

LEGAL ADVISOR

A PilieroMazza Update for Federal Contractors and Commercial Businesses

Government Contracts

WHAT IS ENOUGH CONSIDERATION OF SMALL BUSINESS INTERESTS? – GAO DENIES PROTESTS AGAINST GSA CONSOLIDATION OF SMALL BUSINESS CONTRACTS

By Katie Flood

In a recent decision by the U.S. Government Accountability Office (GAO), the U.S. General Services Administration (GSA) prevailed upon its argument that the government-wide provision of office supply items in the Office Supplies Third Generation (OS3) procurement did not improperly consolidate smaller contracts. In *American Toner & Ink, et al.*, B-409528.7 *et al.* (June 2014), the GSA argued that targeted consideration of the potential impact on small businesses was sufficient, and that the consolidation would result in substantial benefits to the government. Despite the receipt of input from the SBA, which argued that the consideration given by the GSA to the economic consequences in store for small businesses if consolidation occurred was not sufficient, the GAO determined that GSA complied with statutory requirements to consider the consolidation's potential economic effect on small businesses.

The protesters—American Toner and Ink, KPaul Properties, LLC., Dolphin Blue, Inc., and Capital Shredder Corp.—argued that the GSA's plan to consolidate numerous existing contracts for office supply items into a small pool of strategically sourced, multiple award contracts would harm small businesses. GSA undisputedly had a statutory duty to examine these impacts on small businesses before it proceeded with the planned consolidation. Specifically, Section 1331 of the Small Business Jobs Act of 2010, Pub. L. 111-240 (Jobs Act), sets forth limitations on contract consolidation. Before consolidating contracts, agencies must conduct sufficient market research, assess and analyze the impact such a contract could have on small businesses, and ensure there are sufficient opportunities for small businesses. Moreover, the agency must make a determination that the

consolidation is both necessary and justified, and may do so only if the benefits of the acquisition strategy substantially exceed the benefits of each of the possible alternative contracting approaches identified by the agency.

GSA argued that OS3 was a “follow on” contracting vehicle to a prior version of the program (OS2), and therefore did not constitute a consolidation of contract requirements subject to the provisions of the Jobs Act. In addition, GSA argued that it is “contrary to law” to provide an economic analysis of the consequences on small businesses on a consolidated contract. The SBA disagreed with this construction, arguing that the plain language of the statute states that consolidation of contracts occurs when an agency combines two or more requirements of the agency for goods or services that have been provided to or performed for the agency under two or more separate contracts lower in cost than the total cost of the contract for which the offers are solicited. Here, the SBA argued that GSA combined several of the office supplies requirements of GSA and numerous other agencies, and that these functions were performed on other contracts undeniably lower in cost than the estimated \$1.25 billion of the OS3 procurement. SBA also argued that there was no reason to distinguish follow-on contracts from other types of consolidated contracts under the Jobs Act. Further, SBA posited that some type of data analysis of the potential impact by OS3 on the government's small businesses suppliers should have been performed.

Ultimately, the GAO disagreed with the SBA's analysis of the Jobs Act's requirements. In denying the protests, the GAO held that the consolidation analysis performed by the GSA was sufficient. The GSA conducted market research, identified alternate contract approaches that would involve less consolidation, and set out its views on the negative impact the consolidation strategy would have on small businesses,

Continued on page 2

Published by



Continued from page 1

ultimately concluding that the benefits to be gained through OS3 outweighed the potential negative impact to small business concerns. Moreover, GSA expected that 23 of the 24 OS3 contracts to be awarded would be awarded to small businesses. The GAO held that the Jobs Act did not require “a more detailed or quantified cost-benefit analysis to justify the agency’s solicitation approach” as argued by the SBA and the protesters. The GAO found that GSA met all of the Jobs Act’s requirements, and therefore denied the protests.

The GAO’s decision in *American Toner & Ink* is potentially troubling for the small business community, as there may be a negative impact on small businesses in relation to future procurements that consolidate smaller contracts into a larger vehicle like the OS3 contract. The GAO has now specifically found that agencies need not perform quantified cost-benefit or economic impact analysis when analyzing procurement data in the decision to consolidate contracts. Instead of bolstering the Jobs Act protections for small businesses against the very real trend towards consolidating contract into larger government-wide vehicles, the GAO instead found that agencies may perfunctorily check the various requirements before reaching a general determination that the benefits of consolidation outweigh the potential negative impacts on small business concerns. Hopefully, Congress will pay attention to the implementation of this policy on the ground, and will revise the Jobs Act to give the required consolidation analysis more teeth. □

About the Author: Katie Flood, an associate with PilieroMazza, practices in the areas of government contracts, small business administration programs, and litigation. Ms. Flood counsels clients in a broad range of government contracting matters, as well as Administrative Procedure Act actions and complex civil litigation in federal forums. She can be reached at kflood@pilieromazza.com.

The *Legal Advisor* is a periodic newsletter designed to inform clients and other interested persons about recent developments and issues relevant to federal contractors and commercial businesses. Nothing in the *Legal Advisor* constitutes legal advice, which can only be obtained as a result of personal consultation with an attorney. The information published here is believed to be accurate at the time of publication but is subject to change and does not purport to be a complete statement of all relevant issues.