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Decision

Matter of: C&E Services, Inc.

File: B-420374.3; B-420374.4

Date: June 21, 2022

Kevin P. Connelly, Esq., Kelly Buroker, Esq., and Tamara Droubi, Esq., Vedder Price PC, for the protester.

Devon E. Hewitt, Esq., Protorae Law PLLC, for Kadiak, LLC, the intervenor.

Katherine Allen, Esq., and Rachel McGuane, Esq., Department of the Treasury; and Mark Hagedorn, Esq., and John W. Klein, Esq., Small Business Administration, for the agencies.

Mary G. Curcio, Esq., and Jonathan L. Kang, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

In conducting an analysis to determine if placing a requirement in the Small Business Administration 8(a) business development program would have an adverse impact on a small business, the Small Business Administration reasonably considered invoices for work performed and supplies and equipment purchased during relevant time period, instead of the total dollar amount of invoices submitted during that time period.

DECISION

C&E Services, Inc., of Vienna, Virginia, protests the decision by the Department of the Treasury, Bureau of Engraving and Printing (BEP), and the Small Business Administration (SBA), to place contract No. 2031ZA22C00005 for maintenance and support services in SBA's 8(a) business development program, and the award of that contract to Kadiak, LLC, of Chantilly, Virginia. C&E, a small business contractor that has been performing these services, contends that the SBA did not consider all relevant information in determining the adverse impact on C&E, which results from placing the requirement in the 8(a) program.¹

¹ C&E initially protested that the SBA failed to perform a required adverse impact analysis before accepting the requirement into the 8(a) program. We dismissed that protest after the BEP took corrective action so that the SBA could review its acceptance, and conduct an adverse impact analysis if one was required. *C&E Servs.*,

We deny the protest.

BACKGROUND

Section 8(a) of the Small Business Act, 15 U.S.C. § 637(a), authorizes the SBA to contract with other government agencies, and to subcontract the performance of those contracts to qualified 8(a) program participants. Pursuant to SBA regulations, a procuring activity must generally offer and the SBA must accept a procurement requirement for award as an 8(a) contract. See 13 C.F.R. § 124.501-504. The Act offers broad discretion to the SBA and federal procuring activities in selecting procurement requirements that are suitable for award under the 8(a) program. 15 U.S.C. § 637(a) (stating that a contracting officer is authorized to issue a contract to the SBA for “any specific Government procurement” as long as the SBA is “competent and responsible to perform”).

SBA has promulgated regulations at 13 C.F.R. § 124.504, which set forth limitations on its authority to accept requirements into the 8(a) program under certain circumstances. Relevant to C&E’s protest, SBA will not accept a procurement for award as an 8(a) contract where the SBA has made a written determination that such acceptance would have an adverse impact on an individual small business. *Id.* § 124.504(c). The adverse impact inquiry is intended to protect small businesses performing prime federal contracts awarded outside the 8(a) program.²

The contract at issue here is for maintenance and support services for the BEP’s eastern currency facility wastewater pretreatment plant in Washington, D.C. C&E, a small business, has performed the services for the past 24 years. On August 24, 2021, the BEP offered the requirement to the SBA 8(a) business development program on behalf of Kadiak. Memorandum of Law at 2. The SBA accepted the offer on September 8, and the contract was awarded to Kadiak on November 1. *Id.* On November 15, the BEP informed C&E that a new contract, which would begin on January 1, 2022, had been awarded to Kadiak under the Small Business 8(a) program.

On December 15, the contracting officer requested that the SBA review its acceptance of the wastewater treatment requirement into the 8(a) program, and perform an adverse impact analysis if one was required. Agency Report (AR), Exh.15, SBA email to

Inc., B-420374, B-420374.2, Dec. 22, 2021 (unpublished decision). Subsequently, the SBA conducted an adverse impact analysis and concluded that accepting the contract into the 8(a) program would not have an adverse impact on C&E. C&E then filed the current protest which asserts that the adverse impact analysis failed to consider all relevant information. This decision concerns the protest that followed the SBA’s adverse impact analysis.

² No adverse impact analysis is required where the acquisition is a “follow-on” 8(a) acquisition, or a “new” requirement (a requirement which has not been previously procured by the relevant procuring activity). *Id.* § 124.504(c)(1)(ii).

contract specialist agreeing to perform adverse impact analysis. The SBA conducted the adverse impact analysis, and concluded that awarding the contract to Kadiak under the 8(a) program would not have an adverse impact on C&E. AR, Exh. 28, Adverse Impact Analysis at 2. On March 16, 2022, the agency notified C&E that the award to Kadiak was affirmed. Protest at 5. This protest followed.

DISCUSSION

C&E protests that the SBA did not consider all relevant information when it conducted its adverse impact analysis. According to C&E, an adverse impact analysis based on accurate information would have led the SBA to conclude that acceptance of the requirement into the 8(a) program would adversely impact C&E, thereby precluding SBA's acceptance of the requirement under the 8(a) program. As discussed below, we find that SBA's adverse impact analysis was consistent with applicable regulations.³

As noted above, the Small Business Act affords the SBA and contracting agencies broad discretion in selecting procurements for the 8(a) program. Accordingly, our Office will not question the decision to procure under the 8(a) program absent a showing of bad faith on the part of government officials or that specific regulations have been violated. *Korean Maint. Co.*, B-243957, Sept. 16, 1991, 91-2 CPD ¶ 246 at 5. Moreover, we will defer to the SBA's interpretation of its own regulations as long as that interpretation is reasonable. *NANA Servs., LLC*, B-297177.3, B-297117.4, Jan. 3, 2006, 2006 CPD ¶ 4 at 10.

In determining whether the acceptance of a requirement into the 8(a) program would have an adverse impact on an individual small business, the SBA presumes an adverse impact to exist where:

- (A) The small business concern has performed the specific requirement for at least 24 months;
- (B) The small business is performing the requirement at the time it is offered to the 8(a) BD [business development] program, or its performance of the requirement ended within 30 days of the procuring activity's offer of the requirement to the 8(a) BD program; and
- (C) 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 (including those of its affiliates). For a multi-year requirement, the dollar value of the last 12 months of the requirement is used to determine whether a small business would be adversely affected by SBA's acceptance.

³ While we have considered all the arguments that C&E made in its protest, and have found that none of them would lead us to sustain this protest, our decision does not discuss all the arguments raised.

13 C.F.R. § 124.504(c)(1). SBA regulations require that contracting agencies furnish detailed information about a procurement when offering it for inclusion in the program. 13 C.F.R. § 124.502. In this regard, 13 C.F.R. § 124.502(c) sets forth information that must be identified in a contracting agency's letter offering work for inclusion in the 8(a) program. As a general matter, the SBA is entitled to rely on a contracting agency's representations regarding the offered requirement. *C. Martin Co., Inc.*, B-292662, Nov. 6, 2003, 2003 CPD ¶ 207 at 7.

SBA's Adverse Impact Analysis

Here, there is no dispute that C&E performed the specific requirement for at least 24 months, and was performing the requirement when it was offered to the 8(a) program. The dispute concerns whether the dollar value of the requirement that C&E was performing comprised 25 percent or more of C&E's recent annual gross sales.

The SBA requested C&E to provide financial statements and corporate tax returns for purposes of determining C&E's gross annual sales. In its adverse impact analysis, the SBA utilized [DELETED], the amount C&E reported on its 2020 corporate tax return, as C&E's gross annual sales.⁴ AR, Exh. 28, Adverse Impact Analysis at 2.

For purposes of determining the value of the wastewater treatment contract to C&E, the SBA used the period comprising the 12 months of work completed by the protester prior to the offer of the requirement to the 8(a) program: September 1, 2020 through August 31, 2021. *Id.* at 1. The SBA requested the BEP to provide information on payments made to C&E for work performed and supplies and equipment purchased during this time period. As relevant here, C&E received fixed-monthly payments to perform recurring tasks, as well as payments (referred to as non-monthly payments) for additional work that the agency ordered. C&E received \$2,467,461 in fixed-monthly payments for performance during the relevant 1-year period. This amount is not in dispute.

With respect to non-monthly payments made to C&E, the BEP provided the SBA with five invoices, which the agency received from C&E between September 1, 2020, and August 31, 2021. The five invoices totaled \$305,046. AR, Exh. 21, Contracting Officer (CO) information on non-monthly payments; AR, Exh. 22, email from SBA regarding adverse impact analysis.

⁴ C&E's financial statements indicated gross annual sales of [DELETED]. The SBA explained that for purposes of the adverse impact analysis, a firm's tax returns should be used, since revenues reported for federal tax purposes are primarily used to determine the size status of the business. See SBA Supp. Comments, May 13, 2022. We have no basis to question SBA's reasonable interpretation of its own regulations. See *NANA Servs., LLC*, *supra*, (GAO should defer to SBA's reasonable interpretation of its own regulations).

The SBA determined that \$101,238 of the \$305,046 the firm invoiced for non-monthly payments for work performed and equipment and supplies purchased between September 1, 2020 and August 31, 2021, should be included in the adverse impact analysis. AR, Exh. 28, Adverse Impact Analysis at 1. As relevant to this protest, the SBA reviewed invoice 04-23655, which included \$122,525 for the period May 1, 2020, through October 8, 2020. In its analysis, the SBA included \$28,071 of the \$122,525 listed for this period because approximately one month overlapped with the relevant time period (September 1, 2020 through August 31, 2021).⁵ AR, Exh. 24, Email from CO to SBA, Feb. 3, 2022 at 1, 4; Comments at 5. The SBA determined that the total value to C&E from the BEP contract for the time period of September 1, 2020 until August 31, 2021 was \$2,568,700 (\$2,467,461 in monthly payments plus \$101,238 in non-monthly payments). AR, Exh. 28, Adverse Impact Analysis at 2; SBA Supp. Comments, May 13, 2022, at 2. The SBA computed that the dollar value of the requirement during the relevant period (\$2,568,700) was [DELETED] percent of C&E's gross annual sales, based on its 2020 tax return ([DELETED]). AR, Exh. 28, Adverse Impact Analysis at 2. Since the value of the requirement was less than 25 percent of C&E's gross sales, the SBA concluded that C&E would not be adversely impacted by placing the contract in the 8 (a) program. *Id.*

Total Value of Invoices Submitted

As discussed above, in considering whether C&E's total revenue from the wastewater treatment plant for the period comprised 25 percent or more of C&E's annual gross sales, the SBA determined that \$101,238 of the \$305,046 in non-monthly costs was invoiced for work performed or supplies and materials purchased between September 1, 2020, and August 31, 2021, and included that amount in the adverse impact analysis. AR, Exh. 28, Adverse Impact Analysis at 1. The SBA did not consider the remaining \$203,808 because while this amount was included on invoices submitted between September 1, 2020, and August 31, 2021, it was for work performed, or equipment and supplies ordered, outside that time period.

C&E asserts that the SBA's adverse impact analysis should have considered the value of all five of the non-recurring payments C&E invoiced between September 2020 and August 2021 for the BEP wastewater contract, which totaled \$305,046. According to C&E, the SBA should have considered amounts included in the invoices for work performed prior to September 1, 2020, because the protester could not have submitted invoices for this work earlier, as the work had not been accepted by BEP. C&E

⁵ Invoice 04-23655 included \$122,525 for the period May 1, 2020 through October 8, 2020. The SBA initially attributed one fifth of this amount (\$24,505) as revenue to C&E because 1 out of 5 months covered by the invoice was within the relevant period. See AR, Exh. 24, Email from CO to SBA, Feb. 3, 2022 at 4; Tab 27, BEP Invoice Analysis. BEP believed that \$28,071 of the \$122,525 should have been included. AR, Exh. 24, Email from CO to SBA, Feb. 3, 2022 at 1; Comments at 5. The SBA acceded to the agency's view. AR, Exh. 24, Email from CO to SBA, Feb. 3, 2022 at 1.

therefore asserts that it should have been credited with \$305,046, the full amount that it invoiced in the relevant time period. The parties agree that, had the SBA used the full \$305,046 amount, rather than the \$101,238 amount, the SBA would have found that the requirement was more than 25 percent of C&E's most recent annual gross sales. SBA Supp. Comments, May 13, 2022, at 3.

The SBA acknowledges that contractors may only invoice for work at specific intervals, or after work is completed and accepted, and that may span multiple time periods. In the SBA's view, however, it would frustrate the objective of the adverse impact analysis--which is required to consider "the dollar value of the last 12 months of the requirement"--to exclude or include work performed or equipment and supplies purchased based solely on when the contractor is eligible to receive payment or in fact does receive payment. SBA Comments, May 9, 2022 at 4. Thus, the SBA interprets its regulations as requiring the calculation to be based on the value of the work actually performed and costs of equipment and supplies actually purchased during the relevant 1-year period. Although C&E would prefer that the SBA consider all invoices submitted within the 1-year time period regardless of whether those invoices are for work performed and equipment or supplies purchased outside the relevant 1-year time period, we find no basis to conclude that the SBA's interpretation of its regulation is unreasonable. See *NANA Servs., LLC, supra*.

Invoice 04-23655

Next, C&E asserts that in determining the value of the requirement to C&E, the SBA should have included the full value of equipment purchased by a subcontractor, totaling \$122,525, which was included in invoice 04-23655 for the period May 1, 2020 through October 8, 2020. Invoice 04-23655 was for work performed and equipment and supplies ordered by MC Dean, a subcontractor to C&E, for work related to the installation of flow meters. The invoice included a charge of \$122,525 for the period of May 1, 2020 through October 8, 2020, which was for purchase of the flow meters. In its adverse impact determination, the SBA included \$28,070, of the \$122,525 in the total for equipment purchased in the relevant time period (September 1, 2020-August 31, 2021) since there was some overlap between the time period for which the invoice was submitted, and the relevant time period. AR, Exh. 24, Email from CO to SBA, Feb. 3, 2022, at 1, 4; Comments at 5.

C&E asserts that as a result of the COVID-19 pandemic, the agency prohibited most contractors from performing work at the BEP between approximately March 10, 2020, and September 6, 2020. C&E asserts that as a result, the flow meters were delivered to MC Dean after September 11, 2020, and were not delivered to the agency until November 2020. C&E argues that since the flow meters were delivered to the subcontractor and agency during the relevant one year period, the total amount of the invoice should have been considered in the adverse impact determination. C&E contends that if the entire \$122,525 is included, C&E's revenues from its work on the contract would be more than 25 percent of its annual gross sales, and the SBA would

have determined that C&E would suffer an adverse impact if the contract was placed in the 8(a) program.

As discussed above, SBA states that an adverse impact analysis should consider services provided and equipment purchased during the relevant 1-year period to calculate the dollar value of the last 12 months of the requirement. AR, Exh. 28, Adverse Impact Analysis, at 1; SBA Comments, May 9, 2022, at 4. We therefore apply this standard to the evaluation of the value of invoice 04-23655.

The BEP contends that the flow meters must have been purchased prior to September 1, 2020, and should therefore not be included in C&E's recent annual gross sales. BEP Additional Briefing, May 11, 2022 at 2. BEP notes that the invoice lists May 1, 2020 to October 8, 2020 as the dates of performance on invoice 04-23655, which was submitted by C&E in the amount of \$122,525 for the flow meters. *Id.* at 2. The agency explains in this regard that it placed the order with C&E for the flow meter work in September 2019, and at that time the contractor was authorized to purchase the flow meters. *Id.* C&E issued a purchase order for the items to MC Dean in November 2019. *Id.* The agency infers that since C&E placed the order with MC Dean in November 2019, MC Dean likely ordered the flow meters from the vendor before September 2020. *Id.* The SBA agrees with the agency that if the meters were purchased prior to September 1, 2020, the purchase price should not be considered as part of the 1-year relevant time period even if the meters were later delivered and installed. SBA Supp. Comments, May 13, 2022, at 3.

C&E does not claim that the meters were ordered after September 1, thereby placing the order within the relevant 1-year period of September 1, 2020, through August 31, 2021; rather, the protester contends that the items did not reach their final point of delivery at the agency until November 2020. Comments at 15. For this reason, the protester argues that the flow meters should be attributed to the 1-year period and counted towards the dollar value of the last 12 months of the requirement.

We find no basis to disagree with the agency and the SBA that the full price of the flow meters should not have been considered in the adverse impact analysis.⁶ As

⁶ SBA's interpretation of its regulation suggests that the entirety of the costs for the flow meters should be excluded from the calculation of annual gross sales because the protester does not establish or specifically contend that they were purchased during the relevant 1-year period. The record, however, shows that BEP and SBA gave the protester credit for a pro-rated portion of the purchased item because the invoice, which covered the period of May 1, 2020 through October 8, 2020, overlapped one month of the relevant 1-year period of September 1, 2020 through August 31, 2021. See AR, Exh. 24, Email from CO to SBA, Feb. 3, 2022 at 1, 4. The fact that the SBA considered a part of the cost, when it arguably could have excluded the entirety of the cost, does not show that its interpretation of its regulation is unreasonable. Additionally, to the extent it introduced an error with the calculation, it was to the protester's advantage, and

discussed above, we think the SBA reasonably interprets its regulations as providing that the annual gross sales should be calculated based on the work performed or items purchased during the relevant 1-year period (September 1, 2020 through August 31, 2021). As also discussed above, the protester does not allege or otherwise establish that the flow meters were ordered during the relevant period; instead, the protester disagrees with SBA's interpretation of its regulation and contends that the cost of the flow meters should be included because they were delivered during the relevant period. Because we conclude that the SBA reasonably interprets its regulations concerning the calculation of annual gross sales, and that the SBA applied that interpretation in the adverse impact analysis here, we find no basis to sustain the protest. See *BMAR & Assocs, Inc.*, B-281414, Feb. 5, 1999, 99-1 CPD ¶ 29 at 4 (Protest of SBA's decision to place procurement in 8(a) program is denied where protester disagrees with SBA adverse impact analysis, but does not demonstrate SBA violated applicable regulations).

The protest is denied.

Edda Emmanuelli Perez
General Counsel

therefore did not competitively prejudice the protester in any way. See *NANA Servs., LLC, supra*, at 6 (SBA's failure to follow its regulations did not prejudice protester where the record reflects had SBA followed its regulations the same result would have been reached).