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**Comptroller General
of the United States**

**United States Government Accountability Office
Washington, DC 20548**

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The decision issued on the date below was subject to a GAO Protective Order. No party requested redactions; we are therefore releasing the decision in its entirety.

Decision

Matter of: JXM, Inc.

File: B-402643

Date: June 25, 2010

Ronald J. Shaw, Esq., The Shaw Law Firm, for the protester.
Maj. Patrick L. Vergona, Department of the Army; and John W. Klein, Esq., and
Laura Mann Eyester, Esq., Small Business Administration, for the agencies.
Paul N. Wengert, Esq., and Sharon L. Larkin, Esq., Office of the General Counsel,
GAO, participated in the preparation of the decision.

DIGEST

1. Protest that agency improperly issued a sole-source contract to an Alaska Native Corporation under the Small Business Administration's 8(a) program, after canceling an earlier competitive 8(a) solicitation, is denied where agency's requirement had substantially increased, the agency reasonably described the procurement as a new requirement, and the SBA properly accepted the requirement for sole-source award.
 2. Protest that agency improperly bundled requirements for hospital environmental services is denied, where the protester has not alleged sufficient facts to show that it was precluded from competition by the alleged improper bundling, or that requirements were consolidated or unsuitable for award to small businesses.
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DECISION

JXM, Inc., an 8(a) small business in San Antonio, Texas, protests the award of a sole-source contract to Ahtna Facility Services, Inc., an 8(a) Alaska Native Corporation (ANC) in Anchorage, Alaska, by the Department of the Army under request for proposals (RFP) No. W81K04-10-R-0006 for hospital environmental services at various medical treatment facilities in Fort Sam Houston and Camp Bullis in Texas. JXM argues that the Army mischaracterized the RFP as a new requirement in order to use the Small Business Administration's (SBA) 8(a) program to award a sole-source contract to Ahtna, and that the Army has engaged in improper bundling under the Competition in Contracting Act and the Small Business Act.

We deny the protest.

BACKGROUND

On March 10, 2010, the Army offered a requirement for hospital environmental services to the SBA for a sole-source contract to Ahtna under the SBA's 8(a) program. The hospital environmental services to be provided included hospital housekeeping, linen services, medical waste and trash collection and removal services, and exterior building services such as window cleaning, outdoor policing, and snow removal. Agency Report (AR), Tab 13, Statement of Work, at 1. The Army described the requirement as a 12-month contract to provide hospital environmental services in multiple buildings totaling an estimated 2,800,000 square feet, of which 1,650,000 square feet required services immediately, and the remainder of the buildings would require services as they were completed during the contract term. Id.; AR at 4. The offering letter valued the procurement at \$20.4 million, and described it as a new requirement. AR, Tab 12, Letter from Contracting Officer to SBA, Mar. 10, 2010, at 2. After reviewing the offering, the SBA accepted it for award of a sole-source 8(a) contract to Ahtna. AR, Tab 14, Letter from SBA to Contracting Officer, Mar. 10, 2010, at 1.

On March 22, 2010, after learning of the Army's intention to award a sole-source contract to Ahtna under the 8(a) program, JXM filed this protest.¹ Principally, JXM argues that an 8(a) sole-source contract was improper because an earlier solicitation, issued in April 2008, had been conducted as a competitive procurement under the SBA's 8(a) program. Thus, the background of that earlier solicitation is relevant to the issues here.

The earlier procurement was conducted under a solicitation issued on April 28, 2008, seeking proposals for hospital housekeeping services at various medical treatment facilities in Fort Sam Houston and Camp Bullis in Texas. The solicitation required services for approximately 1,392,313 square feet of facilities. AR at 4. After receiving proposals from several firms, including from JXM,² the Army awarded the contract, and notified JXM on June 25, 2009, that its proposal was not successful.

Two offerors, including JXM, protested that award to our Office. During the development of the protest record, the Army announced that it would take corrective action, which would result in a new source selection decision.

¹ On May 4, the Army notified our Office that the agency had issued an override determination in order to proceed with the award of a contract to Ahtna. E-mail from Army to GAO, May 4, 2010, at 1.

² Although it has no significance to our resolution of the protest, for the sake of clarity, we refer to the entity that responded to the earlier solicitation as JXM, even though it was a joint venture between JXM and another firm.

Accordingly, our Office dismissed the protests.³ JXM, Inc./MBM, Inc. JV, B-401568, B-401568.2, Sept. 8, 2009; Medical Support Servs. JV, LLC, B-401574, Sept. 25, 2009.

Before a new award under that solicitation had been made, the Army determined that its needs had changed significantly. Specifically, the Army concluded that the upcoming completion of new medical treatment facilities and renovated building expansions in connection with base realignment and closure would roughly double the square footage of facility areas to be covered, significantly increase and expand the workload, and nearly double the value of the contract. AR at 3-5; Contracting Officer's Statement at 11-13; Supplemental Contracting Officer's Statement at 1-6. As a result, the contracting officer concluded that the existing RFP for hospital housekeeping services would not meet the agency's increased requirements. Contracting Officer's Statement at 12. Accordingly, on March 9, 2010, the Army posted notice that it was canceling the April 2008 solicitation.

As described above, the Army then offered its revised requirement to the SBA, and the SBA accepted it for award of a sole-source 8(a) contract to Ahtna. JXM protested that decision to our Office.

DISCUSSION

Section 8(a) of the Small Business Act authorizes the SBA to contract with other government agencies and to arrange for the performance of those contracts via subcontracts awarded to socially and economically disadvantaged small businesses. 15 U.S.C. § 637(a) (2006). The Act affords the 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 of possible bad faith on the part of government officials or that regulations may have been violated. 4 C.F.R. § 21.5(b)(3) (2010); Rothe Computer Solutions, LLC, B-299452, May 9, 2007, 2007 CPD ¶ 92 at 3.

³ Among other events in the months that followed, the Army attempted to meet its daily requirement for services by awarding a 12-month interim contract to the incumbent, which JXM also protested. JXM subsequently withdrew that protest based on a settlement agreement that JXM reached with the Army. Contracting Officer's Statement at 4-6. We will not consider JXM's arguments that the Army has breached that agreement because enforcement of its terms is beyond our bid protest jurisdiction. See U-Tech Servs. Corp.; K-Mar Indus., Inc., B-284183.3, B-284183.4, Oct. 6, 2000, 2002 CPD ¶ 78 at 3-4 (breach of settlement agreement does not give rise to cognizable protest ground, except where the alleged breach results in a prejudicial violation of procurement laws or regulations).

The section 8(a) program has both competitive and noncompetitive (that is, sole-source) components. Generally where a procurement for services exceeds the competitive threshold (currently \$3.5 million), the requirement must be competed among qualified 8(a) program participants. 13 C.F.R. § 124.506(a)(2)(ii). However, as provided by statute,⁴ the competitive threshold does not apply to the award of a sole-source 8(a) contract to a participant that is owned and controlled by an Indian tribe or an ANC, such as Ahtna.

In implementing this statutory authority, the SBA has established a limit on moving an existing requirement from the 8(a) competitive program to the 8(a) sole-source program:

SBA may award a sole source 8(a) contract to a Participant concern owned and controlled by an Indian tribe or an ANC where the anticipated value of the procurement exceeds the applicable competitive threshold if SBA has not accepted the requirement into the 8(a) [business development] program as a competitive procurement. There is no requirement that a procurement must be competed whenever possible before it can be accepted on a sole-source basis for a tribally-owned or ANC-owned concern, but a procurement may not be removed from competition to award it to a tribally-owned or ANC-owned concern on a sole-source basis.

13 C.F.R. § 124.506(b) (emphasis added).

The main question posed by the protest, then, is whether the requirement issued as an 8(a) competitive procurement in April 2008 is the same as the requirement accepted for the 8(a) sole-source award to Ahtna.

In this regard, the SBA regulations provide that:

[t]he expansion or modification of an existing requirement will be considered a new requirement where the magnitude of change is significant enough to cause a price adjustment of at least 25 percent (adjusted for inflation) or to require significant additional or different types of capabilities or work.

13 C.F.R. § 124.504(c)(1)(ii)(C).⁵

⁴ Pub. L. 100-656, § 602, as amended by Pub. L. 101-37, § 22 (codified at 15 U.S.C. § 637 note).

⁵ Although this regulation addresses an agency's decision to move an existing requirement from another small business program to the 8(a) program, as distinguished from the decision here to move a requirement between two parts of
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JXM argues that the Army and the SBA pursued an 8(a) competitive procurement for the requirement here in April 2008, and therefore the SBA is now prohibited from procuring the requirement using a sole-source contract to Ahtna. JXM disputes the Army's characterization of the contract with Ahtna as a new requirement, and argues that the Army's assertion that it needs services at significantly more building square footage is based on adding to the contract unfinished, unoccupied buildings that do not require such services. JXM submitted photographs to show that some of the buildings included are new buildings still under construction, and it argues that the Army has not shown a "definitive date for use and occupancy" of the additional square footage such that additional services could be validly required under Ahtna's contract. Protester's Supplemental Comments at 3.

The Army maintains that it accurately described its requirement to the SBA, and the SBA properly accepted it for award to Ahtna. The Army states that the building reconfiguration and new construction have nearly doubled the area requiring services, from 1,392,313 square feet for the original requirement to 2,712,720 square feet for the requirement here. The Army also identifies an increase in the scope of services to be provided. In this regard, the original requirement was for housekeeping services, whereas the requirement here is for hospital environmental services including housekeeping, medical waste and trash collection and removal, and exterior building services.⁶ As the agency also explained, the contract value increased from approximately \$11.3 for the prior 13-months of interim contracts to \$20.4 million for the 12-month effort here. AR at 5; Contracting Officer's Statement at 12-13.

With respect to JXM's argument that the buildings have not been finished, the Army acknowledges that services are not immediately needed for all of the additional square footage now. However, the Army maintains that it will begin to require the additional services in the coming weeks because much of the construction is nearing completion. In support of this argument, the Army has identified each building

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the 8(a) program, we accept the Army's uncontested argument in support of its application here. AR at 8; see also SBA Comments, May 5, 2010, at 7 (describing the Army's argument).

⁶ We note that JXM argues that the differences between the requirements are not significant, and thus the change in the description of the scope is mainly semantic. Protester's Comments at 10. While the Army's arguments to our Office principally focus on the changes in square footage and price, it is also apparent from the record that there are differences in the types of services required. Compare AR, Tab 5, Initial RFP Technical Exh. C, at 553-56 with AR, Tab 13, Draft Performance-Based Statement of Work, at 39-57. Since the Army and the SBA had a reasonable basis to conclude that the differences were significant, we defer to that judgment.

undergoing construction, and has explained when each is expected to be ready. The Army states that even though one large building will not be complete until 2011, it expects to transition areas of the building into service upon completion of those areas. Accordingly, the Army contends that it was necessary to include the square footage for all the additional buildings in its requirement. Supplemental Contracting Officer's Statement at 3-6.

At our Office's request, the SBA provided its views on the protest. We accord great weight to the SBA's interpretation of its regulations as to what constitutes a new requirement, unless the interpretation is unreasonable. NANA Servs., LLC, B-297177.3; B-297177.4, Jan. 3, 2006, 2006 CPD ¶ 4 at 10. Here, the SBA states that it agrees with the Army that notwithstanding the protester's arguments, the SBA properly accepted the requirement into the 8(a) program for award to Ahtna. The SBA considered the increase in square footage, workload, and contract value and reasonably determined that the services sought constituted a new requirement.⁷ SBA's Comments at 7; SBA's Supplemental Comments at 1-2. Based on the record, as discussed above, we see no basis to object to the Army's decision to offer the requirement to the SBA, or to the SBA's decision to accept it as an 8(a) sole-source award to Ahtna.

JXM also argues that the inclusion of the additional square footage in the contract with Ahtna constitutes unjustified bundling under the Competition in Contracting Act and the Small Business Act. See 10 U.S.C. § 2305(a)(1); 15 U.S.C. § 631(j)(3). However, JXM has failed to provide a sufficient factual basis for these protest grounds.

An allegation of bundling under the Competition in Contracting Act is based on a claim that a contract combines separate requirements beyond what is necessary to meet the agency's needs, which limits competition because the protester can only furnish a portion of the requirement. See Teximara, Inc., B-293221.2, July 9, 2004, 2004 CPD ¶ 151 at 6-9 (discussing elements of Competition in Contracting Act bundling). JXM has not argued that it would be unable to supply the full requirement due to the alleged bundling. To the contrary, JXM maintains that it can supply the Army's requirement, and should be allowed to compete for it. See Protest at 6; Protester's Comments at 10.

With respect to JXM's complaint of improper bundling under the Small Business Act, such a claim is based on the unnecessary and unjustified consolidation of two or more separate smaller contracts, which makes the requirement unsuitable for award

⁷ Although JXM contends that the Army misrepresented the requirement to the SBA, we are not persuaded by the protester's arguments and note that the SBA, after receiving access to the entire record during this protest, does not assert that it was misled.

to small businesses. 15 U.S.C. § 631(j); 13 C.F.R. § 125.2(d). However, JXM has not identified two or more separate smaller contracts that have been combined, nor has JXM shown that the resulting scope is unsuitable for award to a small business. Indeed, the actual awardee, Ahtna, qualifies as a small business, and so does JXM, who, as stated above, asserts that it can perform the entire requirement. In short, JXM has failed to allege sufficient facts that would constitute impermissible bundling under either the Small Business Act or Competition in Contracting Act.⁸

The protest is denied.

Lynn H. Gibson
Acting General Counsel

⁸ JXM raised other arguments in its initial protest, such as the agency's failure to comply with the requirements of Federal Acquisition Regulation Part 19 and the HUBZone set-aside requirement. We have reviewed these arguments and find them to be without merit.