



United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Ohana Industries, Ltd.

File: B-404941

Date: June 27, 2011

Mary Ann Gardis, and Neil Gardis, Ohana Industries, Ltd., for the protester. Sherry Kinland Kaswell, Esq., Department of the Interior, and Kenneth Dodds, Esq., Small Business Administration, for the agencies. Jacqueline Maeder, Esq., Scott H. Riback, Esq., and David A. Ashen, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest against Small Business Administration's (SBA) acceptance of a requirement into SBA's section 8(a) program is denied where the record shows that SBA properly determined that the acquiring agency's requirement was new, and thus exempt from the requirement that SBA determine that award under the section 8(a) program would not result in an adverse impact to another small business concern.

DECISION

Ohana Industries, Ltd., of Clarkson, Kentucky, protests the decision of the Department of the Interior, Fish and Wildlife Service (FWS) and the Small Business Administration (SBA), to place an FWS requirement for restoration/construction work on the historic Kilauea Lighthouse, Kilauea Point National Wildlife Refuge, Kauai, Hawaii, under SBA's section 8(a) program for award of a sole-source contract to McMillen LLC, of Boise, Idaho. Ohana contends that FWS's decision to offer this requirement to SBA, and SBA's resulting acceptance of the requirement into the section 8(a) program, were improper.

We deny the protest.

The requirement is for design/build services for Phase II restoration/construction work on the Kilauea Lighthouse structure, the lightkeepers's quarters, an oil storage building and landing station. Ohana, a small business concern, competed successfully for the Phase I contract, which was limited to the repair and rehabilitation of the historic lantern of the Kilauea Lighthouse.

To address the Phase II requirement, the agency initially planned to proceed with a competitive acquisition among existing design/build indefinite-delivery/indefinite-quantity multiple-award task order contract (MATOC) holders. Agency Report (AR) at 1. In accordance with the MATOC task order selection process, FWS evaluated three design/build firms and recommended McMillen for award. AR at 1; AR, exh. B, at 2. Because of McMillen's status as an 8(a) contractor, FWS decided to pursue this requirement as a sole-source award under the 8(a) program. AR at 1.

By letter to the SBA dated December 13, 2010, FWS offered to contract with McMillen for the lighthouse restoration under the section 8(a) program. FWS described the scope of work as follows:

to provide the necessary services to complete: 1) the required construction services for the restoration work on the historic Kilauea Lighthouse and Oil Storage Building, and 2) provide the planning, design and construction services for the remainder of the historic Kilauea Lightstation building restoration projects including but not necessarily limited to the three (3) lightkeeper's quarters and the landing station. Project will also include an initial on-site scoping site visit, preparation of construction documents, project review meetings, construction and/or construction management services.

AR, exh. C , at 1. FWS represented to SBA that "the proposed procurement has not been offered previously by public solicitation under a small or small disadvantaged business set-aside," and that no small business contractor has performed this specific requirement during the last 24 months. *Id.* As subsequently explained during this protest, FWS considered the Phase I and Phase II work to be significantly different, such that the Phase II work constituted a "new" requirement. AR at 4.

Based on e-mail correspondence with SBA indicating that acceptance of the project into the section 8(a) program would be forthcoming, FWS began negotiations with McMillen for the Phase II work. AR at 1. However, when FWS had not received SBA's acceptance letter within several weeks, the agency decided to award McMillen the work as a task order under its MATOC. FWS issued the task order on January 11, 2011.¹ AR at 2.

Ohana filed an agency-level protest, asserting that the Phase II work exceeded the scope of McMillen's MATOC contract and that McMillen lacked the specialized experience required to work on the historic structures. The agency denied the protest on February 25. Ohana then protested McMillen's task order award to our

¹ FWS ultimately received SBA's acceptance letter on January 20, 2011. AR at 2, n.3; AR, exh. K.

Office on March 7. FWS subsequently advised our Office that it would terminate McMillen's task order and instead award a sole-source section 8(a) contract to McMillen for the required restoration work. In light of the agency's proposed action, we dismissed the protest as academic (B-404857, March 18, 2011).

On March 21, FWS requested that SBA cancel its original December 13 request and submitted a revised letter to SBA, offering to contract with McMillen under the section 8(a) program. AR, exh. M, at 1. FWS again represented to SBA that no small business contractor had performed this specific requirement during the preceding 24 months. Id.

By e-mail on March 22, SBA again accepted the requirement into the 8(a) program. AR, exh. N, at 1. In connection with the protest, SBA has advised our Office that an adverse impact analysis was not required because the Phase II work constituted a new, separate and distinct restoration/construction requirement.² SBA Comments at 1, 3. FWS awarded the contract to McMillen on March 22. AR, exh. O, at 1. On March 28, Ohana protested to our Office.

Ohana asserts that FWS failed to provide SBA with complete and accurate information as part of its section 8(a) program offering, and that FWS and SBA incorrectly determined that the Phase II work constituted a new requirement. Specifically, Ohana contends that FWS incorrectly represented to SBA that the Kilauea Lighthouse restoration contract had not been previously awarded to a small business firm when, in fact, Ohana, a small business concern, had performed Phase I of the work. Ohana argues that FWS's misinformation resulted in SBA concluding that an adverse impact determination was not required.

Section 8(a) of the Small Business Act authorizes SBA to contract with other government agencies and to arrange for the performance of those contracts by awarding subcontracts to socially and economically disadvantaged small businesses.³ 15 U.S.C. § 637(a) (2006). The 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

² On April 12, FWS provided additional information to the SBA, including a detailed description of the work required under Phase I and Phase II. AR at 5; AR, exh. R, at 1-4. SBA responded the following day, stating that its position "has not changed in accepting the requirement into the 8(a) program and on behalf of McMillen, LLC." AR, exh. S, at 1.

³ These subcontracts may be awarded on a competitive or noncompetitive basis, based primarily on the size of the contracts. See Federal Acquisition Regulation § 19.800.

applicable regulations may have been violated. 4 C.F.R. § 21.5(b)(3) (2010); Designer Assocs., Inc., B-293226, Feb. 12, 2004, 2004 CPD ¶ 114 at 4.

Under the Act's implementing regulations, SBA may not accept any procurement into the section 8(a) program if doing so would have an adverse impact on an individual small business, a group of small businesses in a specific geographical location, or other small business programs. 13 C.F.R. § 124.504(c) (2011). The adverse impact concept is designed to protect small business concerns that are performing the same requirement under a government contract awarded outside the 8(a) program. Id. However, SBA regulations explicitly provide that an adverse impact determination need not be performed where a "new" requirement is offered to the 8(a) program. 13 C.F.R. §124.504(c)(1)(ii)(D). As is pertinent here, the regulations specifically note that "[c]onstruction contracts, by their very nature (e.g. the building of a specific structure), are deemed new requirements." 13 C.F.R. § 124.504(c)(1)(ii)(B).

Here, as noted above, SBA determined that the Phase II requirement constituted separate and distinct construction services, such that an adverse impact analysis was not required. SBA Comments at 1, 3. SBA concluded that Ohana's Phase I contract was limited to restoration/construction work on the lighthouse lantern, which is separate and distinct from the Phase II work, which involves work on the lighthouse, lightkeeper's quarters, the oil storage building and the landing station. While Ohana disagrees, arguing that the Phase II work simply is the completion of the lighthouse restoration work currently in progress, its disagreement, without more, does not demonstrate that SBA's determination was made in bad faith or was otherwise inconsistent with applicable regulations. To the contrary, SBA's determination was consistent with applicable SBA regulations, inasmuch as those regulations specifically define construction work as "new" work. 13 C.F.R. § 124.504(c)(1)(ii)(B). Consequently, we have no basis to object to SBA's determination that there was no requirement to conduct an adverse impact analysis prior to accepting the new, Phase II requirement under the 8(a) program.

Ohana also asserts that McMillen lacks the experience to perform the historic restoration/construction work required under the Phase II contract. We dismiss this aspect of Ohana's protest. A protester must be an interested party, that is, an actual or prospective offeror whose direct economic interest would be affected by the award of, or the failure to award, a contract. 4 C.F.R. § 21.0(2). Since, as discussed above, the Phase II work was properly accepted into the 8(a) program and Ohana is not an 8(a) contractor, it is not an interested party for purposes of challenging the award to McMillen. See Kuwait Leaders Gen. Trading & Contracting Co., B-401015.2, May 21, 2009, 2009 CPD ¶ 113 at 4.

Finally, Ohana alleges that FWS acted in bad faith or with bias against it, arguing that the agency misled it during ongoing informal discussions regarding Ohana's potential involvement in the Phase II procurement. Government officials are presumed to act in good faith and we will not attribute unfair or prejudicial motives to procurement officials on the basis of inference or supposition. TPL, Inc., B-297136.10,

B-297136.11, June 29, 2006, 2006 CPD ¶ 104 at 20-21. Where a protester alleges bad faith or bias, it must not only provide credible evidence clearly demonstrating bias against the protester or in favor of the awardee, but also must show that this bias translated into action that unfairly affected the protester's competitive position. Id.

Ohana's protest does not meet this standard. While there may have been a discussion between the agency and Ohana regarding using Ohana to perform some aspect of the Phase II requirement, any such discussion among the parties, without more, does not demonstrate that the agency acted in bad faith in this matter. Moreover, our conclusion above, that the agency properly placed its requirement under the section 8(a) program, coupled with the fact that Ohana is not an eligible section 8(a) concern, eliminates the possibility that the agency's actions translated into competitive prejudice to the protester.

The protest is denied.

Lynn H. Gibson
General Counsel