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Decision

Matter of: Digital Forensic Services, LLC

File: B-419305.3

Date: February 25, 2021

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Ekta Patel, Esq., Department of Homeland Security; and John W. Klein, Esq., and Sam Q. Le, Esq., Small Business Administration, for the agencies.

Raymond Richards, Esq., Charmaine A. Stevenson, Esq., and Laura Eyester, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging agency’s decision to cancel its prior award and solicitation, and revise and resolicit its requirements as part of corrective action taken in response to an earlier protest is denied where the agency demonstrates a reasonable basis for its actions.

DECISION

Digital Forensic Services, LLC (Digital), a service-disabled veteran-owned small business (SDVOSB) of Greenbelt, Maryland, protests the corrective action announced by the Department of Homeland Security, Federal Emergency Management Agency (FEMA) in response to Digital’s earlier protest challenging the award of a task order to Platinum Business Services, LLC (Platinum), an SDVOSB of Laurel, Maryland, under request for quotations (RFQ) No. 70FA3020Q00000101, for independent verification and validation (IV&V) services. The protester argues that the corrective action is unreasonable and pretextual.

We deny the protest.

BACKGROUND

On September 17, 2019, FEMA submitted an offering letter to the Small Business Administration (SBA) for acceptance of FEMA’s IV&V services requirement into the 8(a)

program.¹ Req. for Dismissal, exh. 2, Offering Letter at 1. The IV&V services require the contractor to perform independent security assessments of information technology systems, security control assessments to support security authorizations, and system completion of the certification and accreditation process in support of FEMA's Office of the Chief Information Officer Cyber Security Division. *Id.* On September 18, the SBA accepted FEMA's IV&V requirement into the 8(a) program on behalf of Digital. *Id.*, exh. 3, Acceptance Letter at 1. The estimated value of the procurement, including all options, was \$3.6 million. *Id.* FEMA awarded a 1-year contract to Digital on a sole-source basis with a period of performance from September 30, 2019, to September 29, 2020. Contracting Officer's Statement (COS) at ¶ 4.

On August 26, 2020, FEMA issued the RFQ seeking quotations for follow-on IV&V services through the General Service Administration's (GSA) e-Buy website using Federal Acquisition Regulation subpart 8.4 procedures. Agency Report (AR), Tab 2, RFQ at 1, 5, 13. The RFQ was issued as a set-aside for "firms that are certified as 8(a)/SDVOSB firms." *Id.* at 3. The RFQ contemplated the award of a fixed-price task order with a period of performance consisting of a 1-year base period and a 1-year option period. *Id.* FEMA did not offer this requirement to the SBA for acceptance into the 8(a) program. COS at ¶ 5. On September 29, the agency made award to Platinum. *Id.* at ¶ 7.

On October 9, Digital filed a protest with our Office challenging the agency's decision to award the task order to Platinum. *Id.* at ¶ 8. On November 10, FEMA advised our Office that it intended to take corrective action by canceling the award to Platinum and issuing a new solicitation for its requirements; accordingly we dismissed the protest as academic. *Digital Forensic Servs., LLC*, B-419305, B-419305.2, Nov. 16, 2020 (unpublished decision). On November 20, FEMA canceled the award to Platinum and canceled the RFQ. Resp. to GAO, Feb. 2, 2021, at 1. That same day, Digital filed this protest.

DISCUSSION

Digital argues that FEMA does not have a reasonable basis for the corrective action taken in response to Digital's earlier protest. Specifically, Digital argues that the cancellation of the RFQ and resolicitation of the IV&V requirement is a pretext to avoid resolution of Digital's protest allegations--namely, that Platinum was ineligible to compete for award under its GSA contract at the time of quotation submission--and to now steer the award to Platinum, which has remedied the alleged defects in its GSA contract in the interim. Protest at 7-9; see also Comments at 3. FEMA argues that its corrective action is reasonable and appropriate to remedy the concerns which caused

¹ Section 8(a) of the Small Business Act, 15 U.S.C. § 637(a), authorizes SBA to enter into contracts with government agencies and to arrange for performance through subcontracts with socially and economically disadvantaged small business concerns. See 13 C.F.R. § 124.501(a)(SBA may enter into all types of awards, including contracts and orders). This program is commonly referred to as the 8(a) program.

the agency to take corrective action, in particular, to comply with SBA's 8(a) program regulations regarding offer and acceptance, and to revise the solicitation to accurately reflect the agency's requirements. Memorandum of Law at 3-5. We have considered all of the protester's arguments, including those that are in addition to or variations of those specifically discussed below, and find no basis to sustain the protest.

Contracting officers have broad discretion to take corrective action where the agency has determined that such action is necessary to ensure fair and impartial competition. *Virtual Medical Grp.*, B-418386, Mar. 25, 2020, 2020 CPD ¶ 113 at 4. As a general matter, the details of corrective action taken in response to a protest are within the sound discretion and judgement of the contracting agency. *Id.* at 4-5. We will not object to any particular corrective action, so long as it is appropriate to remedy the concern that caused the agency to take corrective action. *American Sys. Corp.*, B-412501.2, B-412501.3, Mar. 18, 2016, 2016 CPD ¶ 91 at 5. Where, as here, a protester has alleged that the agency's rationale for cancellation is pretextual, that is, the agency's actual motivation is to avoid awarding a contract or order on a competitive basis or to avoid resolving a protest, our Office will review the reasonableness of the agency's actions in canceling the solicitation. *Harmonia Holdings Grp., LLC*, B-417475.5, B-417475.6, Jan. 2, 2020, 2020 CPD ¶ 18 at 3. A reasonable basis to cancel exists when, for example, an agency determines that there was a flaw in the procurement, or when the agency determines that a solicitation does not accurately reflect its needs. *American Sys. Corp.*, *supra*.

Here, the contracting officer states that after the initial protest was filed challenging the award to Platinum, SBA informed FEMA that the RFQ did not comply with applicable regulations in two regards: (1) FEMA failed to offer the requirement to SBA for acceptance into the 8(a) program prior to issuing the RFQ as an 8(a) program set-aside; and (2) government agencies are not permitted to limit the competition of an 8(a) requirement to SDVOSB concerns within the 8(a) program. COS at ¶¶ 8-9. In addition, the contracting officer states that FEMA has determined that the solicitation should be revised to require vendors to hold capability maturity model integration (CMMI) level 3 certification, change the award type to a hybrid labor-hour and fixed-price award, and revise the price evaluation criteria. *Id.* at ¶ 12.

In light of the 8(a) program issues presented, our Office invited SBA to provide its views on these issues, pursuant to 4 C.F.R. § 21.3(j). Electronic Protest Docketing System No. 16, Dec. 8, 2020. As noted, FEMA did not submit an offering letter to the SBA 8(a) program for the RFQ. COS at ¶ 5; SBA Comments at 1. SBA states that "an agency is required to seek SBA's acceptance of an 8(a) requirement prior to soliciting for a competitive 8(a) award. This is a requirement even if the services were previously performed through the 8(a) program." SBA Comments at 1. SBA states that the only exception to the normal offer and acceptance process involves a scenario where the procurement is valued below the simplified acquisition threshold. *Id.*

SBA also explains that applicable regulations in effect at the time the RFQ was issued allowed set-asides only for 8(a) participants, historically underutilized business zone

(HUBZone) small business concerns, SDVOSB concerns, women-owned small business (WOSB) concerns, and where appropriate, economically disadvantaged WOSB concerns. *Id.* at 1-2. SBA argues that the applicable regulations did not allow “a further set-aside within an 8(a) competition.” *Id.* at 1-2 (*quoting* 13 C.F.R. § 125.2(i) (2020)).

Digital argues that contrary to FEMA’s reasoning and SBA’s explanation, canceling the RFQ to issue a new solicitation is unwarranted. Protester Resp. to SBA Comments at 1. Digital argues that the applicable regulation did not require FEMA to submit the follow-on requirement to SBA for acceptance into the 8(a) program, and even if FEMA should have offered the requirement to SBA, canceling the procurement at this point was an “extreme action” not warranted here. *Id.* To support this position, Digital cites to SBA’s October 16, 2020, final rule published in the *Federal Register* which states:

SBA will not accept a procurement for award as an 8(a) contract if the circumstances identified in paragraphs (a) through (d) of this section exist.

* * * * *

(b) *Competition prior to offer and acceptance.* The procuring activity competed a requirement among 8(a) Participants prior to offering the requirement to SBA and did not clearly evidence its intent to conduct an 8(a) competitive acquisition.

Consolidation of Mentor-Protégé Programs and Other Government Contracting Amendments, 85 Fed. Reg. 66,146, 66,188 (Oct. 16, 2020). In the preamble to the final rule, SBA explained the reasoning for this regulation, as follows:

The proposed rule amended [13 C.F.R.] § 124.504(b) to alter the provision prohibiting SBA from accepting a requirement into the 8(a) [business development (BD)] program where a procuring activity competed a requirement among 8(a) Participants prior to offering the requirement to SBA and receiving SBA’s formal acceptance of the requirement. SBA believes that the restriction as written is overly harsh and burdensome to procuring agencies. . . . As long as a procuring agency clearly identified a requirement as a competitive 8(a) procurement and the public fully understood it to be restricted only to eligible 8(a) Participants, SBA should be able to accept that requirement regardless of when the offering occurred.

Id. at 66,162.

Digital argues that this language clarifies that even if the appropriate offer and acceptance procedures were not followed--which the protester does not concede happened here--it does not mean that agencies must resolicit the requirement because SBA is still able to accept the requirement into the 8(a) program. Protester Resp. to

SBA Comments at 2. Digital argues that this same reasoning applies to the alleged set-aside impropriety here, insisting that the regulations in effect at the time the RFQ was issued did not make clear that the dual set-aside was impermissible. *Id.* at 2-3.

Although Digital disagrees, we find reasonable FEMA’s decision to cancel the RFQ and resolicit its requirement. First, the corrective action reasonably addresses FEMA’s concern regarding the acceptance of its requirement into the 8(a) program. After Digital filed its October 9 protest, an SBA supervisory business opportunity specialist (BOS) informed the FEMA contracting officer that FEMA did not follow the SBA regulations applicable to follow-on requirements in the 8(a) program, and explained that “it was not proper for FEMA to have conducted an 8(a) competition without first seeking offer-and-acceptance from SBA.” COS at ¶ 8; Statement of SBA BOS at ¶ 3.

The relevant regulation in effect when the RFQ was issued through the date the agency filed its notice of corrective action was the 2016 version of section 124.504 of title 13 of the Code of Federal Regulations. See 13 C.F.R. § 124.504 (2016); 13 C.F.R. § 124.504 (2020). This regulation stated in relevant part:

SBA will not accept a procurement for award as an 8(a) contract if the circumstances identified in paragraphs (a) through (d) of this section exist.

* * * * *

(b) *Competition prior to offer and acceptance.* The procuring activity competed a requirement among [8(a)] Participants prior to offering the requirement to SBA and receiving SBA’s formal acceptance of the requirement.

(1) Any competition conducted without first obtaining SBA’s formal acceptance of the procurement for the 8(a) BD program will not be considered an 8(a) competitive requirement.

(2) SBA may accept the requirement for the 8(a) BD program as a competitive 8(a) requirement, but only if the procuring activity agrees to resolicit the requirement using appropriate competitive 8(a) procedures.

13 C.F.R. § 124.504 (2016).² The regulation in effect during the acquisition stated that SBA would not accept a procurement for award as an 8(a) contract prior to offer and acceptance, and that “SBA may accept the requirement for the 8(a) BD program as a competitive 8(a) requirement, but only if the procuring activity agrees to resolicit the

² SBA’s revised regulation on this topic became effective on November 16, 2020, the same day our Office dismissed Digital’s earlier protest as academic. See 13 C.F.R. § 124.504 (2020); *Digital Forensic Servs., LLC, supra*.

requirement using appropriate competitive 8(a) procedures.” 13 C.F.R. § 124.504(b)(2) (2016). Since FEMA competed its follow-on IV&V requirement as an 8(a) procurement without following the proper offer and acceptance procedures, the agency had a reasonable basis to cancel the solicitation and resolicit the requirement as part of its corrective action.³

Further, SBA’s BOS informed the FEMA contracting officer that FEMA “is not permitted to set aside an 8(a) competitive contract for [SDVOSB] 8(a) participants.” Statement of SBA BOS at ¶ 4. The agency’s corrective action reasonably addresses FEMA’s concern that it improperly limited competition by including an SDVOSB set-aside among 8(a) participants in the RFQ, and independently provides a reasonable basis for the agency’s corrective action. In light of the fact the agency decided to cancel the solicitation in response to concerns expressed by SBA, we do not find that the agency’s corrective action was a pretext to avoiding a protest. Accordingly, we deny these protest allegations.⁴

Finally, in response to the agency’s stated intentions regarding revisions to the solicitation, Digital argues that the potential terms of FEMA’s forthcoming solicitation regarding CMMI level 3 certification are unduly restrictive of competition, and the proposed revision to the evaluation criteria is a pretext to avoid resolving Digital’s earlier protest. Resp. to Req. for Dismissal at 4-5; Comments at 3-5. FEMA has not yet issued a new solicitation for the IV&V requirement. COS at ¶ 12. Thus, we find that any contentions about the solicitation that the agency plans to issue are, at this time,

³ Further, Digital has not shown that even under SBA’s revised regulations, SBA would have been required to accept the procurement into the 8(a) program based on the facts presented here. SBA’s revised regulation states that it “will not accept” a procurement into the 8(a) program where the agency competed the requirement among 8(a) Participants prior to offering the requirement to SBA *and* the agency “did not clearly evidence its intent to conduct an 8(a) competitive acquisition.” 13 C.F.R. § 124.504(b) (2021). The RFQ at issue here was limited to vendors that were “8(a)/SDVOSB.” RFQ at 2; *see also id.* at 3 (“[T]his acquisition is set aside for 8(a) firms. This acquisition is set aside for firms that are certified as 8(a)/SDVOSB firms.”). Arguably, the agency did not evidence a “clear intent” to conduct an 8(a) competition.

⁴ In addition, as noted, the agency stated it canceled the solicitation to change the award type to a hybrid labor-hour and fixed-price award, and to revise the price evaluation criteria. COS at ¶ 12. Specifically, the agency states that there is uncertainty in the level of work that the vendor will perform during the beginning and end of the period of performance. Supp. COS at ¶ 7. The agency explains that this change in award type will impact the price analysis performed by FEMA when it analyzes the proposals. *Id.* The protester failed to respond to these bases for cancellation of the solicitation. We note that an agency’s determination that a solicitation no longer reflects its needs, standing alone, provides a reasonable basis to cancel that solicitation. *See American Sys. Corp., supra.*

premature. *Harmonia Holdings Grp., LLC, supra* at 5 (citing *Dayton-Granger, Inc.--Recon.*, B-246226.2, Feb. 28, 1992, 92-1 CPD ¶ 240 at 2 (“protests that merely anticipate improper agency action are speculative and premature”).

The protest is denied.

Thomas H. Armstrong
General Counsel