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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: BGI-Fiore JV, LLC

File: B-409520

Date: May 29, 2014

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Eric M. Ransom, Esq., and Edward Goldstein, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest of agency's determination that 8(a) joint venture protester was ineligible to compete for 8(a) set-aside because protester's 8(a) joint venture agreement had not been approved by the Small Business Administration (SBA) prior to submission of proposals is sustained where SBA's regulations do not require 8(a) joint venture agreements to be approved until the time of award.

DECISION

BGI-Fiore JV, LLC, of Chandler, Arizona, protests the rejection of its proposal under solicitation No. NNL14493618R issued by the National Aeronautics and Space Administration (NASA), for facility services at NASA's Langley Research Center. The solicitation was issued as a set-aside under the Small Business Administration's (SBA) 8(a) program. The protester argues that the agency improperly rejected its proposal on the basis that the protester's 8(a) joint venture agreement had not been certified by the SBA prior to submission of proposals.

We sustain the protest.

BACKGROUND

NASA issued the solicitation on December 19, 2013, with a due date for proposals of January 21, 2014, later extended to January 28. As relevant, the solicitation

included Federal Acquisition Regulation (FAR) provision 52.219-18, providing in relevant part as follows:

> a) Offers are solicited only from small business concerns expressly certified by the Small Business Administration (SBA) for participation in the SBA's 8(a) Program and which meet the following criteria at the time of submission of offer—
>
> (1) The Offeror is in conformance with the 8(a) support limitation set forth in its approved business plan; and
>
> (2) The Offeror is in conformance with the Business Activity Targets set forth in its approved business plan or any remedial action directed by the SBA.
>
> b) By submission of its offer, the Offeror represents that it meets all of the criteria set forth in paragraph (a) of this clause.

Agency Report, Tab 9, Solicitation at 292 (emphasis added).

The protester is joint venture entity comprised of Banda Group International, LLC, a certified 8(a) program participant, and Fiore Industries, a non-8(a) small business firm. Prior to the issuance of this solicitation, the two firms entered into a joint venture agreement for the purpose of submitting a proposal for the subject solicitation, and submitted the joint venture agreement to SBA for approval. SBA confirmed receipt of BGI-Fiore's joint venture agreement on December 10, 2013.

BGI-Fiore timely submitted its proposal in response to the solicitation on January 27. Based on an initial review of the submission, NASA concluded that BGI-Fiore was ineligible to compete under the solicitation because it had not been certified by SBA for participation in the 8(a) program prior to the submission of its proposal. On February 6, NASA notified BGI-Fiore that its proposal had been eliminated from the competition. This protest followed.

DISCUSSION

BGI-Fiore acknowledges that at the time of the submission of its proposal on January 27, SBA had not yet taken action to approve BGI-Fiore's 8(a) joint venture agreement. However, BGI-Fiore argues that the relevant SBA regulations governing 8(a) joint venture agreements do not require a joint venture agreement to be approved prior to submission of a proposal. Rather, according to the protester, the regulations require that the 8(a) member of the joint venture be certified at the

time of proposal submission and that the joint venture be approved by SBA prior to the time of award.

In this regard, the protester cites the SBA's regulations regarding 8(a) joint ventures, which provide as follows:

> *Prior approval by SBA*. (1) SBA must approve a joint venture agreement prior to the award of an 8(a) contract on behalf of the joint venture.

13 C.F.R. § 124.513(e) (emphasis added). BGI-Fiore asserts that NASA erred by misapplying the certification requirement of FAR provision 52.219-18 to reject its proposal from the competition, where SBA does not "certify" 8(a) joint ventures, and where approval of an 8(a) joint venture agreement is governed by the SBA regulations, which contemplate approval of the joint venture agreement only prior to the time of contract award. BGI-Fiore contends that FAR provision 52.219-18 applies only to the status of the 8(a) member of the joint venture, and not the joint venture itself.

NASA contests the protester's interpretation of the regulations. According to NASA, FAR provision 52.219-18 requires a joint venture to be admitted to the 8(a) program--whether through "certification" or "approval"--prior to the submission of a proposal. NASA contends that this reading of 52.219-18 does not conflict with 13 C.F.R. § 124.513(e), because the FAR provision does not prohibit an agency from requiring admission to the 8(a) program at an earlier time than the time of award, when necessary to meet the agency's needs.[1] As set forth below, and based on the legal opinion that our Office requested and received from SBA during the development of this protest, we disagree with NASA's contention that its reading of the FAR provision does not conflict with the SBA's regulation, which SBA asserts is intended to permit the approval of 8(a) joint venture agreements up until the time of award.

As a general matter, the SBA's comments on this protest advised our Office that its regulations set forth the eligibility rules for participation in the 8(a) program. Upon determining that a business concern meets relevant criteria, SBA sends a letter "certifying the concern's admission to the program." 13 C.F.R. § 124.2 (emphasis added).

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[1] The agency's need in this instance appears to be based on its desire to avoid evaluating the proposal of a firm (BGI-Fiore), which may not ultimately be approved by SBA for participation under the 8(a) program as a joint venture. See Agency Report Tab 15, Email Message, February 5, 2014. (NASA "[didn't] want to go through the evaluation process with [BGI-Fiore] if they are not 8(a) certified").

SBA further explained that its regulations separately address the eligibility of 8(a) joint ventures to perform an acquisition that has been set-aside under the 8(a) program. According to its regulations, "[i]f approved by SBA, a [certified 8(a)] Participant may enter into a joint venture agreement with one or more other small business concerns, whether or not 8(a) Participants, for the purpose of performing one or more specific 8(a) contracts." 13 C.F.R. § 124.513(a)(1). According to SBA, it does not "certify" 8(a) joint ventures for admission to the 8(a) program. Rather, only the 8(a) participant to the joint venture is certified into the program. SBA explains that this is the case because "the joint venture can be comprised of one 8(a) Participant and one small business concern, and therefore would likely not meet the eligibility requirements for certification [as an 8(a) participant]." SBA Comments at 2. Moreover, regarding the timing of the joint venture approval, the SBA explains, as the protester notes, that its regulations contemplate approval "prior to the award of an 8(a) contract on behalf of the joint venture." 13 C.F.R. § 124.513(e) (emphasis added).

In further support of SBA's last point regarding the timing of such approval, SBA cites to the preamble to its regulations concerning mentor/protégé agreements, 13 C.F.R. § 124.520, which explains as follows:

> Joint ventures are tied to procurements and often there is insufficient time to obtain SBA's approval between the issuance of a solicitation and the submission of an offer. Therefore, SBA has permitted joint ventures to be approved on 8(a) procurements after the submission of offers, as long as the approval takes place prior to the actual award.

74 Fed. Reg. 55694 (Oct. 28, 2009) (distinguishing standard joint venture agreements from mentor/protégé agreements, which do require approval prior to the submission of a proposal).

With regard to the specific issue presented in the protest, the SBA interprets the FAR provision 52.219-18 as simply requiring "those 8(a) Participants to the joint venture to represent that they are certified into the 8(a) program[;] [t]he clause cannot be read to require the joint venture to be certified into the program because SBA does not certify the joint venture; rather . . . it approves the joint venture for the purposes of a specific award." Id. at 3.

Further, to the extent NASA interprets FAR provision 52.219-18 as requiring certification of an 8(a) joint venture at the time of submission of proposals, SBA argues that NASA's reading of the FAR provision would place it in conflict with the SBA's regulations and its administration of the 8(a) program. Such a reading presupposes a joint venture certification process, which does not exist under the 8(a) program, and the certification of joint ventures occurring prior to the submission of an offer by the joint venture whereas the 8(a) program contemplates the approval

of such agreements up until contract award.[2] Moreover, SBA maintains that its interpretation of its regulations must be given deference. Id. at 4 (citing Hawpe Const., Inc., v. United States, 46 Fed. Cl. 571, 582 (2000) ("Conflicts between FAR and SBA regulations should be resolved by looking at the SBA's latest intent on the issue and by relying on SBA to determine which provision best implements the policies of the agency itself")).

Accordingly, SBA maintains that the correct and harmonious reading of the two regulations is one where 52.219-18 requires the 8(a) participant members of an 8(a) joint venture to be certified prior to the submission of a proposal, and 13 C.F.R. § 124.513(e), which governs the process for approving 8(a) joint venture agreements, allows a joint venture to compete for an award so long as SBA approves the agreement prior to the time of contract award.

We agree with the SBA's interpretation of the relevant regulations in this case. The SBA's interpretation reads the regulations harmoniously, while also giving effect to the specific language of each regulation--that is, by recognizing that "certification" of an 8(a) participant, and "approval" of an 8(a) joint venture agreement reflect distinct processes under SBA's 8(a) program with distinct timeframes for approval by SBA in connection with a procurement, and are not merely interchangeable concepts as NASA's interpretation would suggest. Therefore, we read the regulations in accordance with the views expressed by SBA.

In this case, the record shows that Banda Group International, LLC, was a previously certified 8(a) participant, satisfying the requirements of FAR provision 52.219-18, and that BGI-Fiore submitted its 8(a) joint venture agreement to SBA by December 10, 2013--well in advance of the January 27 submission of its proposal--thereby satisfying the requirements of 13 C.F.R. § 124.513(e) concerning the submission of a proposal. Where BGI-Fiore met the eligibility requirements for submission of a proposal set forth by both regulations applicable in this case, NASA erred in rejecting BGI-Fiore as an ineligible offeror.

We recommend that the agency reinsert BGI-Fiore into the competition under this solicitation, and evaluate BGI-Fiore's previously submitted proposal. We also recommend that BGI-Fiore be reimbursed its costs of filing and pursuing the protest.

[2] Additionally, we note that in Hughes Group Solutions, B-408781.2, Mar. 5, 2014, 2014 CPD ¶ 91, our Office reviewed the SBA's procedures under the 8(a) program in connection with a set-aside award to an 8(a) joint venture firm. Based on SBA's representations, we explained that SBA does not necessarily review submitted 8(a) joint venture agreements until such time as the joint venture has actually been selected for award, and may not routinely approve a pending joint venture agreement prior to the time that the joint venture intends to submit a proposal in response to a solicitation. See Hughes Group Solutions, supra, at 4 n.3.

Bid Protest Regulations, 4 C.F.R. § 21.8(d)(1) (2012). The protester's certified claims for such costs, detailing the time expended and costs incurred, must be submitted directly to the agency within 60 days after receipt of this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

Susan A. Poling
General Counsel