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Decision

Matter of: B&D Consulting, Inc.
File: B-413310; B-413310.2; B-413310.3
Date: September 30, 2016

Gary J. Campbell, Esq., and G. Matthew Koehl, Esq., Pepper Hamilton LLP, for the protester.

Sarah L. Carroll, Esq., Defense Information Systems Agency, and Sam Q. Le, Esq., Small Business Administration, for the agencies.

Young S. Lee, Esq., Noah B. Bleicher, Esq., and Peter Tran, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that the Small Business Administration (SBA) improperly accepted a requirement into the 8(a) program without first determining whether doing so would have an adverse impact on existing small business concerns is denied where the requirement qualifies as new under SBA's regulations, and consequently, no adverse impact analysis was required.
 2. Protest that the SBA is precluded from accepting a requirement into the 8(a) program because the requirement was alleged to have been previously solicited as a small business set-aside is denied where the requirement is new and was not previously advertised.
 3. Protest that solicitation should have been issued as a competitive 8(a) set-aside is denied where the anticipated value of the award does not exceed the threshold above which competition is required.
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DECISION

B&D Consulting, Inc., a small business of Columbia, Maryland, protests the decision by the Defense Information Systems Agency (DISA) and the Small Business Administration (SBA) to offer a requirement for technology environment management support and outreach services under SBA's section 8(a) business development (BD) program solely to Allegheny Science and Technology Corporation, a small business of Weston, West Virginia, through the issuance of request for proposal (RFP) No. HC1047-16-R-4017. B&D argues that the agency's

decision to offer the requirement to SBA, and SBA's resulting acceptance, were improper. Alternatively, the protester contends that DISA should not have issued the requirement on a sole-source basis, and should have instead used a competitive 8(a) set-aside.

We deny the protest.

BACKGROUND

In 2014, DISA awarded contract No. HC1047-14-C-4010 for technology integration engineering and network enterprise management services to B&D.¹ Agency Report (AR) at 3. The contract had a total period of performance consisting of a 1-year base period and four 1-year options. Id. The performance work statement required B&D:

to apply demonstration management assistance expertise and training in order to facilitate collaboration, requirements identification, analysis and design, reengineering, systems implementation and deployment, training, and product evaluation. Additional objectives include providing transition engineering expertise, scenario and capability-based demonstrations, and a modernized portfolio of collaboration and scheduling tools compatible with the net-centric environment, and to migrate those tools to the [Defense Information Infrastructure].

AR, Tab 1, RFP-4000, at 21.² The scope of B&D's contract encompassed technical, engineering, operations, planning, outreach, demonstration management assistance, and network information services functions on Department of Defense (DoD) networks, as well as networks interfacing with the DoD. Id.

On April 10, 2015, B&D's contract was modified to support a newly established DISA organization called the Advanced Concept and Experimentation Office within the agency's Services Development Directorate's Emergent Services Division (SD7). AR, Tab 3, B&D Contract Mod. 3, at 1-21. The total value of the modified contract, inclusive of all four options, was \$21,858,038.07. AR, Tab 2, B&D's Contract, at 4-62. In July 2016, DISA decided not to exercise option year two of the

¹ B&D's contract was awarded under RFP No. HC1047-14-R-4000, which was exclusively set aside for small businesses. AR at 3. DISA issued the RFP on January 28, 2014. Id.

² Because this decision contains a discussion of more than one RFP, citations and references to each solicitation are identified by the last four digits of the RFP number.

contract, after concluding that funding would not be available, and that B&D's services would no longer be needed.³ AR at 6.

DISA issued RFP No. HC1047-16-R-4017, as a sole-source 8(a) set-aside, to Allegheny on June 23. RFP-4017, at 1. As relevant to this protest, the solicitation contemplated the award of a contract with a 1-year base period and one 1-year option, as well as an optional extension to the final ordering period, for up to 6-months, in accordance with Federal Acquisition Regulation (FAR) clause 52.217-8. Id. at 13-14, 16.

The next day, on June 24, 2016, DISA sent an offering letter to SBA requesting that SBA accept this requirement under its 8(a) business development program for services. AR, Tab 19, 8(a) Offer Letter, at 1. The letter explained that the services would:

facilitate the Chief Technology Office (CTO) technology assessments by providing systems administration and environmental support in several developmental environments, and by providing maintenance during transition of technology solutions. The technology assessments include evaluations, use cases, proofs of concept, and demonstrations, including integration and processes/best practices. The combined efforts allow the identification of technology risks and potential alternative material solutions early in the system lifecycle.

Id. The offer letter described the contract's scope of effort as encompassing system administration in laboratory environments in support of DISA and DoD systems, networks, and networks interfacing with DoD. Id. The effort's scope also included technology outreach and technology transfer with DoD and federal agencies, industry, and academia to identify best practices, methodologies, material solutions, mature capabilities, and enterprise services. Id. DISA's offer letter to SBA identified the RFP's period of performance consisting of a 1-year base period and one 1-year option, with an anticipated value of \$2,997,189.04.⁴ Id. DISA's

³ Earlier that year, the contracting agency discovered that the SD7 office would not receive any funding for fiscal year 2017. AR at 6. B&D's contract expired on July 17, 2016. Id.

⁴ DISA's independent government cost estimate (IGCE) indicated that the cost of the requirement would be \$3,753,657.56, if the option to extend services was exercised for the maximum 6-month period. AR, Tab 16, IGCE, at 1. In this regard, the agency's estimated value of the contract's base year was \$1,484,252.00, the estimated value of the option year was \$1,512,937.04, and the estimated value of the option to extend services was valued at \$756,468.52. AR, Tab 16, IGCE, at 1. We note that FAR clause 52.217-8 provides that "[t]he option provision may be
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offering letter contemplated that this requirement would result in a sole-source fixed-price contract award to Allegheny. AR, Tab 19, 8(a) Offer Letter, at 1.

The SBA reviewed DISA's offer letter and accepted the contracting agency's requirement into the 8(a) program on the same day the letter was received. AR, Tab 20, 8(a) Acceptance Letter, at 1. B&D filed its protest on June 24, before DISA could award the proposed requirement.

DISCUSSION

B&D objects to the placement of the agency's proposed requirement into the 8(a) program. Specifically, B&D argues that SBA failed to perform an adverse impact analysis that the protester contends was required by SBA's regulations. B&D also asserts that SBA's regulations prohibit SBA from accepting a procurement into the 8(a) program since, according to B&D, DISA previously solicited the same requirement as a small business set-aside. Finally, B&D contends that even if the requirement was properly placed into the 8(a) program, the solicitation should have been issued as a competitive 8(a) set-aside.

Adverse Impact Determination

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). The Act affords the SBA and contracting agencies broad discretion in selecting procurements for the 8(a) program; our Office 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); JXM, Inc., B-402643, June 25, 2010, 2010 CPD ¶ 158 at 3.

Under the Act's implementing regulations, the SBA may not accept any procurement for award as an 8(a) contract 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).

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exercised more than once, but the total extension of performance hereunder shall not exceed 6 months." FAR clause 52.217-8. Although the protester makes much of the fact that DISA's offer letter failed to include the value of the option period envisioned by FAR clause 52.217-8, the anticipated value of that option period is not relevant to the analysis here because, the agency is under no obligation to exercise that option, and even if exercised, is under no obligation to extend the contract's period of performance for the full 6-months. See FAR clause 52.217-8

The adverse impact review process is designed to protect small business concerns that are performing government contracts awarded outside the 8(a) program. Id. SBA presumes adverse impact to exist where a small business concern has performed the specific requirement for at least 24 months; the small business is performing the requirement at the time it is offered to the 8(a) program, or its performance of the requirement ended within 30 days of the procuring activity's offer of the requirement to the 8(a) program; and the dollar value of the requirement that the small business is or was performing is 25 percent or more of its most recent annual gross sales. 13 C.F.R. § 124.504(c)(1)(i).

The requirement for the SBA to conduct an adverse impact analysis generally does not apply to new requirements. 13 C.F.R. § 124.504(c)(1)(ii). The SBA regulations define a new requirement as one that previously has not been procured by the relevant procuring activity. Id. The SBA regulations also 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). These regulations explain that an adverse impact analysis is not required for a new requirement because "no small business could have previously performed the requirement and, thus, SBA's acceptance of the requirement for the 8(a) BD program will not adversely impact any small business." 13 C.F.R. § 124.504(c)(1)(ii)(A).

Here, we find that an adverse impact analysis was not necessary because DISA's proposed requirement is considered new under SBA's regulations.⁵ In this regard, we find nothing unreasonable about SBA's and DISA's conclusion that the anticipated value of the proposed requirement is more than 25 percent lower than the total dollar value of the work previously awarded to B&D.⁶ The record also

⁵ 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.

⁶ B&D argues that it was improper for DISA to consider the full value of B&D's expired contract, as modified with the work necessary to support SD7, when performing the 25 percent comparison calculation. In this regard, the protester contends that for the purposes of evaluating whether the proposed requirement is new, DISA should have used the value of B&D's unmodified contract, as originally awarded. We disagree. SBA interprets its regulation as providing for comparison of the value of the requirement to be solicited, with the overall value of the existing

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confirms the agencies' conclusion. DISA's offer letter established that the anticipated value of the proposed technology environment management support and outreach services was \$2,997,189.04.⁷ AR, Tab 19, 8(a) Offer Letter, at 1. The total value of B&D's expired contract, inclusive of all options was \$21,858,038.07.⁸ AR, Tab 2, B&D's Contract, at 4-62. Thus, the total value of the new requirement is more than 25 percent lower than the one that was being performed by B&D, and no adverse impact analysis was required. Compare AR, Tab 19, 8(a) Offer Letter, at 1, with Tab 2, B&D's Contract, at 4-62. Accordingly, we decline to sustain B&D's protest based on this allegation.⁹

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contract encompassing that requirement. See Rothe Computer Solutions, LLC d/b/a Rohmann Joint Venture, B-299452, May 9, 2007, 2007 CPD ¶ 92 at 5. Although B&D disagrees and offers an alternate approach, we see no basis to conclude that the interpretation by the SBA--the agency that is charged by statute with administering the 8(a) program, and that promulgated regulation at issue--is unreasonable. As such we deny this protest allegation. Id.

⁷ This value was confirmed by the agency's IGCE (after subtracting out the option to extend services for 6 months). AR, Tab 16, IGCE, at 1.

⁸ In responding to this protest allegation, DISA compared the value of its proposed requirement to the value of option years two and three of B&D's expired contract. AR at 17. We note that for the purpose of determining whether a requirement is new, SBA interprets its regulations as requiring a comparison between the anticipated value of the proposed requirement, to the total value of the pre-existing requirement, inclusive of all options. Rothe Computer Solutions, LLC d/b/a Rohmann Joint Venture, supra. We have previously declined to find SBA's interpretation to be unreasonable in this regard. Id. Accordingly, this decision reflects SBA's interpretation of its own regulations, and refers to the total value of B&D's contract, inclusive of all options.

⁹ The protester also alleges that DISA's offering letter failed to provide, and SBA failed to request, complete and accurate information regarding the contracting agency's proposed requirement. For example, B&D complains that DISA's offering letter did not notify SBA that a small business concern had allegedly been performing the requirement. As noted in the decision, DISA reasonably concluded that the requirement qualified as new under SBA's regulations. We also note that SBA agrees that the requirement proposed for award to Allegheny is new. SBA Comments at 4. In this regard, because the contracting officer determined that the requirement was new, the contracting agency concluded that there was no acquisition history to report. We agree that the contracting agency had no obligation to provide SBA with information that did not exist. Furthermore, after receiving the entire record, SBA does not assert that it was misled.

Prior Solicitation

Next, B&D asserts that SBA was precluded from accepting the requirement into the 8(a) business development program because B&D's expired contract was previously solicited as a small business set-aside in 2014.

Under SBA's implementing regulations, SBA is precluded from accepting into the 8(a) program a requirement for which the contracting agency previously "issued a solicitation for or otherwise expressed publicly a clear intent to award the contract as a small business set-aside, or to use the HUBZone, Service Disabled Veteran-Owned Small Business, or Women-Owned Small Business programs prior to offering the requirement to SBA for award as an 8(a) contract." 13 C.F.R. § 124.504(a).

As discussed above, our review of the record confirms that DISA's proposed requirement is considered new and as such, the limitations set forth in 13 C.F.R. § 123.504(a) do not apply. In this regard, the existence of B&D's small business set-aside contract has no bearing on DISA's obligations with respect to the procurement here because the requirement here is not viewed by DISA or SBA as the same requirement that was solicited in 2014. As SBA explained "[s]ection 12.504(a) does not reach back to prior contracts that the agency has already solicited, awarded, and on which it has begun receiving performance." SBA Comments at 2. We have previously agreed with SBA in this regard. AHNTECH, Inc., B-401092, April, 22, 2009, 2009 CPD ¶ 91 at 3.

Competitive 8(a) Solicitation

Finally, the protester alleges in the alternative that even assuming that placement of the requirement under the SBA's 8(a) program was unobjectionable, B&D should be given an opportunity to compete based on the dollar value of the requirement. The SBA's section 8(a) program has both competitive and noncompetitive (that is, sole-source) components. Generally, where a procurement for services exceeds a certain threshold (currently \$4 million for non-manufacturing contracts), the requirement must be competed among qualified 8(a) program participants. 13 C.F.R. § 124.506(a)(2)(ii). In relevant part, SBA's regulations provide as follows:

- (2) A procurement offered and accepted for the 8(a) BD program must be competed among eligible Participants if:
 - (i) There is a reasonable expectation that at least two eligible participants will submit offers at fair market price;
 - (ii) The anticipated award price of the contract, including options, will exceed . . . \$4,000,000 for all other contracts;

* * * *

(3) For all types of contracts, the applicable competitive threshold amounts will be applied to the procuring activity estimate of the total value of the contract, including all options.

Example to paragraph (a)(3). If the anticipated award price for a professional services requirement is determined to be \$3.8 million and it is accepted as a sole source 8(a) requirement on that basis, a sole source award will be valid even if the contract price arrived at after negotiation is \$4.2 million.

13 C.F.R. §§ 124.506(a)(2), (3).

B&D argues that the anticipated award price for the proposed requirement was understated because it should have been based on a 36-month period of performance rather than the 24-month period of performance that was identified in the contracting agency's offer letter to SBA. In this regard, RFP-4017 contained FAR clause 52.217-9, which requires agencies to identify the total anticipated duration of the period of performance of a resulting contract, if all anticipated options are exercised. RFP-4017 at 16. In addressing this requirement the agency indicated that the resulting contract would not exceed a 30-month period of performance. Id. B&D contends that the total period of performance for the proposed requirement is actually 36 months because the contracting officer identified a 30-month period of performance when filling in FAR clause 52.217-9, and because the RFP also contains the 6-month extension of services option (52.217-8) clause. The protester argues that if the anticipated award price of the proposed requirement accounted for the allegedly missing additional 6-month period of performance, the value of the proposed requirement would exceed the \$4 million threshold identified in 13 C.F.R. § 124.506(a)(2)(ii).

Our review of the record reflects that the agency did not intend to include the additional 6-month period of performance that the protester argues exists.¹⁰ Instead, the agency explains that the contracting officer mistakenly believed that the

¹⁰ To the extent that B&D is alleging that DISA in bad faith structured the solicitation's period of performance so that the anticipated value of the award would be under the \$4 million threshold, government officials are presumed to act in good faith, and a protester's contention that contracting officials are motivated by bias or bad faith must be supported by convincing proof; we will not attribute unfair or prejudicial motives to procurement officials on the basis of inference or supposition. Career Innovations, LLC, B-404377.4, May 24, 2011, 2011 CPD ¶ 111 at 7-8. Here, apart from the protester's unsupported allegations, it has provided no evidence, and there is none in the record, showing bias or bad faith.

possible 6-month extension provided for in FAR clause 52.217-8 had to be included when calculating the total duration of the contract. AR at 4 n. 1.

As discussed above, the contracting agency's offer letter identified a 1-year base period and a 1-year option period for the proposed requirement. AR, Tab 19, 8(a) Offer Letter, at 1. Id. Furthermore, the RFP expressly identifies a 1-year base period and a 1-year option period.¹¹ RFP-4017 at 13-14. Accordingly, because the agency anticipated that the proposed requirement would be less than \$4 million, the proposed requirement is not subject to the competition requirements set forth in 13 C.F.R. § 124.506(a)(2)(ii).

We deny the protest.¹²

Susan A. Poling
General Counsel

¹¹ The contracting agency concedes that B&D has identified an inconsistency between the solicitation's stated period of performance and the total duration of the proposed requirement, as identified in RFP-4017 at FAR clause 52.217-9. In order to address the discrepancy, DISA has agreed to correct the administrative error. AR at 4 n. 1.

¹² B&D also broadly alleges that the agency's decision to offer the requirement into the 8(a) business development program lacked a rational basis, and that DISA should have instead exercised an option under the protester's contract to fulfill the agency's requirement. This protest ground is dismissed because the decision to place or not to place a procurement under the 8(a) program is not subject to review 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); JXM, Inc., supra.