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Comptroller General
of the United States

United States General Accounting Office
Washington, DC 20548

Decision

Matter of: S&K Electronics

File: B-282167

Date: June 10, 1999

Pamela J. Mazza, Esq., and Antonio R. Franco, Esq., Piliero, Mazza & Pargament, for the protester.
Marc Rigrodsky, Esq., Department of Treasury, Roger D. Waldron, Esq., General Services Administration, and Kenneth W. Dodds, Esq., Small Business Administration, for the agencies.
David A. Ashen, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Decision whether to place procurement under 8(a) program is not subject to General Accounting Office review where there is no showing of possible bad faith on the part of government officials or that regulations may have been violated.

2. Protest by 8(a) firm alleging improper bundling of desktop computing requirements under General Services Administration's Seat Management Services Program is denied where record shows Seat Management contracts reflect qualitatively different approach from earlier acquisitions and agency reasonably anticipated substantial technical benefits from use of Seat Management contract to acquire broad range of computing requirements under one contract.

DECISION

S&K Electronics (SKE) protests the Department of the Treasury's determination to acquire information technology (IT) technical support services--previously furnished by a section 8(a) contractor--as part of a package of IT services, hardware and software under the General Services Administration's (GSA) Seat Management Services Program. SKE asserts that this approach violates Treasury's procurement regulations with respect to section 8(a) contracts and constitutes improper contract bundling.

We deny the protest.

BACKGROUND

On October 4, 1997, GSA issued solicitation No. TFF-97-014, which provided for multiple-award, non-mandatory indefinite-delivery/indefinite-quantity task order contracts, for a period not to exceed 120 months, to furnish Seat Management services. The statement of work (SOW) provided as follows:

> Under the Seat Management concept, the Government will acquire integrated services and the required components to include: (1) general purpose desktop computers, servers and associated peripherals; (2) high performance computational systems and associated peripherals; (3) local area and wide area network capabilities; (4) commercial off-the-shelf (COTS) software; (5) help desk services; (6) maintenance; (7) design and installation; and (8) training.
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> The Contractor will provide the assets needed to provide Seat Management Services and will hold title directly or indirectly to all assets provided. . . . The Government intends to acquire desktop computing services and support as a utility and pay for them on a per 'seat' basis. So that the Government may benefit from the total cost savings, these services must be acquired in an integrated fashion from a single source.

TFF-97-014, SOW § C1, at 1; see Commerce Business Daily, Sept. 30, 1997 (posted Sept. 24, 1997). The SOW emphasized that the services to be furnished under the contracts will include "all the essential components and resources to service and maintain the desktop computing environment," and that "[c]omponents of Seat Management Services may not be purchased independently." TFF-97-014, SOW §§ C3, C4, at 2-3. The Seat Management contracts were to include fixed ceiling prices, with the ordering agencies free to negotiate lower prices for each task order. On June 30, 1998, GSA awarded eight Seat Management contracts.

Treasury historically has acquired desktop computer supplies and services from multiple vendors. In particular, desktop computer support services for its departmental offices have been furnished for approximately 10 years by 8(a) firms--most recently by Uniband, Inc.--under the Small Business Administration’s (SBA) 8(a) program. Uniband’s contract covered fiscal year 1994, contained options for fiscal years 1995-98, and was extended until March 1999.

On September 28, SKE wrote to the SBA’s Helena, Montana office to request that Treasury’s computer support services requirements be reserved for SKE under the 8(a) program; that office, in turn, requested Treasury to consider awarding an 8(a) contract for these services, to be performed by SKE. SKE subsequently met with Treasury representatives on several occasions to discuss the agency's intended procurement approach. Apparently dissatisfied with the response received from Treasury, on December 21 SKE wrote to both the SBA and Treasury to question the agency's intended approach to meeting the requirement. SKE asserted that Treasury's intent to remove the requirement from the 8(a) program, and to compete the effort among the GSA Seat Management contractors, violated agency regulations. Agency Report, Tab 20, Letter from SKE to SBA (Dec. 21, 1998), and Tab 21, Letter from SKE to Treasury (Dec. 21, 1998). By letter of February 9, 1999, Treasury responded to SKE:

> This is in response to your December 21, 1998 letter regarding an expiring technical support contract within Departmental Offices. As you noted, these services are currently being supplied by UNIBAND in conjunction with TAMSCO. You expressed a desire to be considered for a follow-on contract for these services.
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> Departmental Offices has determined that its needs have changed since the award of the previous contract and has decided to satisfy these new requirements through the General Services Administration's Seat Management program. GSA's Seat Management Program includes ample opportunities for small and minority-owned businesses. Therefore we no longer have a need for the type of support services currently supplied by UNIBAND.

Agency Report, Tab 22, Letter from Treasury to SKE (Feb. 9, 1999). On February 25, GSA issued Treasury's task order request (TOR) (No. TFC-9902) to the Seat Management contractors; the closing date for receipt of proposals was March 29. Upon learning of issuance of the TOR, SKE filed this protest with our Office on March 2.

DISCUSSION

8(a) Set-Aside

It remains SKE's position that meeting the requirement here under the Seat Management program is inconsistent with Department of the Treasury Acquisition Regulation (DTAR) § 1019.803(c), which provides that

> [o]nce a product or service has been acquired successfully by an acquisition office on the basis of an 8(a) set-aside, all future requirements of that office for that product or service shall be acquired using 8(a) set-aside procedures. If a [contracting officer] determines there is no longer a reasonable likelihood that an offer can be obtained from a qualified 8(a) concern and award can be made at fair market prices, the repetitive set-aside must be withdrawn, using the

> procedures at 1019.506, prior to proceeding with the procurement on another basis.

Under our Bid Protest Regulations, we will not review a decision whether to place a procurement 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) (1999).

Here, SKE has made no showing of possible bad faith on the part of procuring officials in their determination to remove Treasury's computer support services requirements from the 8(a) program. Nor has SKE shown a violation of the cited regulation, DTAR § 1019.803(c). That provision presupposes a follow-on procurement of the same product or service that has been acquired successfully by an acquisition office on the basis of an 8(a) set-aside. GSA's Seat Management program, however, represents a new and different approach to acquiring IT services, under which an agency will acquire all of its desktop IT requirements--including hardware, software and services--as a package of services from a single contractor that would retain title to the hardware and software. As emphasized in the Seat Management SOW, all the essential components and resources to service and maintain the desktop computing environment are to be furnished by the selected GSA Seat Management contractor, and components of the Seat Management services cannot be purchased independently. TFF-97-014, SOW §§ C3, C4, at 2-3. This unified, integrated procurement approach is qualitatively different from a model based on purchasing (and obtaining title to) hardware and software from a different contractor than the contractor(s) furnishing computer support services. Since Treasury is acquiring a different product or service than that previously procured on the basis of an 8(a) set-aside, DTAR § 1019.803(c) does not require a continued 8(a) set-aside here.[1]

Bundling

SKE also argues that Treasury's action amounts to a bundling of its IT requirements, in violation of the provisions of the Small Business Act, 15 U.S.C.A. § 631(j)(3) (West Supp. 1999), requiring agencies to avoid unnecessary and unjustified bundling of contract requirements that precludes competition by small businesses. The Competition in Contracting Act of 1984, 41 U.S.C. § 253a(a) (1994), generally requires that solicitations permit full and open competition and contain restrictive provisions or conditions only to the extent necessary to satisfy the needs of the agency. Since bundled, consolidated, or total-package procurements combine separate, multiple

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[1] We note that SKE and Treasury disagree as to whether DTAR § 1019.803(c), which has not been published in the Federal Register, is an agency acquisition regulation such that a violation of that provision would furnish a basis for our sustaining the protest. In view of our conclusion that no violation has been shown, we need not resolve this dispute.

requirements into one contract, they have the potential for restricting competition by excluding firms that can furnish only a portion of the requirement. The Urban Group, Inc.; McSwain and Assocs., Inc., B-281352, B-281353, Jan. 28, 1999, 99-1 CPD ¶ __ at 7; Aalco Forwarding, Inc., et al., B-277241.12, B-277241.13, Dec. 29, 1997, 97-2 CPD ¶ 175 at 6. Furthermore, as noted by the protester, the Small Business Act, 15 U.S.C.A. § 631(j)(3) (West Supp. 1999), states that, "to the maximum extent practicable," each agency shall "avoid unnecessary and unjustified bundling of contract requirements that precludes small business participation in procurements as prime contractors." We will review such solicitations to determine whether the approach is necessary and justified to satisfy the agency's needs. See The Urban Group, Inc.; McSwain and Assocs., Inc., supra; Aalco Forwarding, Inc., et al., supra.

The Small Business Act, 15 U.S.C.A. § 644(e)(2)(A), states that, before proceeding with an acquisition strategy that could lead to a contract containing consolidated procurement requirements, the head of an agency shall conduct market research to determine whether consolidation of the requirements is necessary and justified. An agency may determine that consolidation of requirements is "necessary and justified if, as compared to the benefits that would be derived from contracting to meet those requirements if not consolidated, the Federal Government would derive from the consolidation measurably substantial benefits, including any combination of benefits that, in combination, are measurably substantial." 15 U.S.C.A. § 644(e)(2)(B). Such benefits may include (1) cost savings, (2) quality improvements, (3) reduction in acquisition cycle times, (4) better terms and conditions, or (5) any other benefits. Id.[2]

Treasury reports that it projects achieving substantial technical benefits from consolidating its IT requirements, including the requirement here, under the Seat Management program. For example, Treasury expects that having a single contractor responsible for all of its desktop IT requirements--rather than continuing to rely on the current fragmented approach of using different sources for hardware/software and services--will result in significant quality improvements as a result of (1) having a single contractor responsible for infrastructure interoperability and product compatibility, (2) eliminating the confusion, delays and denials of responsibility for service interruptions or installation problems, and (3) facilitating consistent, timely upgrades and refreshment of technology. Treasury Reports, Apr. 2, 1999, at 25-26, Apr. 28, 1999, at 5-6, and Apr. 30, 1999, at 1-2; Agency Report, Tab 26, Acquisition Plan, Feb. 9, 1999, at 3, 9.

SKE has not rebutted the basis for Treasury's determination to procure the services in question under the Seat Management contract; it has made no showing that Treasury in fact had no reasonable expectation of achieving substantial technical

[2] The reduction of administrative or personnel costs alone is not a justification for bundling contract requirements, unless the cost savings are expected to be substantial in relation to the dollar value of the procurement requirements to be consolidated. 15 U.S.C.A. § 644(e)(2)(C).

benefits from consolidating these IT requirements under the Seat Management contract. Thus, there is no basis for finding that the agency's approach violates the prohibition against improper bundling.[3]

SKE's protest is based largely on its view that the requirement should be made available to SKE under the 8(a) program because it could "establish teaming relationships with vendors to provide the agency with the latest technology," and "provide the needed expertise for Treasury's new technological environments by, among other things, subcontracting with concerns with the specialized skills to meet Treasury's needs." In this way, SKE asserts, it could satisfy all of the agency's desktop computing needs and furnish the agency with the same benefits that are available under the Seat Management program. SKE Comments, May 5, 1999, at 7. However, whether SKE can in fact satisfy all of Treasury's desktop computing needs is of no legal relevance here. Even if true, SKE has not shown how this claim would provide a basis to challenge the agency's decision to shift from the limited scope of Uniband's contract under the 8(a) program to the qualitatively different acquisition concept of the Seat Management contract. Furthermore, the claim that SKE could satisfy all of Treasury's desktop computing requirements would appear to undercut

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[3] Treasury also expects to achieve cost savings from consolidating its IT requirements under the Seat Management program. Based on Treasury's distributed computing environment requirements and the ceiling rates under two of the Seat Management contracts, GSA calculated that the cost to support Treasury's requirements under the Seat Management program at $4,390 to $5,098 per seat per year (depending on the level of service chosen) in fiscal year 1999; when discounted 20 percent to account for lower prices from competition among the Seat Management contractors, the projected fiscal year 1999 cost per seat ranged from $3,513 to $4,078. (Treasury received six proposals in response to the TOR; the agency reports that the initial price proposals received were consistent with the expected discounted rates. Treasury Report, Apr. 28, 1999, at 4.) In contrast, Treasury's actual support service costs for fiscal year 1998 appears to have been $4,319 per seat; when increased by 3 percent to account for inflation, the fiscal year 1999 cost per seat would total $4,449. Although SKE questions the agency's savings estimates, we need not consider its challenge in this regard since, as discussed above, there is no basis for questioning the reasonableness of the agency's forecast of substantial technical benefits from consolidating its IT requirements. Treasury Report, Apr. 28, 1999, at 1-4; Agency Report, Tab 26, Acquisition Plan, Feb. 9, 1999, at 4-5.

its argument that there has been a bundling of contract requirements here that precludes small business participation as a prime contractor.

The protest is denied.

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