



U.S. GOVERNMENT ACCOUNTABILITY OFFICE

441 G St. N.W.
Washington, DC 20548

Comptroller General
of the United States

Decision

DOCUMENT FOR PUBLIC RELEASE

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Matter of: SKC, LLC

File: B-415151

Date: November 20, 2017

Devon E. Hewitt, Esq., and Michael E. Stamp, Esq., ProTorae Law PLLC, for the protester.

Amy Laderberg O'Sullivan, Esq., Olivia L. Lynch, Esq., and Laura J. Mitchell Baker, Esq., Crowell & Moring LLP, for IKun, LLC, the intervenor.

Meagan K. Guerzon, Esq., and John W. Klein, Esq., for the Small Business Administration.

Lieutenant Colonel Gregory J. Fike, Defense Intelligence Agency, for the agency. Mary G. Curcio, Esq., and Laura Eyester, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Small Business Administration properly accepted Defense Intelligence Agency requirement for facility support services into the 8(a) program without determining whether acceptance would have an adverse impact on an existing small business that had been performing similar services where the Defense Intelligence Agency did not publicly and clearly indicate its intent to procure the services using small business set-aside procedures, and where, based on the record, there is no reason to object to the decision that the services to be obtained under the 8(a) program constituted a new requirement.

DECISION

SKC, LLC, a service-disabled veteran-owned small business located in Reston, Virginia, protests the decision by the Defense Intelligence Agency (DIA) and the Small Business Administration (SBA), to place a requirement for facility support services for DIA's Directorate of Logistics Operations Center (DLOC) under the SBA's 8(a) program for award on a sole-source basis to IKun, LLC of Herndon, Virginia, an Alaska Native Corporation.

We deny the protest.

BACKGROUND

SKC performed the DLOC facility support services under a contract that was awarded using small business set-aside procedures from April 22, 2011 through September 24, 2016 (including the exercise of contract options and contract modifications).

Contracting Officer's Statement (COS) at 1-2. On August 23, 2016, the agency notified SKC that it was anticipating a change in its current acquisition strategy for the services and that in lieu of recompeting the contract at that time, it was contemplating the award of a "bridge contract to SKC."¹ Protest, Exh. A, Email from Agency to SKC. The agency further stated that the recompete process for the services would resume during the "bridge contract" period. Id. On September 23, when performance under the last modification to the contract expired, DIA awarded SKC a non-competitive bridge contract for a 1-year base period (September 25, 2016 through September 24, 2017), with a 1-year option period. COS at 2.

On February 14, and June 16, 2017, DIA held industry engagement days at which it gave presentations forecasting its planned acquisitions for fiscal years 2017 and 2018. COS at 2, 4; Agency Report (AR), Tab 9, Agency Engagement with Industry. During the presentations, DIA noted that the current incumbent for the DLOC contract was SKC, and forecasted that the follow-on procurement would be issued as a small business set-aside. COS at 2, 4; AR, Tab 9.1, Industry Day Presentation, Forecast, Feb. 14, 2017, at 12; Tab 9.2, Industry Day Presentation, Forecast, June 16, 2017, at 28. The agency stated, however, that its forecasts were tentative and that no final decision regarding the potential procurements or acquisition strategies had been made. COS at 2, 4; AR, Tab 9.1, Industry Day Presentation, Forecast, Feb. 14, 2017, at 16, 21, 22.

On May 22, 2017, while SKC was performing under its bridge contract, DIA submitted an offer letter to the SBA to accept the requirement for award under its 8(a) program, for performance by IKun. COS at 3; AR, Tab 4.1, Initial Offer Letter. In the initial offer letter, the agency informed SBA that the requirement was a follow-on contract to the SKC bridge contract. Id. On May 31, during a conference call, DIA and SBA discussed the nature of the contract to be awarded under the 8(a) program as it related to the SKC contracts. Id. On June 2, DIA submitted an updated letter to the SBA, and removed information concerning any previously awarded contract to SKC. Id.; AR, Tab 4.2, Second Offer Letter. This submission identified the DLOC procurement as a new requirement with a 1-year base period, and two, 1-year option periods, and an anticipated value of \$20,416,925. AR, Tab 4.2, Second Offer Letter. On June 5, SBA accepted the requirement into the 8(a) program on behalf of IKun. Id., Tab 4.3, SBA Acceptance Letter. On August 15, DIA notified SKC of the award to IKun, and that it

¹ The agency explains that a bridge contract is generally a short-term, temporary vehicle which is used to fill an agency requirement until a more comprehensive procurement can be conducted. Memorandum of Law (MOL) at 9.

would not exercise the option in SKC's bridge contract. Id., Tab 8.3, Email to SKC. On August 24, SKC submitted this protest to our Office.

DISCUSSION

SKC asserts that the agency's sole-source award to IKun under the 8(a) program violates law and regulations for two reasons: (1) during the industry days, DIA clearly announced its intention to award the requirement as a small business set-aside, which precludes acceptance of the requirement by SBA into the 8(a) program; and (2) the SBA failed to determine whether awarding the contract under the 8(a) program would have an adverse impact on SKC, a small business concern. As discussed below, we find the protest without merit.

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 business concerns. 15 U.S.C. § 637(a). 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 an agency's 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); Rothe Computer Solutions, LLC d/b/a Rohmann J.V., B-299452, May 9, 2007 CPD ¶ 92 at 3.

Under the Small Business Act's implementing regulations, the SBA is precluded from accepting into the 8(a) program a procurement for which the contracting agency had previously expressed publicly a clear intent to award the contract as a small business set-aside. 13 C.F.R. § 124.504(a). Specifically, SBA's regulations state:

- (a) *Prior intent to award as a small business set-aside, or use the HUBZone, Service Disabled Veteran-Owned Small Business, or Women-Owned Small Business programs.* The procuring activity 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. However, the AA/BD [Associate Administrator/Business Development] may permit the acceptance of the requirement under extraordinary circumstances.

Id. SKC asserts that the SBA improperly accepted the contract into the 8(a) program because during the industry day presentations, the agency expressed a clear intent to award a follow-on contract as a small business set-aside. SKC specifically notes that the agency distributed a document to attendees which identified SKC as the incumbent contractor for the services, and indicated that the services would be solicited using small business set-aside procedures. The forecast also gave the period of performance, and the month and year the agency expected to release the solicitation

and award the contract. According to the protester, the purpose of these materials was to inform the public regarding the agency's plans to set aside the facility services contract for small business concerns, and was not ambiguous.

DIA acknowledges that during the industry days it identified SKC as the incumbent contractor and represented that the upcoming procurement would be conducted as a small business set-aside. The agency notes, however, that during the presentations participants were also advised that the information being presented was a draft and subject to change. COS at 7; AR, Tab 2.2, Decl. of Director, DIA Small Business Programs, Sept. 22, 2017, at 2; Tab 2.3, Decl. of Deputy, Head of Contracting Activity, at 1. DIA further notes that it never issued a pre-solicitation notice, a synopsis, or a solicitation for the requirement. MOL at 4.

At our request, the SBA provided its comments on the issue. The SBA reports that it does not consider the draft forecast of the upcoming procurements for fiscal years 2017 and 2018, with multiple disclaimers that the information is subject to change, as a clear public expression of intent to award the requirement as a small business set-aside. SBA MOL at 5. The SBA also considered in this regard that there was no pre-solicitation notice, synopsis, or solicitation issued for the IKun contract which indicated that the procurement would be set aside for small business concerns. Id. The SBA concludes that DIA did not express a clear intent to award the requirement using a small business set-aside and that SBA therefore properly accepted the procurement into the 8(a) program. Id.

As the agency responsible for promulgating the applicable regulations, the SBA's interpretation of its regulations is accorded great weight; we defer to the SBA's interpretation so long as that interpretation is reasonable. See NANA Servs., LLC, B-297177.3, B-297177.4, Jan. 3, 2006, 2006 CPD ¶ 4 at 10. SKC has provided no basis for us to disagree with the SBA's interpretation that 13 C.F.R. § 124.504(a) does not limit SBA's ability to accept a procurement into the 8(a) program when a procuring agency does not issue a pre-solicitation notice, synopsis, or solicitation to procure the requirement as a small business set-aside, but simply states that the requirement will be issued as a set-aside as part of a forecast with multiple disclaimers that the information is subject to change. In this regard, the SBA concludes that the agency has not expressed a clear intent to set aside this requirement for small businesses. Accordingly, we deny this protest allegation.

SKC also asserts that since it was currently performing the contract, the SBA was required to, but did not perform an adverse impact analysis to determine if accepting the contract into the 8(a) program would have an adverse impact on SKC.

The SBA is precluded from accepting a procurement for award under the 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). The adverse impact concept is designed to protect small business concerns that are performing government contracts awarded outside the 8(a)

program. Id. However, no adverse impact analysis is required where a new requirement is offered to the 8(a) program 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). As relevant here, the SBA’s 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.” Id. § 124.504(c)(1)(ii)(C).

DIA and the SBA assert that an adverse impact analysis was not required here because the DLOC requirement was a new requirement. MOL at 9; SBA MOL at 5-6; Decl. of SBA Business Opportunity Specialist; Decl. of Branch Chief, Contracting Officer; Decl. of Director, DIA Small Business Programs, Oct. 12, 2017; Decl. of Business Manager, Office of Logistic and Global Readiness. In this regard, the agency explains that the value of the SKC contract (including all four option years), which was awarded as a small business set-aside, was \$49,545,651, while the estimated value of the IKun 8(a) sole-source award was \$17,221,933. COS at 8. The agency asserts, and the SBA agrees, that since the difference between the two contracts is greater than 25 percent, the IKun LLC 8(a) sole-source award represents a new requirement. Id.; SBA MOL at 6. The SBA concludes that it was therefore not required to perform an adverse impact analysis before it accepted the requirement into the 8(a) program.

SKC asserts that whether the contract awarded to IKun was a new requirement should have been determined based on the value of the latest bridge contract it performed, with a value of \$16.6 million, rather than on the value of the contract that SKC was initially awarded and performed.² SKC notes that if the bridge contract is used as the basis of comparison, the change in value from the bridge contract to the IKun 8(a) sole-source contract is less than 25 percent, and the SBA therefore could not accept the contract into the 8(a) program without performing an adverse impact analysis.

The SBA reports that the value of a bridge contract is not generally considered when determining whether an offered procurement is a new requirement, since a bridge contract is a temporary vehicle to fill a specific need until a more comprehensive procurement can be conducted. SBA MOL at 6. The SBA specifically notes that in this

² SKC notes that the regulation states, “[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” 13 C.F.R. § 124.504(c)(1)(ii)(C). In SKC’s view, the existing contract referred to is the one being performed, in this case the bridge contract. While that is one interpretation, we accept as reasonable SBA’s interpretation of its own regulation that the bridge contract is a temporary solution and the new requirement analysis can be based on the full, “long-term” contract which had previously been awarded for the services.

case, the bridge contract was only meant to be a temporary solution while DIA was contemporaneously planning for its next DLOC contract. Id. As a result, the SBA states that it was reasonable to compare the previous “long-term” SKC contract to the requirement offered to the 8(a) program. Again, as noted above, we will accept the SBA’s interpretation of its own regulations unless that interpretation is not reasonable.³ While SKC disagrees with SBA, it has not provided any information which demonstrates that the SBA position violates a statute or regulation, or is otherwise unreasonable. Accordingly, we accept the SBA’s view that the requirement is new and that no adverse impact analysis was required.

The protest is denied.

Susan A. Poling
General Counsel

³ SKC also asserts that the period of performance of the IKun contract (31.5 months) was much closer to the bridge contract (24 months) than to the initial contract it was awarded (60 months). While this may be true, it does not change the fact that the pertinent regulation allows the SBA to determine that a requirement is a new requirement based on the change in dollar value, and does not require the SBA to consider the term of the contract. See B&D Consulting, Inc., B-413310 et al., Sept. 30, 2016, 2016 CPD ¶ 280 at 5 n.6 (SBA compares the value of the requirement to be solicited with the overall value of the existing contract encompassing the requirement).