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## Decision

**Matter of:** Deval LLC  
**File:** B-408519  
**Date:** October 25, 2013

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Dorothy Crow-Willard, Esq., Zachary P. Moutin, Esq., and Jay A. Lauer, Esq., Department of Housing and Urban Development, for the agency.  
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Kenneth Kilgour, Esq., and David A. Ashen, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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### DIGEST

Protest that contracting agency improperly offered a requirement for loan servicing support services for competitive award to a small disadvantaged business under the Small Business Administration's 8(a) program is denied where the protester has not shown a violation of procurement regulation or that the agency acted in bad faith.

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### DECISION

Deval LLC, of Irvine, Texas, protests the terms of request for proposals (RFP) No. DU208WR-13-R-0005, issued by the Department of Housing and Urban Development (HUD) for loan servicing support services. Deval, the incumbent contractor, is a small business that recently graduated from the Small Business Administration's (SBA) 8(a) business development program. The protester challenges the agency's decision to offer this requirement to the SBA for procurement under the 8(a) program, asserting that the agency's actions violated procurement regulations and were in bad faith.

We deny the protest.

## BACKGROUND

The current solicitation, with an estimated value of \$[DELETED], is the third in a series of procurements for loan servicing offered by HUD for competitive award to a small disadvantaged business under Section 8(a) of the Small Business Act.<sup>1</sup> Previous awards for this requirement under the 8(a) program were made in 2007 and 2011, most recently to Deval. The record, however, indicates that HUD viewed Deval's performance under its 2011 contract as poor, with HUD giving Deval an unsatisfactory rating in all completed quarterly desk reviews and issuing Deval a cure notice on November 9, 2012. Contracting Officer's Statement of Facts at 2-3; Agency Report (AR), Tab 16, Quarterly Desk Reviews; AR, Tab 20, Cure Notice, Nov. 9, 2012. Among the agency's concerns with Deval's performance was what it viewed as the "unprofessional . . . combative, aggressive and uncooperative" communications of Deval's president with HUD. AR, Tab 18, Letter from HUD to Deval, Nov. 6, 2012. On February 15, 2013, HUD notified Deval that the agency would not exercise its option for Deval's continued performance of the contract. AR at 2.

Instead, on February 20, HUD issued a sources sought notice which identified the procurement as a potential set-aside for 8(a) and other categories of small business concerns. Sources Sought Notice, February 20, 2013. The agency received 14 responses, with nine submissions from 8(a) firms. Sources Sought Capability Results at 1. While none of the nine 8(a) firms that responded were initially viewed by HUD as able to meet the agency's needs, two of the firms were evaluated as having capability in three out of four performance areas, and were rated "POSSIBLE" for "Meets Needs." Id. Ultimately, in reviewing the capability statements submitted by the 8(a) firms, the agency found that "[t]here appear[s] to be 3-5 companies who are capable as long as their teaming arrangement is concrete or sub-contract support is solid." E-mail from HUD National Servicing Center Deputy Director to Contracting Officer, March 18, 2013. HUD then sent SBA an offer letter stating that nine 8(a) firms had responded to the sources sought notice and that "3-5 show capability to perform the requirement." Offer Letter from HUD to SBA, May 13, 2013, at 2. The SBA accepted the requirement into the 8(a) program on May 21. Letter from SBA to HUD, May 21, 2013. When the agency issued the solicitation as an 8(a) set-aside, with a closing date of July 8, 2013, Deval filed this protest against the terms of the solicitation. Nine 8(a) firms ultimately submitted proposals by the July 8 closing date. AR at 2.

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<sup>1</sup> The requirement was not accepted into the 8(a) program until 2007, but the requirement has been performed by an 8(a) firm since 2004. Contracting Officer's Statement of Facts at 1.

## DISCUSSION

Deval protests that setting aside this requirement under the 8(a) program was improper. In this regard, GAO will only consider the decision to place a procurement in the 8(a) program under limited circumstances. Specifically, GAO's regulations provide that

since contracts are entered into with the Small Business Administration at the contracting officer's discretion and on such terms as are agreed upon by the procuring agency and the Small Business Administration, the decision to place or not to place a procurement under the 8(a) program is not subject to review absent a showing of possible bad faith on the part of government officials or that regulations may have been violated. 15 U.S.C. 637(a).

4 C.F.R. § 21.5(b)(3) (2013). Here, Deval argues that the decision to issue the solicitation as a competitive 8(a) procurement both violated procurement regulations and resulted from bad faith on the part of HUD.

Deval first asserts that the contracting officer was precluded from offering this requirement to the SBA under the 8(a) program by Federal Acquisition Regulation (FAR) § 19.805-1, which provides as follows:

(a) Except as provided in paragraph (b) of this subsection, an acquisition offered to the SBA under the 8(a) Program shall be awarded on the basis of competition limited to eligible 8(a) firms if--

(1) There is a reasonable expectation that at least two eligible and responsible 8(a) firms will submit offers and that award can be made at a fair market price; and

(2) The anticipated total value of the contract, including options, will exceed \$6.5 million for acquisitions assigned manufacturing North American Industry Classification System (NAICS) codes and \$4 million for all other acquisitions.

(b) Where an acquisition exceeds the competitive threshold, the SBA may accept the requirement for a sole source 8(a) award if--

(1) There is not a reasonable expectation that at least two eligible and responsible 8(a) firms will submit offers at a fair market price; or

(2) SBA accepts the requirement on behalf of a concern owned by an Indian tribe or an Alaska Native Corporation.

FAR §§ 19.805-1(a), (b). Deval argues that HUD violated the requirements of FAR § 19.805-1 because the agency had no reasonable expectation that at least two eligible and responsible 8(a) firms would participate in the procurement. Protest at 8-11; Protester Comments, Sept. 10, 2013, at 3; Protester Comments, Sept. 26, 2013, at 5-7.

As noted by the SBA in its response to the protest, however, FAR § 19.805-1 does not govern the acceptance of a requirement under the 8(a) program; instead, it applies after a contracting activity has decided to place a requirement under the 8(a) program and directs whether the requirement must be accepted as a competitive 8(a) procurement. SBA Comments, Sept. 23, 2013, at 4-7; see 13 C.F.R. § 124.506(a)(2) (2013). Further, in the event that a contract opportunity exceeds the applicable threshold and there is not a reasonable expectation that at least two eligible 8(a) firms will submit offers at a fair price, the SBA may accept the requirement for a sole source award if it determines that an eligible 8(a) firm is capable of performing the requirement at a fair price. 13 C.F.R. § 124.506(d). In sum, as noted by the SBA, there is no requirement that there must be a reasonable expectation that at least two eligible 8(a) firms will submit offers in order for a requirement to be offered to the SBA under the 8(a) program. SBA Comments at 7.

Further, where, as here, a procurement has been awarded as an 8(a) contract, a follow-on acquisition must remain in the 8(a) program unless the SBA agrees to release it for non-8(a) competition. 13 C.F.R. § 124.504(d). Here, the SBA has not released the follow-on acquisition for non-8(a) competition; thus, HUD was required to proceed under the 8(a) program.<sup>2</sup> Deval, having graduated from the 8(a) program, is not an interested party to challenge the determination to conduct a competitive 8(a) procurement rather than a sole-source 8(a) procurement. See 4 C.F.R. §§ 21.0(a)(1), 21.1(a) (2013); Cattlemen's Meat Co., B-296616, Aug. 30, 2005, 2005 CPD ¶ 167 at 2 n.1 (in order for a protest to be considered by our Office, a protester must be an interested party, that is, an actual or prospective offeror whose direct economic interest would be affected by the award or failure to award a contract).

Deval's allegation of bad faith also provides no basis to question the agency's decision to proceed with this procurement under the 8(a) program. Although Deval alleges that HUD's actions arise from animosity on the part of HUD officials related to disputes over contract performance, SBA's regulations direct the result here. As discussed above, this follow-on acquisition was required to remain in the 8(a) program unless released by the SBA, which the SBA has not done. Moreover,

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<sup>2</sup> In the planning stages for the 2011 procurement, HUD requested that the SBA release this requirement from the 8(a) program. Letter from HUD to SBA, April 8, 2011. The SBA declined to do so. Letter from SBA to HUD, May 9, 2011.

we will not attribute unfair or prejudicial motives to procurement officials on the basis of inference or supposition. Career Innovations, LLC, B-404377.4, May 24, 2011, 2011 CPD ¶ 111 at 7-8.

The protest is denied.

Susan A. Poling  
General Counsel