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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Agency Management Concepts, Inc.

File: B-411206; B-411206.2

Date: April 21, 2015

Robert E. Korroch, Esq., William A. Wozniak, Esq., and Jordan E. Stanaway, Esq., Williams Mullen, for the protester.

Dennis J. Gallagher, Esq., Department of State; and John W. Klein, Esq., and Laura M. Foster, Esq., Small Business Administration, for the agencies.

Matthew T. Crosby, Esq., and Christina Sklarew, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest alleging agency's prior award of contracts under Small Business Administration's (SBA) section 8(a) program precludes award of sole-source 8(a) contract for follow-on requirement to tribally-owned concern is dismissed where SBA's regulations permit such award, so long as agency is not removing procurement from an ongoing competition among 8(a) program participants in order to make award to tribally-owned concern--a circumstance not present here.

DECISION

Agency Management Concepts, Inc. (AMC), of Oakton, Virginia, protests the Department of State's (DOS) decision to award a sole-source contract for lock and lock services to a tribally-owned concern under the Small Business Administration's (SBA) section 8(a) program. AMC asserts award of the contract on a sole-source basis is improper and DOS must instead conduct the procurement as a competition among eligible 8(a) program participants.

We dismiss the protest.

BACKGROUND

DOS has had a longstanding requirement for lock and lock services. See Protest at 3. Since 2003, DOS generally has procured this requirement through the award

of contracts under SBA's 8(a) program.¹ See Protest at 3. After the most recent incumbent contractor graduated from the 8(a) program, AMC--an 8(a) program participant--began pursuing the opportunity to compete for the requirement. Id. at 3-4. After communicating with DOS, AMC learned the agency intended to award a sole-source 8(a) contract valued at \$5.5 million. Id. at 4; Request for Dismissal, exh. 1, SBA Acceptance Ltr., at 1. On February 10, 2015, AMC filed an agency-level protest asserting the procurement instead should be conducted as a competition among eligible 8(a) program participants. See Protest, exh. 1, Agency-Level Protest, at 1.

On February 25, the agency denied AMC's protest. Protest, exh. 2, Contracting Officer E-Mail to AMC, at 1. In the e-mail denying the protest, the contracting officer informed AMC that DOS intended to make a sole-source 8(a) award to a tribally-owned concern and that SBA had "formally accepted and approved [DOS]'s 8(a) offering letter." Id.

On March 9, AMC filed a protest with our Office, again arguing DOS should compete the requirement among eligible 8(a) program participants instead of awarding a sole-source 8(a) contract. On March 18, DOS requested our Office summarily dismiss AMC's protest on grounds that SBA's 8(a) program regulations expressly permit the actions taken by the agency.

DISCUSSION

As described above, AMC alleges DOS's decision to award an 8(a) contract on a sole-source basis instead of competing it among eligible 8(a) program participants is improper. Protest at 4-6. In support of this allegation, AMC cites 13 C.F.R. § 124.506(a)(2), which provides as follows:

A procurement offered and accepted for the 8(a) BD [business development] program must be competed among eligible Participants if:

- (i) There is a reasonable expectation that at least two eligible Participants will submit offers at a fair market price;

¹ Section 8(a) of the Small Business Act authorizes SBA to contract with other agencies and to arrange for performance of those contracts through subcontracts awarded to socially and economically disadvantaged small businesses. 15 U.S.C. § 637(a) (2012). The 8(a) program has both competitive and noncompetitive (that is, sole-source) components. See 13 C.F.R. § 124.506(a) (2015).

(ii) The anticipated award price of the contract, including options, will exceed \$6,500,000 for contracts assigned manufacturing NAICS codes and \$4,000,000 for all other contracts; and

(iii) The requirement has not been accepted by SBA for award as a sole source 8(a) procurement on behalf of a tribally-owned or ANC [Alaska Native Corporation]-owned concern.

Thus, under this regulation, a procurement “offered and accepted for” the 8(a) program must be competed among eligible 8(a) program participants if the three conditions described in subsections (i) through (iii) are met. AMC argues each of the three conditions has been met in this instance and, therefore, the regulation requires DOS to compete the requirement among eligible 8(a) program participants. Protest at 4-6.

In response to the protest, DOS reiterates the contracting officer’s statement that the agency intends to award a sole-source 8(a) contract to a tribally-owned concern. Request for Dismissal at 1. Based on this, DOS argues the “exception” in subsection (iii) of the regulation applies and, therefore, DOS’s actions are permissible under SBA’s 8(a) program regulations. Id. at 1. DOS further argues that since SBA’s regulations permit the intended award, AMC’s protest should be dismissed. Id. at 2.

AMC acknowledges DOS’s reliance on subsection (iii) of the regulation. Protest at 5. AMC, however, argues such reliance is misplaced based on two provisions within 13 C.F.R. § 124.506(b).

First, AMC cites 13 C.F.R. § 124.506(b)(1), which provides as follows:

A Participant concern owned and controlled by an Indian Tribe or an ANC may be awarded a sole source 8(a) contract where the anticipated value of the procurement exceeds the applicable competitive threshold if SBA has not accepted the requirement into the 8(a) BD program as a competitive procurement.

(Emphasis added.) AMC alleges the requirement previously was competed among 8(a) program participants and, therefore, this regulation prohibits DOS from conducting the follow-on procurement as a sole-source 8(a) award to a tribally-owned concern. Protest at 5-6.

Second, AMC cites 13 C.F.R. § 124.506(b)(3), which provides as follows:

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.

(Emphasis added.) Again, AMC alleges the requirement previously was competed among 8(a) program participants and, therefore, this regulation prohibits DOS from conducting the procurement as sole-source 8(a) award to a tribally-owned concern. Protest at 5-6.

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 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) (2014); Rothe Computer Solutions, LLC d/b/a Rohmann Joint Venture, B-299452, May 9, 2007, 2007 CPD ¶ 92 at 3. At our Office's invitation, SBA provided its views on this protest. As a general matter, we accord SBA's interpretations of regulations it promulgates, such as those regarding the 8(a) program, great weight. Singleton Enters.-GMT Mech., A Joint Venture, B-310552, Jan. 10, 2008, 2008 CPD ¶ 16 at 3.

Here, SBA takes the position DOS has done nothing improper. SBA Comments on Request for Dismissal at 2, 4-5. In this regard, SBA states "the fact that a recurring requirement was previously offered to and accepted by SBA as a competitive 8(a) procurement has no bearing on whether it can be offered and accepted on a sole source basis when it is reprocured." Id. at 4. In support of this position, SBA points to the same provisions of 13 C.F.R. § 124.506(b) as those relied on by AMC. For ease of reference, these provisions are provided again below:

(1) A Participant concern owned and controlled by an Indian Tribe or an ANC may be awarded a sole source 8(a) contract where the anticipated value of the procurement exceeds the applicable competitive threshold if SBA has not accepted the requirement into the 8(a) BD program as a competitive procurement.

* * * * *

(3) 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).

With regard to the provision at subsection (1), SBA interprets the phrase "SBA has not accepted the requirement into the 8(a) BD program as a competitive

procurement” to mean a “specific solicitation was . . . accepted by the SBA as a competitive 8(a) procurement.” See SBA Comments on Request for Dismissal at 4. SBA contrasts the issuance of a “specific solicitation” with the circumstance where, as here, performance of an 8(a) contract has been completed and an agency is faced with the decision of whether to procure a follow-on requirement through issuance of another competitive 8(a) solicitation or award it on a sole-source basis to a tribally- or ANC-owned concern. See id. In other words, SBA interprets the phrase “competitive 8(a) procurement” in the regulation to mean a solicitation has been issued and there is an active competition among 8(a) program participants.

With regard to the provision at section (3) of the regulation, SBA similarly interprets the phrase “a procurement may not be removed from competition to award it to a tribally-owned or ANC-owned concern on a sole-source basis” to refer to instances where a “specific solicitation” has been offered to SBA for acceptance into the 8(a) program; i.e., instances where an active competition exists by virtue of issuance of a solicitation. See SBA Comments on Request for Dismissal at 4.

In support of these interpretations, SBA points to the following text from the preamble to the final rule that implemented the regulation at issue:

[SBA] has amended this paragraph to preclude SBA from awarding a requirement above the threshold amounts on a sole source basis to a tribally-owned 8(a) concern once it has been accepted for competition and prospective offerors have been notified. However, if a requirement is offered to the 8(a) program again (after the concern which was awarded such contract pursuant to competition has completed performance), the requirement must then be separately accepted for the 8(a) program and could be offered to a tribally-owned concern.

54 Fed. Reg. 34,692, 34,704-05 (Aug. 21, 1989). As reflected in the emphasized text, the preamble to the final rule is entirely consistent with the interpretation SBA offers here. SBA summarizes its position by explaining that “the question of whether the [agency] previously awarded a contract for this requirement on a competitive or sole source basis is immaterial to the analysis of whether the instant procurement may properly be sole sourced to a tribally-owned concern.” SBA Comments on Request for Dismissal at 4.

We find SBA’s interpretation of the regulation reasonable. As stated at the outset, AMC alleges DOS’s prior award of contracts under the 8(a) program precludes award of a sole-source 8(a) contract to a tribally-owned concern for the follow-on requirement. See Protest at 4-6. However, as demonstrated above, SBA’s 8(a) program regulations are reasonably interpreted to permit the award of a sole-source 8(a) contract to a tribally-owned concern regardless of whether the requirement previously was procured through competitive or sole-source 8(a) contracts, so long

as a competition among 8(a) participants has not been initiated through issuance of a solicitation. AMC has not alleged, and there is nothing to suggest, that a competition among 8(a) participants was initiated here. Rather, the record reflects DOS offered the requirement to SBA as a sole-source 8(a) award, and SBA accepted the offer. See Request for Dismissal, exh. 1, SBA Acceptance Ltr., at 1; SBA Comments on Request for Dismissal at 4. Accordingly, AMC's allegations fail to show regulations may have been violated, and we will not further consider them. 4 C.F.R. § 21.5(b)(3).

As a supplemental basis of protest, AMC claims DOS's decision to award a sole-source 8(a) contract is improper because DOS allegedly provided incomplete information to SBA when it offered the requirement as a sole-source 8(a) procurement. AMC Response to Request for Dismissal at 3. More particularly, AMC claims DOS "misled SBA by failing to provide a complete acquisition history of the requirement" and "SBA would not have accepted this requirement into the 8(a) BD program if it had received the complete acquisition history." Id.

As described above, SBA has advised that based on the 8(a) program regulations, "the question of whether the [agency] previously awarded a contract for this requirement on a competitive or sole source basis is immaterial to the analysis of whether the . . . procurement may properly be sole sourced to a tribally-owned concern." SBA Comments on Request for Dismissal at 4. Hence, SBA in essence has advised that under its regulations, a requirement's "acquisition history" has no bearing on the determination of whether to accept a procurement as a sole-source 8(a) award to a tribally-owned concern.

The protest is dismissed.

Susan A. Poling
General Counsel