



Decision

Matter of: TFab Manufacturing, LLC

File: B-401190

Date: June 18, 2009

William K. Walker, Esq., Walker Reausaw, for the protester.
Maj. Walter Dukes, U.S. Army Materiel Command, and Kenneth Dodds, Esq., Small Business Administration, for the agencies.
Frank Maguire, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGESTS

Protest challenging propriety of solicitation provision--stating that offerors must meet requirements under Limitations on Subcontracting (LOS) clause separately for services and supply portions of work under solicitation--is sustained where provision is inconsistent with Small Business Act, which provides for application of either services or supply portion of LOS clause, but not both.

DECISION

TFab Manufacturing, LLC, of Madison, Alabama, protests the terms of request for proposals (RFP) No. W58RGZ-08-R-0438, issued by the Department of the Army for improved data modems. TFab maintains that the RFP improperly applies the Limitations on Subcontracting (LOS) clause by applying it separately to both the supply and services portions of the contract.¹

We sustain the protest.

The RFP, issued on July 9, 2008 as a total small business set-aside, provided for the award of an indefinite-delivery, indefinite quantity contract. Contracting Officer's

¹ TFab also initially argued that the RFP improperly included Federal Acquisition Regulation (FAR) clause 52-222-41, "Service Contract Act of 1965," since, it maintained, the "principal purpose" of the RFP was the furnishing of supplies, not the acquisition of services. Protest at 4, 6. The agency subsequently amended the RFP to delete this clause.

Statement (COS) at 3. The RFP called for both hardware requirements and engineering services requirements. COS at 2-3. The RFP incorporated FAR § 52.219-14, the LOS clause, as follows:

LIMITATIONS ON SUBCONTRACTING (DEC 1996)

(a) This clause does not apply to the unrestricted portion of a partial set-aside.

(b) By submission of an offer and execution of a contract, the Offeror/Contractor agrees that in performance of the contract in the case of a contract for—

(1) Services (except construction). At least 50 percent of the cost of contract performance incurred for personnel shall be expended for employees of the concern.

(2) Supplies (other than procurement from a nonmanufacturer of such supplies). The concern shall perform work for at least 50 percent of the cost of manufacturing the supplies, not including the cost of materials.

(3) General construction.....

(4) Construction by special trade contractors.....

Id.; RFP at 45.

The LOS clause implements subsection 15(o) of the Small Business Act, 15 U.S.C. § 644(o), which establishes the 50% subcontracting limitations in paragraph (b)(1) (services) and paragraph (b)(2) (supplies) of the LOS clause. See also Small Business Administration (SBA) Regulations, 13 C.F.R. § 125.6 (2009).

Proposals were received from several small businesses, including TFab. COS at 3. The contracting officer questioned TFab regarding its compliance with the LOS clause, since TFab's proposal specifically indicated "an approximately 95 percent exemption" from the 50% subcontracting rule for the required services. Id. at 3-4. The contracting officer was concerned "that the protester's proposal for how the services CLINS were to be performed amounted to a significant pass through to a large business." Id. at 4. On February 12, the contracting officer issued RFP amendment No. 17, which clarified the manner in which the Army intended to apply the LOS clause, as follows:

V. Offerors are cautioned that this acquisition is a Small Business Set-Aside and is subject to the requirements of FAR clause 52.219-14, Limitations on Subcontracting. This acquisition contains both Supply and Service contract line items, both of which are separately subject to FAR clause 52-219-14, Limitations on Subcontracting. Offerors are cautioned that CLINs described as Cost Plus Fixed Fee CLINs are considered to be an important part of this procurement and not incidental to the production/fixed fee CLINs. Accordingly, offerors

must meet the requirements for Small Business Set-Aside with regard to these CLINS.

RFP, Amend. No. 17, § A-16.V. All offerors, including the protester, submitted revised proposals by the March 17 closing time. COS at 4. This protest was filed prior to the closing time.

ARGUMENTS

TFab asserts that the above provision added by amendment No. 17 improperly applies both subparagraphs (b)(1) (services) and (b)(2) (supplies) of the LOS clause to require small business offerors to agree to perform at least 50% of the cost of both the services and supply portions of the contract. TFab contends that the clause does not provide for such a “hybrid application”; rather, properly applied, the clause requires the agency to determine the principal purpose of the contract—here, services or supplies, but not both—and then apply the paragraph of the LOS clause corresponding to that work.

The Army responds that the services and supply requirements set forth in the RFP historically have been obtained through separate acquisitions, each of which was subject to the appropriate LOS provision, COS at 2-3; AR at 1-2, and explains that the two requirements now have been combined because it was determined to be “advantageous to have one vendor responsible for both the service and supply components.” AR at 2. The Army states that it was concerned that combining the requirements could push small businesses out of the competition for either the services or supplies portion of the procurement—via a pass-through subcontract to a large business—if both of the subcontracting limitations were not imposed, and that it was within the agency’s discretion to apply the LOS clause in a manner to avoid this result. *Id.* In this regard, the contracting officer states that, in combining the requirements, she felt it “only fair to ensure that both efforts were subject to the limitations on subcontracting, so that the services portion would be reserved for small business and not permitted to be a pass-through to large business.” COS at 5.

ANALYSIS

We agree with the protester that the LOS clause does not provide for dual application of the 50% requirement. The clause, on its face, establishes separate subcontracting limitations “in the case of a contract for” four distinct types of work. Paragraph (b)(1) establishes subcontracting limitations, not with regard to services generally, but with regard to “a contract ... for Services.” Similarly, paragraph (b)(2) establishes subcontracting limitations, not with regard to supplies generally, but with regard to “a contract ... for Supplies.” There is no language in the clause that contemplates a hybrid services/supply contract; more specifically, there is no language that provides for applying both paragraphs (b)(1) and (b)(2) in a single acquisition to require small business firms to agree to perform at least 50% of both services and supply work under a single contract. We read the language of the

clause as indicating that the applicable LOS clause paragraph is to be applied to entire contracts, rather than portions of contracts, and that the clause contemplates that the contracting agency must choose among the paragraphs.

In AFL-CIO v. Donovan, 582 F. Supp. 1015, 1020 (D.D.C. 1984), aff'd, 757 F.2d 330 (D.C. Cir. 1985), the court reached a similar conclusion in interpreting applicability of the Service Contract Act (SCA), 41 U.S.C. §§ 351-358 (applicable to contracts “the principal purpose of which is to furnish services”) and the Walsh-Healey Public Contracts Act (WHA), 41 U.S.C. §§ 35-45 (applicable to contracts “for the manufacture or furnishing of materials, supplies, articles, and equipment”), statutes in para materia with subsection 15(o) and the LOS clause. Specifically, in interpreting the relevant provisions of the SCA, the court found that text that “refers to ‘the contract’ without any reference to line item specifications” indicated that the SCA “was intended to apply to entire contracts, not to individual line items.” Agencies’ implementation of the SCA and WHA is consistent with this interpretation; the contracting agency must make a determination whether a requirement is for services or supplies in order to determine which of the two statutes is applicable to an acquisition. See Information Handling Servs., 70 Comp. Gen. 35 (1990), 90-2 CPD ¶ 306 at 3 (regulations implementing the SCA and WHA contemplate an initial determination by the procuring agency as to which statute applies to a particular procurement); Tenavision, Inc., B-231453, Aug. 4, 1988, 88-2 CPD ¶ 114 at 2 (regulatory scheme implementing these statutes envisions an initial determination by the contracting agency as to which statute applies to a particular procurement). This determination requires identification of the principal purpose of the contract. See AFL-CIO v. Donovan, 757 F.2d 330, supra, at 345 (SCA applies only when principal purpose of contract is for services); Southern Packaging & Storage Co. v. U.S., 458 F. Supp. 726, 734 (D.S.C. 1978), aff'd, 618 F.2d 1088, 1090 (4th Cir. 1980) (acquisition of field rations would be exempt from coverage under SCA if found to be subject to provisions of WHA); Department of Labor Regulations, 29 C.F.R. § 4.117 (2009).

We find the courts’ interpretation regarding the manner in which the SCA and WHA are to be applied to contracts supportive of our conclusion here, where we are interpreting an acquisition statute and associated regulations the provisions of which, like those of the SCA and WHA, apply to “contracts” rather than to particular services or supplies within a contract, and which, to be implemented, require an initial agency determination regarding applicability.

Our interpretation also is consistent with SBA’s position regarding this issue. In response to our request for its views, SBA agrees that the Army’s application of the LOS clause to the services and supply portions of the requirement here is improper. SBA points out that the FAR LOS clause requirements parallel those under subsection 125.6(a) of its own regulations, 13 C.F.R. § 125.6(a), which also

implement subsection 15(o) of the Small Business Act, 15 U.S.C. § 644(o).² Consistent with our interpretation, it is SBA's position that these provisions "established one performance requirement that applies to a 'contract for the procurement of supplies' and a different performance requirement that applies to a 'contract for services.'" SBA Comments at 3. SBA concludes that the Army's attempt to apply both the services and supply provisions of the LOS clause is inconsistent with the act. *Id.* at 4. We generally will give deference to an agency's reasonable interpretation of its own regulations. See Blue Rock Structures, Inc., B-293134, Feb. 6, 2004, 2004 CPD ¶ 63 at 8 (SBA's interpretation of statute that it is responsible for implementing entitled to substantial deference and, if reasonable, should be upheld).

Further, we agree with SBA that the Army's implementation of the LOS clause will have the practical effect of restricting competition. In this regard, while, as discussed, the Army is motivated to preclude a small business awardee from subcontracting with a large business to perform all of the service work or all of the supply work under the contract, applying the LOS clause to both the services and supply portions of the contract clearly will limit the small businesses that will be able to compete. Specifically, small business firms that can only perform either a majority of the services work or a majority of the supply work will not be able to compete; the pool of potential competitors will be limited to small businesses that can satisfy the requirements of both paragraph (b)(1) ("50 percent of the cost of contract performance incurred for personnel") and paragraph (b)(2) ("50 percent of the cost of manufacturing the supplies").

Accordingly, we sustain the protest. We recommend that the Army amend the RFP to require offerors to agree to satisfy the 50% requirement only as to either services or supplies, whichever the agency determines is the purpose of the contract, and then provide offerors an opportunity to revise their proposals.³ We also recommend

² Subsection 125.6(a), in paragraphs (1) and (2), is substantially similar to the LOS clause, stating as follows (as relevant here):

(1) In the case of a contract for services (except construction), the concern will perform at least 50 percent of the cost of the contract incurred for personnel with its own employees.

(2) In the case of a contract for supplies or products (other than procurement from a non-manufacturer in such supplies or products), the concern will perform at least 50 percent of the cost of manufacturing the supplies or products (not including the costs of materials).

As with the LOS clause, paragraphs (1) and (2) of subsection 125.6(a) refer only to "a contract," and include no suggestion of applicability only to portions of a contract.

³ Here, since the agency has included FAR clause 52.222-20, Walsh-Healey Public Contracts Act, in the RFP, it appears that the agency has determined that the

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that TFab be reimbursed the costs of filing and pursuing its protest, including reasonable attorneys' fees, with regard to the sustained issue. 4 C.F.R. § 21.8(d)(1). TFab should submit its claim for costs, detailing and certifying the time expended and costs incurred, with the Army within 60 days after receipt of this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

Daniel I. Gordon
Acting General Counsel

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purpose of the acquisition is the furnishing of supplies and that paragraph (b)(2) of the LOS clause therefore would apply. See Mechanical Equip. Co., Inc. et al., B-292789.2 et al., Dec. 15, 2003, 2004 CPD ¶ 192 at 23 (for purposes of LOS clause, contract was a contract for supplies, as indicated by clause implementing WHA).