U.S. SMALL BUSINESS ADMINISTRATION
WASHINGTON, DC 20416

April 11, 2014

Via Email

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U.S. Government Accountability Office
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RE: Response in B-409528

Dear Ms. Riback:

This is in response to the April 8, 2014 filing of the General Services Administration (GSA) concerning RFP No. GSQ02-14-R-SA0001. According to GSA's filing, the U.S. Small Business Administration (SBA) has ignored the plain language of the Small Business Act with respect to requirements of a consolidation analysis. In addition, GSA argues that it is irrelevant to the issues in this protest that SBA's Procurement Center Representative (PCR) non-concurred with the acquisition. Finally, GSA has argued that SBA concurrence on the consolidation analysis is not required. For the following reasons, we disagree with all of GSA's assertions.

1. Negative Impact Assessment and Plain Language of the Statute

The Small Business Act (Act) states that "[i]n order to carry out the policies of this Act there is hereby created an agency under the name 'Small Business Administration' (herein referred to as the Administration). . . ."[1] The management of the Administration, or SBA, is vested in the Administrator.[2] Therefore SBA and its Administrator are charged with implementing the provisions of the Small Business Act.[3]

As noted in our first submission, §1331 of the Small Business Jobs Act of 2010 (Jobs Act), Pub. L. 111-240, amended the Small Business Act and set forth limitations on contract consolidation. Prior to this, only the Department of Defense (DOD) had limitations imposed with respect to contract consolidation (see 10 U.S.C. § 2382). Congress later amended the provisions addressing contract consolidation and specifically repealed 10 U.S.C. §2382. As a result, all agencies have limitations on contract consolidation and SBA is now the sole agency responsible for ensuring compliance with the limitations on contract consolidation and interpreting those provisions.[4]

[1] 15 U.S.C. § 633.
[2] Id. § 633(b)(1).
[3] 15 U.S.C. § 633(a).
[4] See Pub. L. No. 112-239, Div. A, Title XVI, Subtitle D, Part VI, § 1671(a), (b), (c)(2).

As we stated before, the Small Business Act requires that, for any consolidated contract, the Senior Procurement Executive or Chief Acquisition Officer of the agency:

> (A) conducts market research;
> (B) identifies any alternative contracting approaches that would involve a lesser degree of consolidation of contract requirements;
> (C) makes a written determination that the consolidation of contract requirements is necessary and justified;
> (D) identifies any negative impact by the acquisition strategy on contracting with small business concerns; and
> (E) ensures that steps will be taken to include small business concerns in the acquisition strategy.[5]

We explained that based upon this statutory provision, this negative impact analysis would then be used to determine the steps that need to be taken to include small business concerns in the acquisition strategy.[6] SBA reviewed the plain language of the statute and determined that a two sentence statement acknowledging that small businesses will be harmed by OS3 falls far short of the intent of Congress when crafting this legislation.

Clearly, Congress believes that consolidated contracts will negatively impact small businesses. Otherwise, it would not have created a specific statutory section in the Small Business Act limiting agencies' ability to consolidate contracts, require high level approval of the action, and require specific and documented determinations on the acquisition.

It would therefore be unreasonable to interpret the provision requiring an agency "identify any negative impact by the acquisition strategy" to simply require the agency to state that small businesses will be harmed. The plain language of the statute supports the position that more must be done.[7]

We believe that the SBA's interpretation of the various provisions of the Act is reasonable and must be given deference.[8] Although there may be other interpretations of the

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[5] 15 U.S.C. § 657q(c)(1) (emphasis added).
[6] See 15 U.S.C. § 657q(c)(1)(D) & 9(E) ("(D) identifies any negative impact by the acquisition strategy on contracting with small business concerns; and (E) ensures that steps will be taken to include small business concerns in the acquisition strategy.").
[7] It is the position of SBA that a cost benefit analysis needs to be performed. "Cost" must include the economic and social cost of job loss, not just to individual small business, but to the economy as a whole. SBA believes that this is a reasonable approach to assess negative impact of the consolidation.
[8] Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844-845 (1984) ("We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, [footnote omitted] and the principle of deference ... 'has been consistently followed ... whenever ... the meaning or reach of a statute has involved reconciling conflicting policies, and a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge. . . .If this choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned.' [citation omitted].")(emphasis added).

Act, the fact remains that if there is more than one interpretation, the agency charged with implementing the statute – in this case, SBA - must be given deference.[9]

Although GSA stated that it "considered th[e] negative impact on small business," such "consideration" has not, in SBA's view, been adequately documented. Similarly, GSA's conclusion that "the benefits to be gained through OS3 CLINs will outweigh this negative impact" is perfunctory, and, again, appears to be backed by no concrete data or analysis. As we noted in our previous filing, GSA has acknowledged that small businesses will be harmed by OS3, but never states how many and to what degree. Therefore, SBA believes that GSA cannot reasonably conclude that the benefits to be derived through OS3 will outweigh the harm to small business where neither the harm nor the benefits have been adequately captured.

2. PCR's Non Concurrence

The Small Business Act provides that PCRs are authorized to review any bundled or consolidated solicitation or contract in accordance with the Act.[10] In this case, the PCR reviewed the acquisition at issue in the protest and did not concur with it. Since GSA intended to issue the solicitation that day, SBA's non concurrence summarized some but not all issues with the solicitation. In this case, the PCR focused on the specific "preferences" not set forth in the Small Business Act, but utilized by GSA. Ultimately, SBA did not agree with GSA's acquisition strategy for OS3.

3. SBA's Concurrence on a Consolidation Analysis

GSA argues that SBA does not have to approve the consolidation analysis. This argument is illogical. First, as noted above, the provisions concerning limitations on consolidated contracts are set forth in the Small Business Act. Second, the Small Business Act specifically states that SBA's PCRs are authorized to "review any bundled or consolidated solicitation or contract in accordance with the Act."[11] SBA interprets "in accordance with this Act" to mean that SBA's PCRs are authorized to review any consolidated solicitation in accordance with 15 U.S.C. § 657q (§ 44 of the Small Business Act), which sets forth the limitations on contract consolidation. Section 44(c)(1)(D), 15 U.S.C. § 657q(c)(1)(D), requires that the agency "identifies any negative impact by the acquisition strategy on contracting with small business concerns;". Therefore, the SBA does have statutory authority to review and approve the consolidation analysis.

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[9] U.S. Steel Group v. U.S., 225 F.3d 1284, 1287 (Fed. Cir. 2000)("'To survive judicial scrutiny, an agency's construction need not be the only reasonable interpretation or even the most reasonable interpretation.' Koyo Seiko, 36 F.3d at 1570. Thus, when faced with more than one reasonable statutory interpretation, 'a court must defer to an agency's reasonable interpretation ... even if the court might have preferred another.' NSK Ltd. v. United States, 115 F.3d 965, 973 (Fed.Cir.1997).")

[10] 15 U.S.C. § 644(l)(2)(D).

[11] Id.

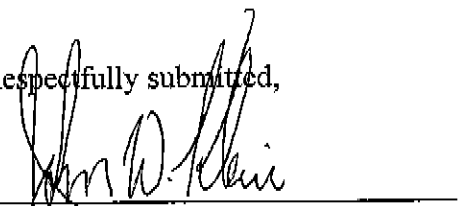
CONCLUSION

SBA stated in its initial submission that the Small Business Act does not preclude an agency from consolidating contracts; rather, it limits when and how an agency may proceed with this type of acquisition. The purpose and intent of the statute is to ensure that before consolidating contracts, agencies 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.

GSA failed to perform a negative impact assessment as part of its consolidation analysis before it posted the solicitation at issue in this protest. SBA has explained its interpretation of the Small Business Act to GSA and specifically stated that GSA was required to prepare a consolidation analysis that assessed the negative impact the acquisition will have (if any) on small businesses. GSA has still failed to perform this negative impact assessment.

For the reasons stated above, and in our initial submission to GAO, we believe the protest must be sustained.

Respectfully submitted,



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