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Decision

Matter of: Lawton-Penna JV

File: B-416848

Date: November 15, 2018

Sean D. Forbes, Esq., and Bryant S. Banes, Esq., Neel, Hooper & Banes, P.C., for the protester.

Thomas J. Warren, Esq., and Blake M. Hedgecock, Esq., Department of the Army, and John Klein, Esq., and Sam Q. Le, Esq., Small Business Administration, for the agencies. Mary G. Curcio, Esq., and Laura Eyester, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

Sean D. Forbes, Esq., Neel, Hooper & Banes, PC, for the protester.

DIGEST

1. Protest that agency conducting procurement using sole-source authority of the Small Business Administration (SBA) 8(a) program was motivated by bad faith to rescind letter requesting protester to submit a proposal is denied where record demonstrates that letter was sent to protester in error.

2. Under sole-source authority of the SBA's 8(a) program, a contracting agency is authorized to nominate the 8(a) participant it desires to perform the contract.

DECISION

Lawton-Penna Joint Venture (LPJV), an 8(a) joint venture of Dallas, Texas, protests the decision of the Department of the Army, Army Corps of Engineers, to rescind its letter requesting LPJV to submit a proposal in response to request for proposals No. W9126G18R0379, for gate repair services at Sommerville, Lake. LPJV asserts that the agency acted in bad faith and failed to follow applicable procurement regulations concerning the Small Business Administration's (SBA) 8(a) program.

We deny the protest.

BACKGROUND

On July 10, 2018, an employee of the field office which required the services contacted the agency contract specialist and indicated that based on prior experience, Sturm

Welding, Inc., an 8(a) small business, was the preferred contractor for an 8(a) sole-source award. See Request for Dismissal, Exh. A, attach. A, Email from Field Office to Contract Specialist. On August 17, a new contract specialist, hereinafter, the second contract specialist, who was not informed that Sturm Welding was the preferred contractor, submitted an offer letter for the project to the SBA identifying LPJV as the intended 8(a) sole-source awardee.¹ Id. at 1, Exh. B, Offering Letter. LPJV is an SBA-approved 8(a) joint venture comprised of The Lawton Group and The Penna Group, LLC. Response to Req. for Dismissal at 1 n.1.

The second contract specialist was also replaced by, hereinafter, the third contract specialist. On September 7, the SBA notified the third contract specialist that the requirement was accepted into the 8(a) program on behalf of LPJV. Request for Dismissal, Exh. C, SBA Acceptance Letter. That same day, the third contract specialist provided LPJV with a copy of the solicitation, and advised the protester that its proposal was due no later than 3:00 pm, Central time, on September 17. Protest, Encl. 1, Emails between LPJV and Agency, at 4.

On September 10, the employee from the field office requiring the services contacted the third contract specialist and asked why Sturm Welding, its preferred contractor, was not selected for the project. Request for Dismissal, Exh. A, Decl. of Third Contract Specialist, at 1-2. The third contract specialist notified the SBA that its offer letter had identified the wrong contractor, and asked for guidance. Id. at 2. The SBA advised the third contract specialist to inform LPJV of the error, and submit a new 8(a) offer letter to the SBA identifying Sturm Welding as the selected contractor. Id. The third contract specialist notified LPJV that the solicitation was sent in error, and withdrew the request for LPJV to submit a proposal. Protest, Encl. 1, Email from Agency to LPJV, at 1. The third contract specialist also prepared a new offer letter for the SBA identifying Sturm Welding as the 8(a) contractor selected for performance. Request for Dismissal, Exh. D, Offer Letter. The new offer letter also revised the contemplated award date and the estimated project amount. Id. On September 17, the SBA accepted the revised requirement into the 8(a) program on behalf of Sturm Welding. Id., Exh. E, SBA Acceptance Letter. Upon learning that it would not receive the sole-source award, LPJV filed this protest.

DISCUSSION

LPJV protests that the agency acted in bad faith when it rescinded its request for LPJV to submit a proposal. In the protester's view, the agency was retaliating against The Penna Group for filing claims against the agency concerning earlier awarded contracts. Protest at 4-5. In this regard, the protester reports that the agency terminated its 8(a)

¹ The regulations state that a "procuring activity contracting officer indicates his or her formal intent to award a procurement requirement as an 8(a) contract by submitting a written offering letter to SBA." 13 C.F.R. § 124.502(a); see also Federal Acquisition Regulations (FAR) § 19.804-2(a).

sole-source “award” only after those contracting officers involved in the claims with The Penna Group, and who are from other districts that had nothing to do with the current procurement, were copied on the email that was sent to LPJV on September 10 concerning a site visit. Id. at 3. The protester contends that these contracting officers influenced the agency to rescind its request for LPJV to submit a proposal.

As noted, the agency planned to meet its requirement using the SBA’s 8(a) program. Section 8(a) of the Small Business Act, 15 U.S.C. § 637(a), authorizes the SBA to enter into sole-source and competitive contracts with government agencies and to arrange for performance through subcontracts with socially and economically disadvantaged small business concerns. See also FAR § 19.800(b); 13 C.F.R. § 124.501(b). The Act affords the SBA and contracting agencies broad discretion in selecting procurements for the 8(a) program; accordingly, 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); Rothe Computer Solutions, LLC d/b/a Rohmann Joint Venture, B-299452, May 9, 2007, 2007 CPD ¶ 92 at 3.

In addition, government officials are presumed to act in good faith, and a protester’s claim that contracting officials were motivated by bias or bad faith must be supported by convincing proof; our Office will not attribute unfair or prejudicial motives to procurement officials on the basis of inference or supposition. Azimuth, Inc., B-409711, B-409711.2, July 21, 2014, 2014 CPD ¶ 218 at 4. Specifically, a protester must present convincing evidence that agency officials had a specific and malicious intent to harm the firm. United Enter. & Assocs., B-295742, Apr. 4, 2005, 2005 CPD ¶ 67 at 5. The burden of establishing bad faith is a heavy one. Id. Our Office will not conclude that an agency’s actions are motivated by bad faith merely because they are adverse to the protester’s interests. Trailboss Enters., B-415812.2, May 7, 2018, 2018 CPD ¶ 171 at 12.

Here, the protester argues that it demonstrated bad faith because the agency’s letter to LPJV requesting a proposal was withdrawn only after contracting officers who have nothing to do with this procurement, and with whom the protester has conflicts, were copied on an email to the protester. This, however, is not convincing proof that the government’s actions were the result of bad faith. Rather, the record shows that LPJV was identified as the preferred contractor to the SBA in error. In this regard, Sturm Welding was initially identified by the customer as the desired contractor, and when the customer learned that Sturm Welding had not been selected it asked why. It is thus clear from the record that the agency withdrew its request for LPJV to submit a proposal, not as the result of bad faith, but because LPJV was never the intended contractor.

The protester also argues that in rescinding its request for LPJV to submit a proposal, and identifying Sturm Welding as the preferred contractor, the agency and the SBA violated applicable procurement regulations. Specifically, the protester asserts that pursuant to FAR § 19.804-3(c), the SBA must select the contractor, make any decision to terminate negotiations with the contractor, and select any substitute contractor. According to the protester, the agency, and not the SBA, made these decisions.

Contrary to the protester's belief, both the FAR and the SBA regulations specifically recognize that under the 8(a) program, the agency may request that the SBA approve a specific contractor selected by the agency to perform the agency's requirement. FAR § 19.804-3(c)(1)(offering letter "identifies particular participant for a sole source award"); 13 C.F.R. § 124.503(c) ("Sole source award where procuring activity nominates a specific Participant. SBA will determine whether an appropriate match exists where the procuring activity identifies a particular Participant for a sole source award."). If the agency does so, the SBA will determine if the selected contractor is an appropriate match. FAR § 19.804-3(c)(1); 13 C.F.R. § 124.503(c). If the selected contractor is an appropriate match, the SBA will advise the agency whether it should negotiate directly with the selected contractor, or whether SBA will participate in the negotiations. FAR § 19.804-3(c); 13 C.F.R. § 124.503(c)(2).

If the SBA determines that the selected contractor is not an appropriate match, the SBA will notify the firm and the agency. FAR § 19.804-3(c)(1)(ii); 13 C.F.R. § 124.503(c)(3). The regulations state that the SBA may then nominate another firm. Id. The regulations, however, do not require that the SBA nominate another firm, or prohibit the agency from doing so.

Here, the SBA initially determined that LPJV was an appropriate match after LPJV was incorrectly identified by the agency for the procurement, and SBA authorized the agency to negotiate with LPJV. When the agency notified the SBA that it had identified LPJV in error, the SBA advised the agency to notify LPJV of the error and provide a new offer letter that identified the firm that the agency desired to perform the contract. The protester has not identified any legal precedent or authority that would make these actions objectionable.²

The protest is denied.

Thomas H. Armstrong
General Counsel

²Our Office requested the views of the SBA on this matter. SBA states that the protester was never awarded an 8(a) contract here; rather, SBA initially accepted the requirement into the 8(a) program on behalf of LPJV and this acceptance letter created no contractual obligations on the agency's part. SBA Comments at 3. In addition, SBA states that its acceptance letter recognizes that an award may not always occur between the procuring agency and nominated business. Id.