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Decision

Matter of: Unami, LLC

File: B-419601

Date: April 12, 2021

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Mary G. Curcio, Esq., and Laura Eyester, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that procurement under Small Business Administration section 8(a) program should have been designated as a new, and not a follow-on, requirement is dismissed where agency followed applicable regulations in issuing an offering letter to the Small Business Administration for a follow-on requirement.

DECISION

Unami, LLC, of Oklahoma City, Oklahoma, protests the Department of the Army's decision not to recommend it for the award of a sole-source contract for installation of cabling services under the Small Business Administration's (SBA) section 8(a) program. Unami asserts that the Army unreasonably characterized the requirement as a follow-on requirement for which Unami is not eligible for award.¹

We dismiss the protest.

¹ Section 8(a) of the Small Business Act authorizes SBA to contract with other agencies and to arrange for performance of those contracts through subcontracts awarded to socially and economically disadvantaged small businesses. 15 U.S.C. § 637(a). The 8(a) program has both competitive and noncompetitive (sole-source) components. See 13 C.F.R. § 124.501(b); 13 C.F.R. § 124.506(a).

BACKGROUND

The cabling services contract is currently being performed by Indigenous Technologies, LLC, a wholly-owned tribal 8(a) company which has graduated from the 8(a) program. See Req. for Dismissal at 2. On July 28, 2020, to meet its continuing need for the services, the Army issued an offering letter to the Oklahoma SBA district office. *Id.* The offering letter identified the requirement as a follow-on requirement and recommended that a contract be awarded to Unami on a sole-source basis. Req. for Dismissal, exh. 2, offering letter (Unami) at 2. Unami and Indigenous are both wholly-owned by the same tribe. Protest at 2.

On September 4, the SBA notified the Army that while the SBA was preparing its acceptance letter it discovered that the Army identified the contract as a follow-on requirement. Req. for Dismissal, exh 3, Farris-King email exchange at 1. The SBA notified the Army that pursuant to 13 C.F.R. § 124.109(c)(3)(ii)(A), a tribally owned 8(a) concern “may not receive an 8(a) sole source contract that is a follow-on contract to an 8(a) contract that was performed immediately previously by another Participant . . . owned by the same Tribe.” *Id.* Consequently, the SBA could not accept the offered sole-source award on behalf of Unami if the requirement was a follow-on requirement. The SBA further explained that under the applicable regulations, it could accept the award on behalf of Unami if the Army designated the contract as a new requirement. *Id.*; 13 C.F.R. § 124.504(c)(1)(ii). The SBA asked how the Army wished to proceed. Req. for Dismissal, exh. 3, Farris-King email exchange at 1.

In response, the Army informed the SBA that it would change its acquisition strategy. *Id.* On January 26, 2021, the Army issued to the SBA an offering letter, in which it continued to refer to the contract as a follow-on requirement, and requested the SBA accept the contract as a sole-source award to a different identified 8(a) participant. Req. for Dismissal, exh. 6, offering letter (GC&E). On February 16, the SBA accepted the award on behalf of the newly identified 8(a) participant. Req. for Dismissal, exh.7, SBA offering letter acceptance.

This protest followed.

DISCUSSION

Unami protests that the Army unreasonably designated the procurement as a follow-on requirement. According to Unami, the requirement is actually a new requirement for which it would be eligible to receive an award on a sole-source basis.

The Small Business Act affords SBA and contracting agencies broad discretion in selecting procurements for the 8(a) program; we will not consider a protest challenging a decision to procure under the 8(a) program absent a showing of possible bad faith on the part of government officials or that regulations may have been violated. 4 C.F.R. § 21.5(b)(3); *Rothe Computer Solutions, LLC d/b/a Rohmann Joint Venture*,

B-299452, May 9, 2007, 2007 CPD ¶ 92 at 3. Unami has not established that the Army violated any regulations or acted in bad faith.

The section 8(a) program has both competitive and noncompetitive components, depending on the dollar value of the requirement. See 13 C.F.R. § 124.501(b); 13 C.F.R. § 124.506(a). A procuring agency indicates its intent to award a contract through the 8(a) program by submitting an offering letter to the SBA. 13 C.F.R. § 124.502(a). The agency may identify a specific participant for the award of a sole-source 8(a) contract. 13 C.F.R. § 124.502(b)(3); 13 C.F.R. § 124.502(c)(12). If the agency identifies a specific participant for a sole-source award it must include certain information in the offering letter including whether the requirement is a new or a follow-on requirement, and the acquisition history of the procurement. 13 C.F.R. § 124.502(c)(9). The SBA may accept the offer of a sole-source 8(a) procurement on behalf of the program and the specific participant, as long as the SBA determines that the participant is eligible to receive the contract award. 13 C.F.R. § 124.503(a)(1).

Here, the Army submitted an offering letter to the SBA which identified Unami as the specific participant for a sole-source contract award. The SBA did not accept the offer on behalf of Unami because the Army identified the requirement as a follow-on requirement to a contract that Indigenous was performing. As the SBA noted, under the applicable regulations Unami was not eligible to receive a sole-source contract award for a follow-on requirement because it is owned by the same tribe as Indigenous. See 13 C.F.R. § 124.109(c)(3)(ii)(A). The SBA advised Unami that the designation of the procurement as a follow-on requirement was at the Army's discretion, and that as long as the agency designated it as such the SBA could not accept the requirement on behalf of Unami. Req. for Dismissal, exh. 4, email exchange between SBA and Unami at 2. The Army then submitted, and the SBA accepted, an offering letter on behalf of another 8(a) participant. While Unami argues that the requirement should have been designated as a new requirement for which Unami was eligible, the agency followed the regulations for award of an 8(a) sole-source contract. Since the Army did not violate any regulations, and there is no allegation or evidence of bad faith, the protest fails to state a legally sufficient basis and is not for our consideration.²

The protest is dismissed.

Thomas H. Armstrong
General Counsel

² Even if GAO concluded that the procurement was a new requirement, and not a follow-on requirement, the Army would not be required to terminate the award to the 8(a) participant on whose behalf the SBA accepted the sole-source award. In this regard, Unami has not challenged the eligibility of that participant to receive the award of a new requirement or a follow-on requirement or shown that this award violated any regulation.