Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Ervin and Associates, Inc.

File: B-279161; B-279162; B-279187; B-279188

Date: April 20, 1998

John J. Ervin for the protester.
Shari Weaver, Esq., and Michael J. Farley, Esq., Department of Housing and Urban Development, for the agency.
Tania L. Calhoun, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. General Accounting Office will not consider allegation that Department of Housing and Urban Development's use of the section 8(a) program to meet its needs for various types of services is unconstitutional in light of Adarand Constructors, Inc. v. Peña and City of Richmond v. J. A. Croson Co. because neither decision constitutes clear judicial precedent on the constitutionality or legality of the contracting agency's use of this program.

2. General Accounting Office will not consider challenge to contracting agency's use of section 8(a) set-aside solicitations as part of its procurement strategy where there is no showing that regulations may have been violated or of possible bad faith on the part of government officials.

DECISION

Ervin and Associates, Inc. protests the Department of Housing and Urban Development's (HUD) decision to satisfy its requirements for two categories of services--due diligence services for HUD's Housing Programs and comprehensive services for the Assistant Secretary for Housing-Federal Housing Commissioner--by issuing, for each category of services, one solicitation set aside for participants in the Small Business Administration's (SBA) section 8(a) program and one solicitation subject to full and open competition. Ervin argues that HUD's use of the section 8(a) program to satisfy its needs is unconstitutional and that HUD's parallel procurement strategy is otherwise improper.

We deny the protests.

Section 8(a) of the Small Business Act authorizes SBA to enter into contracts with government agencies and to arrange for the performance of such contracts by

awarding subcontracts to socially and economically disadvantaged small business contractors. 15 U.S.C. § 637(a) (1994).

HUD has historically obtained due diligence services[1] through section 8(a) set-aside contracts. HUD's most recent due diligence contracts recently expired and, in preparing the follow-on procurement, HUD realized that its need for due diligence services had significantly increased from the initial needs it identified in late 1995. HUD decided that it was in the government's best interest to obtain maximum competition to satisfy this increased capacity. To this end, HUD implemented a parallel procurement strategy that would enable it to continue sponsoring section 8(a) business development opportunities by soliciting for due diligence services at the previous level under the section 8(a) program, and to meet its expanded requirements for these services by soliciting on a full and open basis. Request for proposals (RFP) Nos. DU100C000018600 and DU100C000018561, the set-aside and unrestricted solicitations, respectively, were issued on November 21, 1997.

Each solicitation anticipates the award of multiple indefinite-quantity task order contracts, and each contains the same statement of work. RFPs §§ B-1(b), B-2, I-16, L-4, C. Each solicitation guarantees a minimum order of $250,000 per contract and a maximum of $30 million per contract. RFPs §§ B-3. Each solicitation states that multiple awardees will be provided a fair opportunity to be considered for award of each task order, pursuant to Federal Acquisition Regulation (FAR) § 16.505 (FAC 97-02),[2] and sets forth the same procedures for such consideration. RFPs §§ H-4.

HUD has historically obtained the comprehensive administrative, professional, accounting, financial, and auditing support services for overseeing all Federal Housing Administration programs and operations through separate contracts, each of which was set aside under the section 8(a) program. The services continue to be a significant requirement and are now being consolidated. HUD explains that, in furtherance of its commitment to providing maximum practicable contracting opportunities to small disadvantaged business contractors, it planned to procure a portion of the required services under the section 8(a) program and a portion on a full and open basis. RFP Nos. DU100C000018601 and DU100C000018597, the set-aside and unrestricted solicitations, respectively, were issued on November 28.

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[1]Due diligence encompasses a wide range of services that facilitate the sale or restructuring of HUD-held and/or insured single-family and multifamily mortgages, as well as Title I home improvement and manufactured housing loans.

[2]As a general matter, for orders issued under multiple task order contracts, each awardee shall be provided a fair opportunity to be considered for each order in excess of $2,500. FAR § 16.505(b)(1).

Each solicitation anticipates the award of multiple indefinite-quantity task order contracts, and each contains the same statement of work. RFPs §§ B-2, I-14, C. Each solicitation guarantees a minimum order of $250,000 per contract and a maximum of $20 million per contract. RFPs §§ B-3; Set-Aside RFP Amendment No. 3, Question and Answer (QA) 7b, QA 8; Unrestricted RFP Amendment No. 3, QA 11b, QA 12. Each solicitation states that multiple awardees will be provided a fair opportunity to be considered for award of each task order, and sets forth the same procedures for such consideration. RFPs §§ G-4. Each solicitation further states that proposals for task orders will be solicited on a rotational basis between the set-aside contracts and the unrestricted contracts; successful awardees under each contract shall be given a fair opportunity to be considered. Set-Aside RFP Amendment No. 3, QA 7a, QA 7b; Unrestricted RFP Amendment No. 3, QA 11a, QA 11b.

Ervin first asserts that HUD's decision to procure both of these categories of services through the section 8(a) program is unconstitutional under Adarand Constructors, Inc. v. Peña, 515 U.S. 200 (1995). In Adarand, the Supreme Court held that racial classifications must be subject to strict scrutiny and must serve a compelling governmental interest and be narrowly tailored to further that interest. Id. at 224-27. Ervin, which is not a section 8(a) participant, contends that HUD's procurement of these services through section 8(a) set-aside contracts cannot pass muster under the strict scrutiny standard since there is no evidence of specific past racial discrimination in connection with its procurement of these services.

There must be clear judicial precedent on the precise issue presented to us before we will consider a protest based on the asserted unconstitutionality of the procuring agency's actions. Schwegman Constructors and Eng'rs, Inc., B-272223, Aug. 28, 1996, 96-2 CPD ¶ 90 at 4; DePaul Hosp. and The Catholic Health Ass'n of the United States, B-227160, Aug. 18, 1987, 87-2 CPD ¶ 173 at 6. We have consistently held that, since the Court in Adarand simply announced the standard that is to be applied in determining the constitutionality of programs involving racial classifications in the federal government, and remanded the case to the lower courts for further consideration in light of that standard, Adarand did not provide that precedent. Schwegman Constructors and Eng'rs, Inc., supra; Advanced Eng'g & Research Assocs., Inc., B-261377.2 et al., Oct. 3, 1995, 95-2 CPD ¶ 156 at 4 n.3; Elrich Contracting Inc.; The George Byron Co., B-262015, B-265701, Aug. 17, 1995, 95-2 CPD ¶ 71 at 2.

Ervin incorrectly asserts that Adarand, in tandem with City of Richmond v. J. A. Croson Co., 488 U.S. 469 (1989), provides us with the necessary clear judicial precedent. Neither Adarand, which concerned a Department of Transportation program involving financial incentives to prime contractors awarding subcontracts to small disadvantaged businesses, nor Croson, which concerned a municipality's minority set-aside program, constitutes clear judicial precedent on the constitutionality or legality of HUD's use of section 8(a) set-aside contracts to meet

its need for the services at issue here. These decisions addressed the particular programs that were before the Court and, while they indicate what factors need to be considered to determine the constitutionality of such programs, we are unaware of, and the protester does not cite to, any dispositive federal court decisions applying the standards articulated in Adarand and Croson to any program or procurement which is sufficiently similar to this one so as to warrant regarding those decisions as clear judicial precedent here. G.H. Harlow Co., Inc.--Recon., B-266144.3, Feb. 28, 1996, 96-1 CPD ¶ 116 at 1-2; see also Seyforth Roofing Co., Inc., B-235703, June 19, 1989, 89-1 CPD ¶ 574 at 1-2.

Ervin next asserts that HUD's contracting department has engaged in "massive corruption and favoritism" and that its planned award of "separate but equal" contracts to provide the same services gives HUD the opportunity for "further corruption and favoritism." In this regard, Ervin contends that there is nothing to stop HUD from ordering only the minimum guaranteed amount under the due diligence unrestricted solicitation and directing the remainder of the task orders to its "favored" section 8(a) set-aside contractors. Ervin further contends that the agency's plan to rotate the task orders between the two sets of comprehensive services contracts does not go far enough since one group of contractors or the other will still be excluded from the competition.

Ervin's objection here is clearly not to the issuance of the unrestricted solicitations, but to the issuance of the set-aside solicitations. However, since the Small Business 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 that regulations may have been violated or of possible bad faith on the part of government officials. Bid Protest Regulations, 4 C.F.R. § 21.5(b)(3) (1997). Ervin has made no such showing.

We know of no regulation that is violated by HUD's parallel procurement strategy in general or the issue of particular concern to Ervin, the allocation of task orders under the contracts. Each solicitation complies with the requirement of FAR § 16.505(b)(1) to provide each awardee a fair opportunity to be considered for each order, and the solicitations for comprehensive services go a step further to provide that task orders will rotate between each set of contracts. While Ervin is correct that there is no provision to compete the due diligence task orders between the two sets of contracts, there is no legal requirement for such a provision. HUD's only legal obligation is to order at least the minimum amount set forth under each solicitation, FAR § 16.504(a)(1), and offerors are to prepare their proposals accordingly.

Ervin's allegation that HUD will use this parallel procurement strategy to direct task orders to its "favored" section 8(a) contractors is supported by various examples of what Ervin characterizes as HUD's bad faith. However, to show bad faith, the protester must establish that the procuring agency acted with a malicious and

specific intent to injure the protester. Industrial Data Link Corp., B-246682, Mar. 19, 1992, 92-1 CPD ¶ 296 at 4. None of Ervin's underlying bases for its claim of bad faith--an ongoing criminal investigation of note sales at HUD, a HUD Inspector General audit report critical of HUD's procurement practices, and efforts by HUD to remake its procurement processes--meet this standard.[3] Ervin's allegation merely anticipates improper agency action and is, as a result, speculative and premature and will not be considered. VSE Corp.--Recon. and Entitlement to Costs, B-258204.3, B-258204.4, Dec. 28, 1994, 94-2 CPD ¶ 260 at 2. To the extent that Ervin's request that our Office "focus on what must be done to clean up HUD" can be construed as a request for investigation of HUD's procurement practices, our Office does not conduct such investigations as part of our bid protest function. Stabro Labs., Inc., B-256921, Aug. 8, 1994, 94-2 CPD ¶ 66 at 5.

We deny the protests.

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[3]Ervin has lawsuits pending which include allegations that HUD is retaliating against Ervin by "blackballing" the firm from competing for HUD contracts, as well as allegations of bias, bad faith, and procurement irregularities at HUD, some of which are referenced in these protests. Ervin and Assocs., Inc. v. Helen Dunlap, Civil Action No. 96-CV1253 (D.D.C. filed June 5, 1996) and Ervin and Assocs., Inc. v. United States, No. 96-504C (Fed. Cl. filed Sept. 24, 1997). To the extent that Ervin's reference to HUD's "bad faith with respect to Ervin" concerns these allegations, our Office generally will not consider any protest when the matter involved is the subject of litigation before a court of competent jurisdiction. 4 C.F.R. § 21.11(b); Robinson Enters.--Request for Recon., B-238594.2, Apr. 19, 1990, 90-1 CPD ¶ 402 at 2.