to do site specific contracting. In 1996, USACE successfully defeated a protest against award of a contract for removal of underground storage tanks at Griffiss AFB.<sup>3</sup> USACE had issued a solicitation for all work at Griffiss related to base closure, including soil testing to determine the presence of contamination caused by leakage. Among the five evaluation factors listed in the request for proposal (RFP) were local business preference and subcontracting with local and small businesses. USACE made award to the offeror whose proposal represented the best overall value to the Government. The awardee's price was slightly higher than the protester, however, the awardee scored significantly higher on the technical evaluation because it was located in a county in the vicinity of Griffiss AFB and proposed that a majority of the work would be performed by local subcontractors. The GAO accepted the CO's explanation that his greatest concern was for the Government to receive the best quality under a best value formula and that the policy objectives of DFARS Subpart 226.71 be fulfilled to the greatest extent possible. In the Ocuto protest decision, the Comptroller General referred to this 1996 remediation procurement as exemplary.<sup>4</sup> In the instant procurement, rather than prepare a site specific RFP, USACE issued a regional IDIQ solicitation.

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<sup>1</sup> DFARS § 226.7103 (c); Ocuto Blacktop & Paving Co., Inc., B-284165, Mar. 1, 2000.

<sup>2</sup> DFARS § 226.7103 (b).

<sup>3</sup> GZA Remediation, Inc., B-272386, Oct. 3, 1996, 96-2 Comp. Gen. Dec. ¶ 155.

<sup>4</sup> Ocuto, B-284165, at note 2.

5. USACE published a Commerce Business Daily notice, establishing May 19, 1998 as the prescribed proposal due date. It then created mailing lists for prospective offerors by compiling names of all contractors who requested to be included on the lists. Only those who requested to be on the mailing lists received solicitations. USACE issued three solicitations for PRACs. One solicitation was issued without restrictions, the second was set aside for small businesses, and the third was reserved for small disadvantaged businesses in the Small Business Administration's (SBA) 8(a) set aside program. Each of the solicitations contemplated award of multiple IDIQ contracts. The landfill cap project at Griffiss AFB was to be ordered under one of the two contracts under the 8(a) set aside solicitation. Ocuto was on the mailing list for each of the three solicitations and was among the prospective offerors to whom solicitations were mailed on March. According to the CO, Ocuto did not respond to any of the solicitations. Ocuto claims it cannot recall receiving any of the solicitations

6. USACE selected Cape Environmental Management, Inc. (Cape) for award of the 8(a) contract for all remediation work within EPA Region II. USACE submitted an RFP for capping a landfill at Griffiss AFB to Cape on November 1, 1999. During negotiations, the contract specialist encouraged Cape to solicit quotes from subcontractors in the local Griffiss AFB vicinity, and Cape agreed to use such quotes if it received award. USACE intended to award the base IDIQ contract and the initial task order to cap the landfill at Griffiss simultaneously. Award had not been made by the time Ocuto filed its protest at the GAO, and USACE therefore suspended award.

7. Ocuto, a local contractor, learned from a representative of the BRAC commission that a contract for landfill capping at Griffiss was pending award to Cape, which is located in Waukegan, Illinois. Ocuto filed its GAO protest disputing USACE's failure to award to a contractor in the Rome, New York vicinity, on November 22, 1999. In response, USACE submitted a request for summary dismissal on the bases that (a) the GAO has no jurisdiction over a protest that challenges award of a task order under an IDIQ contract and (b) Ocuto's protest was untimely filed. USACE asserted that the statutory prohibition against protests in connection with the issuance of task orders and Ocuto's failure to file its protest within 10 days of its receipt of the solicitation, mandated dismissal of the protest. The GAO flatly denied the request on both counts. First, Ocuto's challenge is aimed at the solicitation's failure to mention environmental remediation work at closing military bases in the terms describing the underlying IDIQ contracts, not at the delivery order. Therefore, GAO claimed jurisdiction under its authority to review protests alleging a solicitation violates a statute or regulation. Second, because the solicitation gave inadequate notice to potential offerors that BRAC environmental projects were within its scope, Ocuto could not have been expected to protest the agency's interpretation of the solicitation prior to the proposal due date. GAO considered the protest timely because it was filed within 10 days of the date Ocuto knew of its basis for protest.

8. In its decision sustaining Ocuto’s position, the Comptroller General provided an extensive analysis of the statutory and regulatory preference for awarding BRAC work to local and small businesses. The statute requires an agency to give reasonable consideration to whether the preference is practicable. The Comptroller General explained that “where Congress directs that a preference be given to the greatest extent practicable, an agency must either provide the preference or articulate a reasoned explanation of why it is impracticable to do so.” This includes considering alternative solutions. The shortcoming of the USACE procurement strategy was the failure to record any consideration of alternative methods for implementing the local contractor preference.

9. The Comptroller General provided a short list of alternatives USACE might have considered, to include:

- (a) carving out the BRAC-related work and creating a separate contracting opportunity,
- (b) creating a schedule of regional IDIQ contractors, or
- (c) including a contractual requirement in the IDIQ contracts directing contractors to subcontract with local businesses.

Even if USACE had found these alternatives were impracticable, the Comptroller General ruled, the agency would have had to demonstrate that it had made a reasonable analysis of the possibilities. The existing record failed to address those factors that might make the alternatives impractical, such as budgeting and staffing constraints, the degree of local capability, and the number of projects subject to the preference. The Comptroller General concluded that in addition to failing to meet the statutory local business preference, USACE fell short of the regulatory mandate that the CO conduct market research and make a finding of whether local businesses could be reasonably expected to submit offers. Evidence of Ocuto’s interest in participating made USACE’s decision to proceed with an 8(a) set aside contract for the remediation improper.<sup>5</sup>

10. It was the USACE position that implementation of a statutory preference for local contractors is within the discretion of the Department of Defense. Relying on Ocuto Blacktop and Paving Co. v. Perry,<sup>6</sup> USACE contended that its actions in executing its discretionary duty to implement a local preference had been sufficient to meet the statutory requirement. In Ocuto v. Perry, Ocuto had claimed that the Air Force’s use of IDIQ contracts for environmental remediation denied small contractors the opportunity to successfully bid on work at a base closed under the BRAC law, in violation of Public Law 103-160, § 2912. The Comptroller General, however, was able to distinguish the court’s decision refusing to compel the agency’s discretion to be exercised in a particular manner. In that case, because local businesses in the vicinity of the BRAC work had

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<sup>5</sup> DFARS § 226.7103 (c).

<sup>6</sup> 942 F. Supp., 783, 787 (N.D.N.Y.1996) (denying mandamus forcing the Secretary of Defense to institute a local preference).

other opportunities available the court found mandamus jurisdiction inappropriate. The Comptroller General affirmed that the statutory preference is not mandatory, but it does require an agency to give reasonable consideration to the practicability of a local business preference. In the instant case, USACE failed to produce any documentation in the record articulating why the preference is impracticable.

11. The CO asserted that under the circumstances, it was too costly and administratively unwieldy to conduct a site specific solicitation with a preference for local and small businesses. USACE contended that time, expense and growing workload combined with staff reductions made the implementation of the local preference impracticable. Moreover, the USACE defended the appropriate exercise of the CO's discretion in deciding to use IDIQ contracts as the procurement instrument. By encouraging Cape to work with local suppliers, USACE claimed it was accommodating the statutory local preference policy in the context of a different and, under the circumstances, necessary acquisition strategy. Ultimately, the opinion concluded that USACE had made an insufficient effort to consider and implement alternatives such as those referenced in paragraph 9, *supra*.

12. The lesson learned in this case is that regional IDIQ contracting for BRAC projects appears to be unworkable in light of statutory and regulatory preferences for local contractors. Award of contracts related to the closure or realignment of military bases cannot be processed without specific compliance with DFARS §226.7103. The acquisition plan must reflect compliance with the DFARS, especially where discretion is exercised. The option of site-specific contracting for BRAC work should be seriously considered. In those circumstances where giving preference to local businesses is indeed found impracticable, the CO should consider whether other alternatives exist to maximize the use of local contractors and carefully document his or her conclusion in a reasoned analysis. Some thought should be given to modeling future solicitations after the RFP in GZA Remediation, B-272386, *supra*, which included locality as a technical evaluation factor.

13. The point of contact for this matter is Karen Da Ponte, who can be reached at (202) 761-8541.

FOR THE COMMANDER:

/s/

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