



Decision

Matter of: TechAnax, LLC; Rigil Corporation

File: B-408685.22; B-408685.25

Date: August 16, 2019

Byron Athan Jr., for TechAnax, LLC, and Wayne A. Keup, Esq., Wayne Keup, PLLC, for Rigil Corporation, the protesters.

Stephen T. O’Neal, Esq., for the General Services Administration, and John W. Klein, Esq., and Sam Q. Le, Esq., for the Small Business Administration, the agencies.

Jonathan L. Kang, Esq., and Tania Calhoun, Esq., Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protests that a solicitation issued by the General Services Administration (GSA) is inconsistent with the Small Business Runway Extension Act of 2018 is denied where GSA reasonably relied on the interpretation of the Small Business Administration (SBA) that the act requires rulemaking by SBA to implement changes to the basis for calculating a firm’s annual revenue, and where SBA’s interpretation is a matter to which we grant deference.

DECISION

TechAnax, LLC, of Woodbridge, Virginia, a small business, and Rigil Corporation, of Washington, D.C., also a small business, challenge the terms of request for proposals (RFP) GS00Q-13-DR-0002, which was issued by the General Services Administration (GSA), Information Technology Service, for award of new contracts in the agency’s One Acquisition Solution for Integrated Services (OASIS)—small business pool of governmentwide multiple-award indefinite-delivery, indefinite-quantity (IDIQ) contracts. The protesters argue that the Small Business Runway Extension Act of 2018 (Runway Extension Act) changed the method by which the Small Business Administration (SBA) must calculate the size of small businesses, and that the solicitation is flawed because it does not reflect this change.

We deny the protests.

BACKGROUND

GSA administers seven groups of governmentwide multiple-award IDIQ OASIS contracts that are set aside for small business. Agency Request for Dismissal¹ (B-408685.22), July 10, 2019, Exh. 2, RFP amend 6, at 39.² These seven groups of IDIQ contracts are referred to as pools and allow agencies to place orders for flexible and innovative solutions for complex professional services. Id. at 8, 39. This protest concerns the OASIS solicitation for the award of contracts in small business pools 1, 3, and 4. Id. at 7. The agency initially awarded contracts in these pools in 2014; the current solicitation, which was issued on April 29, 2019, is an “open season On-Ramp,” which allows additional firms to compete for the award of contracts. Id. Both protesters state that they intend to compete for the award of contracts in pool 1. TechAnax Protest at 1; Rigil Protest at 2. The solicitation states that the agency intends to award approximately 190 new IDIQ contracts in pool 1. RFP at 65.

As relevant here, SBA issues size standards which “define whether a business entity is small and, thus, eligible for Government programs and preferences reserved for ‘small business’ concerns.” 13 C.F.R. § 121.101(a). SBA’s size standards are generally set forth in number of employees or annual receipts in millions of dollars (i.e., revenue). 13 C.F.R. § 121.201. SBA’s regulations provide that, for purposes of calculating whether a firm meets a size standard defined in terms of annual receipts, the firm’s revenue is averaged over the prior 3 years. 13 C.F.R. § 121.104(c).

In addition, these size standards are established for types of economic activity or industry under the North American Industry Classification System (NAICS) and therefore, SBA’s established size standards correspond to a specific NAICS code. 13 C.F.R. §§ 121.101(a), 121.201. Contracting officers designate the proper NAICS code and corresponding size standard in a solicitation. 13 C.F.R. § 121.402(b). For pool 1, the agency assigned NAICS code 541330, engineering services, to the solicitation, which has an SBA small business size standard of \$15 million in annual receipts. RFP at 7; 13 C.F.R. § 121.201. If an offeror’s small business status is challenged, SBA evaluates the status of the concern and makes a determination, which will be binding on the contracting officer, as to whether the offeror is a small business. Federal Acquisition Regulation (FAR) § 19.301-1(c).

The Small Business Runway Extension Act of 2018 (Runway Extension Act) was enacted prior to the issuance of the RFP. This act provides as follows: “Section 3(a)(2)(C)(ii)(II) of the Small Business Act (15 U.S.C. 632(a)(2)(C)(ii)(II)) is amended by

¹ GSA also filed a request to dismiss Rigil’s protest (B-408685.25) on July 19, 2019, which raised identical arguments and provided identical documents. Citations to the agency’s request to dismiss TechAnax’s protest reflect the agency’s requests regarding both protests.

² Citations to the RFP herein are to amendment 6, unless otherwise noted.

striking '3 years' and inserting '5 years.'" Pub. L. No. 115-324, 132 Stat. 4444, Dec. 17, 2018. As discussed below, this revision pertains to an area of the Small Business Act which prescribes how firms' annual revenues are to be calculated for purposes of determining whether they meet a receipts-based size standard.

On June 6, 2019, GSA issued RFP amendment 4, which addressed questions from prospective offerors, including the following concerning the Runway Extension Act:

[Question] Will the Small Business Runway Extension [Act] apply to this solicitation?

[Answer] The SBA has released their response on this matter, which states that until the SBA issues further direction, agencies will continue to use the previous standard of 3 years when determining size status. The [Small Business] Runway Extension Act amended 15 USC 632 where it describes an alternate path where other Federal agencies can prescribe a size standard for categorizing a business concern as a small business but that also requires public notice and SBA Administrator coordination. GSA lacks the authority to deviate from the SBA's current regulations, which specify a 3 year size standard, absent coordination and concurrence from the SBA.

RFP Amend. 4, Question and Answer (Q&A) No. 27; see also Q&A Nos. 28, 33, 64, 200, 1044, 1094, 1096.

TechAnax filed its protest challenging the terms of the RFP with our Office on June 13, and Rigil filed its protest on June 26; both protests were filed prior to the solicitation's closing date of June 28. On June 24, SBA issued a notice of proposed rulemaking for the purpose of implementing the Runway Extension Act. SBA Notice of Proposed Rulemaking, 84 Fed. Reg. 29399, 29400 (June 24, 2019). On June 26, GSA issued RFP amendment 7, which stated that any issues regarding an offeror's small business size status would be referred to SBA for a determination:

Consistent with the terms of the Solicitation regarding size status, GSA will not make determinations regarding the status of a concern as a small business. Should matters concerning size status representations arise, they will be referred to the SBA in accordance with [Federal Acquisition Regulation] Subpart 19.3.

RFP Amend. 7 at 3.

DISCUSSION

TechAnax and Rigil argue that the RFP does not comply with the Runway Extension Act with regard to the change in the number of years to be averaged when calculating a firm's small business size status. TechAnax Protest at 3-5; Rigil Protest at 3-4.

TechAnax and Rigil argue that the Runway Extension Act applies to all size standards issued by SBA, and that the act took effect immediately after enactment, thereby requiring SBA to immediately apply a 5-year average for the calculation of a firm's revenue in determining its small business size status. For these reasons, the protesters contend that GSA improperly relied on SBA's guidance in advising offerors in RFP amendment 4 that a 3-year average should be used for the calculation of firms' revenue.³ The protesters argue that GSA should amend the solicitation to reflect that a firm's size status is to be calculated based on a 5-year average for revenue. TechAnax Protest at 6; Rigil Protest at 4. GSA requests that our Office dismiss the protest because the agency issued the RFP based on guidance provided by SBA, and because that guidance concerns matters within the exclusive jurisdiction of SBA that our Office does not review as part of our bid protest function.

Under the Competition in Contracting Act of 1984 and our Bid Protest Regulations, we review protests concerning alleged violations of procurement statutes or regulations by federal agencies in the award or proposed award of contracts for the procurement of goods and services, as well as solicitations leading to such awards. See 31 U.S.C. §§ 3551(1), 3552; 4 C.F.R. § 21.1(a). With regard to small business matters, the Small Business Act gives SBA, not our Office, the conclusive authority to determine matters of small business size status for federal procurements. Bid Protest Regulations, 4 C.F.R. § 21.5(b)(1); Mark Dunning Indus., Inc., B-405417.2, Nov. 19, 2013, 2013 CPD ¶ 267 at 5; The Holiday Inn North Raleigh, B-276389, B-276389.2, July 8, 1997, 97-2 CPD ¶ 8 at 2. We therefore will not, for example, review challenges to established size standards or a decision by the SBA that a company is, or is not, a small business for purposes of federal procurements. 4 C.F.R. § 21.5(b)(1); Platinum Bus. Servs., LLC, B-413947, Dec. 23, 2016, 2016 CPD ¶ 377 at 6; Mark Dunning Indus., Inc., *supra*. Our Office also gives deference to SBA in the interpretation of the regulations it promulgates pursuant to its statutory authority under the Small Business Act. Mevacon-NASCO JV; Encanto Facility Servs., LLC, B-414329 *et al.*, May 11, 2017, 2017 CPD ¶ 144 at 20; SKC, LLC, B-415151, Nov. 20, 2017, 2017 CPD ¶ 366 at 4.

Although we will not review SBA's issuance or amendment of size standards, the protesters argue primarily that the effective date of the Runway Extension Act applies to this solicitation. We will consider, therefore, whether the Runway Extension Act imposed requirements that obligated GSA to include terms in the solicitation implementing the change to the number of years to be considered in calculating a firm's average revenue. See Small Business Administration--Recon., B-401057.2, July 6, 2009, 2009 CPD ¶ 148 at 4-5. For the reasons discussed below, we find no basis to conclude that SBA and GSA's actions violate the Runway Extension Act, and therefore deny the protest.

³ The protesters also raise other collateral arguments. Although we do not address every argument, we have reviewed them all and find no basis to conclude that they are within our jurisdiction to consider or otherwise provide a basis to sustain the protests.

As TechAnax notes, “absent a clear direction by Congress to the contrary, a law takes effect on the date of its enactment.” TechAnax Protest at 5 (quoting Gozlon-Peretz v. U.S., 498 U.S. 395, 404 (1991)). The Runway Extension Act does not state an effective date. See Pub. L. No. 115-324, 132 Stat. 4444, Dec. 17, 2018. Even assuming the Runway Extension Act took effect on the date of its enactment, however, we conclude that the act did not automatically amend all existing size standards and SBA regulations. Rather, as the SBA reasonably explains, the Small Business Act requires the promulgation of regulations to give effect to the Runway Extension Act.⁴

The SBA’s comments referred our Office to its notice of proposed rulemaking, which addressed the agency’s interpretation of the Runway Extension Act. SBA states that it interprets the Small Business Act to provide two processes by which small business size standards may be issued: (1) the issuance of size standards by SBA under 15 U.S.C. § 632(a)(2)(A), and (2) the issuance of size standards by other agencies under 15 U.S.C. § 632(a)(2)(C). SBA Comments (B-408685.22), June 21, 2019, at 1-2; SBA Notice of Proposed Rulemaking, 84 Fed. Reg. at 29399-400. The latter process provides that other agencies may issue size standards subject to requirements in the Small Business Act at 15 U.S.C. § 632(a)(2)(C)(i)-(iii), which include approval by SBA of such standards and publication of the proposed standards for notice and comment.

In essence, SBA states that it interprets the Small Business Act as requiring an agency to apply the size standards and regulations issued by SBA under 15 U.S.C. § 632(a)(2)(A), unless the agency follows the process under 15 U.S.C. § 632(a)(2)(C)(ii)(II) to issue its own standards. Id.; see 13 C.F.R. § 121.903(a) (“Federal agencies or departments. . . usually use SBA size criteria. In limited circumstances, if they decide the SBA size standard is not suitable for their programs, then agency heads may establish a more appropriate small business definition for the exclusive use in such programs.”). SBA states that it has “long interpreted section 3(a)(2)(C) of the Small Business Act [15 U.S.C. § 632(a)(2)(C)] as not applying to SBA’s size standards issued under section 3(a)(2)(A) [15 U.S.C. § 632(a)(2)(A)].” SBA Notice of Proposed Rulemaking, 84 Fed. Reg. at 29399.

The requirements of 15 U.S.C. § 632(a)(2)(C)(ii)(II), prior to the enactment of the Runway Extension Act, stated that size standards issued by agencies must assess “the size of a business concern providing services on the basis of the annual average gross receipts of the business concern over a period of not less than” 3 years. SBA Notice of Proposed Rulemaking, 84 Fed. Reg. at 29400. SBA’s regulations implementing those

⁴ We invited SBA to comment on the protests. SBA filed its comments on TechAnax’s protest the same day its notice of proposal rulemaking was made available for public display, which was prior to its publication in the Federal Register. SBA Comments (B-408685.22), June 21, 2019, at 1. SBA also filed comments in connection with Rigil’s protest (B-408685.25) on July 3, 2019, which were essentially identical to those filed in connection with TechAnax’s protest. Citations to SBA’s comments on TechAnax’s protest reflect the agency’s filings in both protests.

statutory provisions provide that, for purposes of calculating whether a firm meets a standard defined in terms of annual revenue, the firm's revenue is averaged over a 3-year period. 13 C.F.R. § 121.903(a)(1)(ii).

The Runway Extension Act revised this provision in 15 U.S.C. § 632(a)(2)(C)(ii)(II) as follows: "Section 3(a)(2)(C)(ii)(II) of the Small Business Act (15 U.S.C. 632(a)(2)(C)(ii)(II)) is amended by striking '3 years' and inserting '5 years.'" Pub. L. No. 115-324, 132 Stat. 4444, Dec. 17, 2018. As SBA notes, this provision changes the period of determining the average receipts of firms engaged in the services industry, but does not affect the period for determining receipts for firms engaged in non-services industries.⁵ SBA Notice of Proposed Rulemaking, 84 Fed. Reg. at 29400.

SBA's notice of proposed rulemaking also explains that the agency does not consider the change in the Runway Extension Act to apply to size standards issued by SBA under 15 U.S.C. § 632(a)(2)(A), as the Act related to the requirements for non-SBA agencies to issue their own size standards under 15 U.S.C. § 632(a)(2)(C).⁶ Id. at 29399-400. SBA nonetheless stated that it "proposes to change its own size standards to provide for a 5-year averaging period for calculating annual average receipts for all receipts-based size standards." Id. at 29400. The agency states that the change was appropriate to avoid confusion for firms arising from conflicts in the following areas: (1) size standards issued by SBA, as compared to standards issued by other agencies; and (2) size standards issued for firms that are engaged in both the service and non-service industries subject to receipts-based size standards. Id.

As relevant to TechAnax's and Rigil's arguments, SBA's notice of proposed rulemaking states that it "only would affect the application of SBA's size standard rules after the effective date of a final rule." Id. at 29401. SBA's comments in response to the protests contend that the Small Business Act requires either that SBA conduct rulemaking to revise, modify, or establish size standards, or that size standards issued by other agencies be proposed after an opportunity for public notice and comment. SBA Comments (B-408685.22), June 21, 2019, at 1 (citing SBA Notice of Proposed Rulemaking, 84 Fed. Reg. at 29400; 15 U.S.C. §§ 632(a)(6), (a)(2)(C)(ii), (a)(2)(C)(iii)). For these reasons, SBA's notice of proposed rulemaking explains that "until the effective date of a final rule, SBA will continue to apply the 3-year averaging period in the present § 121.104 for calculating annual average receipts for all SBA's receipts-based size standards." SBA Notice of Proposed Rulemaking, 84 Fed. Reg. at 29401.

⁵ SBA explains that non-service industries subject to receipts-based size standards include the retail trade, agricultural, and construction industries. See SBA Notice Of Proposed Rulemaking, 84 Fed. Reg. at 29400.

⁶ SBA notes that its regulations have calculated a firm's revenue using a 3-year average since 1956, and that the requirement in 15 U.S.C. § 632(a)(2)(C)(ii)(II) that other agencies issuing small business size standards, which also use a 3-year average, was not enacted until 1994. SBA Notice of Proposed Rulemaking, 84 Fed. Reg. at 29400.

In this regard, SBA states that because a firm's small business size status is determined as of the date when it certifies its size in a proposal, the agency will apply the 3-year calculation period to any firm that self-certified its size prior to the effective date of a final rule. Id.

As discussed above, we grant deference to SBA's interpretation of the Small Business Act, particularly with regard to its role in the establishment, amendment, and interpretation of small business size standards. See Mevacon-NASCO JV; Encanto Facility Servs., LLC, supra; SKC, LLC, supra. We therefore defer to SBA's interpretation of the Runway Extension Act as requiring rulemaking, by either SBA or an agency promulgating its own size standards, to implement the revision of the 3-year average to a 5-year average, and the prospective effect of that revision.

None of the protesters' arguments specifically challenge the SBA's interpretation of the Small Business Act under 15 U.S.C. § 632(a)(2)(A) and 15 U.S.C. § 632(a)(2)(C)(ii)(II) with regard to the requirement to promulgate changes to size standards or the interpretation of those standards. Instead, the protesters assert, without support, that the act must be deemed to automatically revise all existing size standards and SBA regulations, without need for further action by SBA. We find no basis to conclude that the SBA's interpretation of the Small Business Act or its own regulations are unreasonable in such a manner that would require procuring agencies such as GSA to issue solicitations that implement a 5-year average for calculating a firm's annual revenue in the absence of rulemaking.⁷ We therefore conclude that nothing in the Runway Extension Act requires GSA to incorporate terms into the RFP stating that offerors' small business status self-certifications may be based on a 5-year average for revenue.

The protests are denied.

Thomas H. Armstrong
General Counsel

⁷ Similarly, we will not consider the protesters' arguments that SBA has failed to expeditiously promulgate a final rule implementing the Runway Extension Act.