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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: General Services Administration--Reconsideration

File: B-406040.2

Date: October 24, 2012

Gary F. Davis, Esq., General Services Administration; and Sam Q. Le, Esq., Small Business Administration, for the agencies.
Scott H. Riback, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Request for reconsideration is denied where requesting agency fails to show either that our prior decision contains errors of fact or law, or present information not previously considered, that would warrant reversal or modification of the prior decision.

DECISION

The General Services Administration (GSA) requests reconsideration of our decision in The Argos Group, LLC, B-406040, Jan. 24, 2012, 2012 CPD ¶ 32. In that decision, we sustained the protest of The Argos Group against the terms of solicitation No. ONY2508, issued by GSA on a full and open competitive basis, to acquire leased space for the Federal Bureau of Investigation in the vicinity of Hudson Valley, New York. We found that GSA improperly had failed to include in the solicitation the 10 percent price evaluation preference mandated by the Historically Underutilized Business Zone Act of 1997 (the HUBZone Act), 15 U.S.C. § 657a (2006). GSA maintains that our earlier decision is incorrect as a matter of law and impermissibly expands the application of the price evaluation preference to leasehold acquisitions.

We deny the request for reconsideration.

The statute at issue provides as follows:

> Price evaluation preference in full and open competitions. (A) In general. Subject to subparagraph (B), [relating to the procurement of commodities by the Secretary of Agriculture] in any case in which a

> contract is to be awarded on the basis of full and open competition, the price offered by a qualified HUBZone small business concern shall be deemed as being lower than the price offered by another offeror (other than another small business concern), if the price offered by the qualified HUBZone small business concern is not more than 10 percent higher than the price offered by the otherwise lowest, responsive, and responsible offeror.

15 U.S.C. § 657a (b)(3) (2006).

In our prior decision, we found that the 10 percent price evaluation preference is broadly applicable to all acquisitions conducted pursuant to full and open competitive procedures, and that application of the preference was not limited by the terms of the HUBZone Act to the type of contract being awarded (whether leasehold or other type of contract). We therefore recommended that GSA amend the subject solicitation to include the HUBZone Act price evaluation preference.

In its request for reconsideration, GSA advances several arguments in support of its position that our previous decision is legally incorrect. We note at the outset that, in order to prevail on a request for reconsideration, the requesting party must show either that our decision contains errors of fact or law, or present information not previously considered, that would warrant our reversal or modification of the prior decision. 4 C.F.R. § 21.14(a) (2012); Department of Veterans Affairs--Recon., B-405771.2, Feb. 15, 2012, 2012 CPD ¶ 73 at 3. For the reasons discussed below, we conclude that GSA's request does not meet this standard.

GSA asserts that our Office erred in not affording deference to its interpretation of the HUBZone price evaluation preference as inapplicable to leasehold acquisitions. GSA directs our attention to the Supreme Court's decision in Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). According to GSA, the Chevron decision stands for the proposition that, where a statute either is silent or ambiguous with respect to the specific question at issue, we are required to afford deference to the agency's interpretation of the statute, even if it is not the only possible interpretation. According to GSA, the HUBZone price evaluation preference statute is ambiguous with respect to its applicability to leasehold acquisitions and, accordingly, we should have deferred to GSA's interpretation.

GSA misapplies the Court's decision in Chevron. While GSA is correct that the decision stands for the general proposition that deference should be afforded to an agency's interpretation of a statute, that deference is to be afforded to the agency that is charged with administering the statute in question. Chevron supra, at 842.

Here, the statute under consideration, the HUBZone price evaluation preference statute, creates a program to be administered by the Small Business Administration

(SBA), not GSA. In particular, the HUBZone statute expressly identifies the Administrator of SBA as the official responsible for administering the HUBZone program, and establishes the HUBZone program within SBA. 15 U.S.C. § 657a(a). As such, it is the views of SBA, rather than those of GSA, to which our Office will afford deference. Chevron, supra, at 842; Blue Rock Structures, Inc., B-293134, Feb. 6, 2004, 2004 CPD ¶ 63 at 6-8.

Consistent with the deference standard established in Chevron supra, we did carefully consider the views of the SBA in our prior decision; SBA--the agency charged with administration of the HUBZone program--took the position that the HUBZone price evaluation preference is applicable to leasehold acquisitions. The Argos Group, LLC, supra, at 4 n.3; SBA Brief, Dec. 11, 2011. In this reconsideration, SBA has taken the same position, SBA Brief, June 21, 2012, and again we find that it reflects a reasonable interpretation of the statute. Simply stated, the HUBZone Act price evaluation preference, on its face, does not limit the type of contract to which it applies, and as we pointed out in our prior decision, courts (including the Supreme Court) and other adjudicative bodies have long recognized that a real property lease is a contract. There also is no affirmative language in the statute that specifically excludes application of the HUBZone Act price evaluation preference to procurements of leashold interests in real properly. Accordingly, we find that SBA's interpretation of the HUBZone statute is reasonable and should be upheld. Blue Rock Structures, Inc. supra.

GSA asserts that the HUBZone Act and its implementing regulations do not contemplate application of the price evaluation preference to leases. In support of its position, GSA points out that the price evaluation preference is only applicable where a "qualified" HUBZone small business concern is competing for the requirement. 15 U.S.C. § 657a(b)(3)(A). GSA notes that a "qualified" HUBZone small business is defined in 15 U.S.C. § 632(p)(5), and that, as a part of that definition, the statute imposes limitations regarding the extent to which a qualified HUBZone small business may subcontract the requirement to a firm that is not a qualified HUBZone concern. According to GSA, the statute and its implementing regulations only include subcontracting limitations (and, correspondingly, minimum performance standards for the HUBZone small business) for supply, service, and construction type contracts. GSA reasons that leases are distinct from these types of contracts; that there is no logical way to apportion the costs of performing a lease among the qualified HUBZone concern and its prospective non-HUBZone subcontractors; and, because the statute does not include specific performance standards for leases, Congress never intended the preference to apply to them.

GSA is correct that the statutory provision defining a "qualified" HUBZone small business includes specific performance standards for service and supply type

contracts,[1] and also requires the Administrator of SBA to promulgate performance standards for general and specialty construction type contracts. 15 U.S.C § 632(p). However, the statute also specifically contemplates that the Administrator will promulgate appropriate performance standards for any other industry not covered by the performance standards outlined for service and supply type contracts:

> Construction and other contracts. The Administrator shall promulgate final regulations imposing requirements that are similar to those specified in items (aa) [services type contracts] and (bb) [supply type contracts] of subparagraph (A)(i)(III) on contracts for general and specialty construction, and on contracts for any other industry category that would not otherwise be subject to those requirements. The percentage applicable to any such requirement shall be determined in accordance with subparagraph (B).

15 U.S.C. § 632(p)(5)(A)(ii)(C) (Emphasis supplied.). Thus, we agree with SBA that the HUBZone statute does not limit the applicability of the HUBZone price evaluation preference to procurements of supplies, services and construction. Instead, the statute imposes a requirement on SBA to promulgate performance standards for HUBZone small businesses where the industry category is not covered by the performance standards specifically included in the statute itself. While SBA has not yet promulgated performance standards defining "qualified" HUBZone concerns for the real property leasing industry, this does not mean that the HUBZone price evaluation preference is inapplicable to leasehold contracts that have been competed using full and open competition.[2]

GSA asserts that Congress has vested exclusive authority in the GSA Administrator to promulgate regulations relating to the acquisition of real property, 40 U.S.C. § 121(c)(1) (2006), and to establish the terms of leases consistent with the ". . . interest of the Federal Government. . . ." 40 U.S.C. § 585. GSA maintains that the authority conferred on the Administrator of GSA is ". . . not subject to any inconsistent provision of law." 40 U.S.C. § 113(a). According to GSA, requiring the

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[1] In the case of service contracts, not less than 50 percent of the cost of contract performance incurred for personnel must be expended for the HUBZone prime contractor's employees or for the employees of an eligible HUBZone subcontractor. 15 U.S.C. § 632(p)(5)(A)(i)(III)(aa). In the case of a contract for supplies, not less than 50 percent of the cost of manufacturing the supplies--exclusive of the cost of materials--must be incurred in connection with the performance of the contract in a HUBZone by one or more HUBZone small business concerns. 15 U.S.C. § 632(p)(5)(A)(i)(III)(bb).

[2] SBA should consider promulgating regulations implementing the definition of "qualified HUBZone" concerns for lease contracts.

application of the HUBZone price evaluation preference in leasehold acquisitions essentially impairs the Administrator's exclusive authority to enter into leasehold acquisitions that are "in the interest of the Federal Government." 40 U.S.C. § 585. GSA therefore maintains that application of the preference would be inconsistent with the GSA Administrator's exercise of that exclusive authority.[3]

Nothing in the statutory provisions to which GSA refers affects the applicability of the HUBZone price evaluation preference. At the heart of GSA's argument are the statutory provisions that: (1) vest the Administrator of GSA with authority to enter into leasehold acquisitions "in the interest of the Federal Government," 40 U.S.C. § 585; and (2) provide that that authority is ". . . not subject to any inconsistent provision of law." 40 U.S.C. § 113 (a).[4] Simply stated, neither of these provisions except leasehold acquisitions from application of the HUBZone price evaluation preference.

We also note that applying the HUBZone preference is not inconsistent with GSA's authority. In this regard, we note that GSA routinely conducts leasehold acquisitions on a best value (as opposed to lowest price) basis consistent with its authority enter into leasehold acquisitions that are "in the interest of the Federal Government." 40 U.S.C. § 585. Requiring application of the HUBZone price evaluation preference does not alter GSA's fundamental authority and ability to conduct lease acquisitions "in the interest of the Federal Government"; it simply

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[3] GSA recognizes that the Administrator for Federal Procurement Policy is required by statute to develop policies that will promote the achievement of goals for the participation of HUBZone small business concerns in contracting opportunities available from executive branch agencies. 41 U.S.C. § 1122(a)(12) (2006). GSA maintains, however, that the statutory authority of the Administrator for Federal Procurement Policy is expressly limited, and not intended to impair or affect the GSA Administrator's authority relating to the procurement of real property. 41 U.S.C. § 1130. While GSA may be correct regarding the authority of the Administrator for Federal Procurement Policy, that individual's authority does not supersede the independent authority of the Administrator of SBA to implement the HUBZone program. Moreover, unlike the statute implementing the authority of the Administrator for Federal Procurement Policy to promote the achievement of goals for the participation of HUBZone small business concerns in contracting opportunities, 41 U.S.C. § 1130, there is nothing in the statute implementing the HUBZone program that similarly conditions the authority of the Administrator of SBA to implement that program. 15 U.S.C. § 657a.

[4] As noted, GSA also refers to 40 U.S.C. § 121 (c)(1), but that provision simply grants the Administrator of GSA permissive authority to promulgate regulations to implement title 40 and does not address the interrelationship between title 40 and other statutory provisions such as the HUBZone Act.

affords qualifying HUBZone concerns a competitive advantage that must be taken into account in arriving at a best value determination that--by definition--would be in the interest of the federal government.

Moreover, GSA has not explained why the interests of the federal government do not include affording qualified HUBZone small businesses enhanced contracting opportunities through application of the HUBZone price evaluation preference. In fact, as GSA itself recognizes, Request for Reconsideration at 4-5, its own regulations demonstrate that other socioeconomic programs--such as the small business subcontracting program and the small disadvantaged business participation program--are implemented when GSA enters into a lease. See 48 C.F.R. part 519 (2012). It follows that, in implementing these programs, GSA implicitly recognizes that the interests of the federal government include implementation of other socioeconomic programs such as the HUBZone program.

Finally, GSA asserts that, in the case of lease transactions, the offerors often are 'single purpose' entities that are created solely for purposes of leasing space to the government, and that these entities often sell the real estate at a profit after being awarded the lease on the strength of the revenue stream assured by the contract that has been awarded. GSA maintains that any such sale effectively nullifies the benefits of the HUBZone program.

While GSA is correct that there is the possibility of a sale after the lease has been awarded, this is not a concern unique to real property transactions. Business entities providing supplies, services or construction to the federal government also are routinely sold, and as a consequence of those sales, the business's outstanding contractual obligations are transferred to another entity that may or may not be an organization qualified to receive the competitive advantage enjoyed by the original

concern under one or another socioeconomic program. However, this fact does not demonstrate that the HUBZone price evaluation preference is inapplicable to leasehold acquisitions.[5]

The request for reconsideration is denied.[6]

Lynn H. Gibson
General Counsel

[5] To the extent this is a concern to GSA, it could address this matter in its lease solicitations.

[6] As a final matter, GSA requests that we clarify our earlier decision regarding whether or not we concluded that the other two methods of assistance included in the HUBZone Act--sole-source contract awards and HUBZone set aside acquisitions for HUBZone small businesses--were applicable to leasehold acquisitions. Our prior decision only addressed the application of the HUBZone price preference in full and open contracting situations and did not consider these other two methods of assisting HUBZone small businesses.