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Decision

Matter of: Blue Ridge Limousine and Tour Service, Inc.

File: B-407020

Date: October 19, 2012

Lee Dougherty, Esq., and Katherine A. Straw, Esq., General Counsel PC, for the protester.

Capt. Matthew E. Dyson, Department of the Army, and Sam Q. Le, Esq., Small Business Administration, for the agencies.

Katherine I. Riback, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that the Small Business Administration (SBA) improperly accepted Army shuttle bus services requirement into the 8(a) program without first determining whether acceptance would adversely impact the protester--the incumbent 8(a) contractor who had graduated from the 8(a) program--is denied where the SBA determined that the requirement was a follow-on to the previous 8(a) contract and that therefore no adverse impact analysis was required.

DECISION

Blue Ridge Limousine and Tour Service, Inc., of Springfield, Virginia, protests the terms of solicitation No. W9133L-12-R-0048 for shuttle bus services in the Arlington, Virginia area, issued by the National Guard Bureau (NGB). Blue Ridge argues that the solicitation was improperly set-aside as an 8(a) competition.

We deny the protest.

BACKGROUND

On September 1, 2008, NGB awarded Blue Ridge noncompetitive contract No. W9133L-08-D-0018 (-0018) under the Small Business Administration's (SBA) section 8(a) program for the provision of shuttle bus services. The contract provided for a base year and four 1-year option periods, which were to run through

August 31, 2013.¹ The contract, including options, was valued at approximately \$100,000 per year for the operation of one shuttle route. By May 2011, the level of shuttle bus support and the requirement had grown from a \$100,000 per year requirement to a \$2.5 million per year requirement involving multiple shuttle bus routes due to changes resulting from the movement of offices pursuant to the Base Realignment and Closure (BRAC) program. Agency Report (AR), Tab 2, Contracting Officer's Statement at 1; AR, Tab 4, NGB 8(a) Offer Letter (June 14, 2012), at 2. In August 2011, the contracting officer intended to modify contract -0018 to encompass the increased requirements in response to BRAC. However, according to the Army, this was "impossible" due to computer problems at NGB.² AR at 4.

Because of this problem and the urgency to provide funds to allow Blue Ridge's invoices to be paid and to continue performance at the needed level, on August 24, the contracting officer issued contract W9133L-11-C-0042 (-0042) to Blue Ridge. AR, Tab 2, Contracting Officer's Statement at 1; Protest, attach. 11, Contract -0042. The contracting officer reports that this contract was intended to be a modification of contract -0018. AR, Tab 2, Contracting Officer's Statement at 1-2. In fact, the contract is identified as an 8(a) contract. Protest, attach. 11, Contract -0042, at 1. Moreover, the first contract line item (CLIN) of contract -0042, identified as "EXERCISED OPTION," was intended to provide additional funding for prior performance under contract -0018. This CLIN states "[t]he contractor shall provide non-personal services in accordance with the Terms and Conditions of the base IDIQ contract number W9133L-08-D-0018." Id. at 3. In addition, CLIN 3001 of contract states:

The contractor shall provide non-personal services in accordance with the Terms and Conditions of the base IDIQ contract number W9133L-08-D-0018. This contract is issue[d] in lieu of Task Order number 0030 previously sent to the vendor. This contract would allow for proper allocation of previously unforeseeable actual charges and services. . . . This CLIN is for a SIX months extension to allow for recompet. The period of performance shall be from 1 Sep[tember] 2011 through February 29, 2012.

¹ Blue Ridge had previously been awarded a noncompetitive 8(a) contract for these services in 2003; that contract expired in 2008.

² The contracting officer reports that NGB experienced problems during a mandatory software migration from a legacy computer system called "PRWeb" to a web based IT system called General Fund Enterprise Business System. This migration physically prevented NGB from modifying contract -0018 and also led to a backlog of unpaid invoices from Blue Ridge. Contracting Officer's Statement at 1.

Id. at 6.

Blue Ridge graduated from the 8(a) program in July 2011 prior to the execution of contract -0042, and, thus was ineligible to receive a new 8(a) contract. Protester Comments at 2; see 13 C.F.R. § 124.508(c) (2012). The parties disagree as to whether the contracting officer was aware of this fact at the time that contract -0042 was executed in August 2011.

On January 31, 2012, the Army first contacted the SBA and sought approval of the “modification” and extension of Blue Ridge’s 8(a) contract, that is, contract -0042 as extended. After some correspondence, the SBA approved the “modification.”³ AR at 5; Tab 9, Email from SBA to Contract Specialist (Feb. 3, 2012).

On February 22, 2012, the contract specialist sent an email containing an 8(a) offer to the SBA requesting that the follow-on shuttle bus services requirement be accepted in the 8(a) program as a competitive procurement. AR, Tab 15, NGB 8(a) Offer Letter (Feb. 22, 2012). The letter erroneously stated that the acquisition history for this requirement was “N/A.” Id. at 1. On February 28, the SBA accepted NGB’s offer for competition under the 8(a) program. AR, Tab 14, SBA Letter to NGB (Feb. 28, 2012). On March 16, NGB issued solicitation No. W9133L-12-R-0012 as a competitive 8(a) set-aside.

Blue Ridge protested the decision of the NGB to set the solicitation aside for 8(a) certified concerns. The NGB took corrective action in response to that protest because its February 22 letter to the SBA did not provide the acquisition history of the shuttle bus services. The NGB stated that it would re-evaluate, in concert with the appropriate SBA officials, its decision to place the shuttle bus service in the 8(a) program. In light of the corrective action, our Office dismissed Blue Ridge’s protest on May 17.

On June 14, the NGB sent the SBA a new 8(a) offer letter, including attachments showing the acquisition history of this shuttle bus service requirement dating back to 2003. AR, Tab 4, NGB 8(a) Offer Letter (June 14, 2012). On June 20, the SBA accepted the requirement for competition under the 8(a) program. AR, Tab 18, SBA Letter to NGB (June 20, 2012). The SBA’s acceptance letter stated:

Adverse Impact - SBA did not conduct an adverse impact analysis as this is a follow-on 8(a) acquisition. Our analysis below demonstrates that this is a follow-on acquisition. Moreover, even if this were not a follow-on acquisition, it would be considered a new requirement.

³ Since then, this contract has been periodically extended to allow for the 8(a) competition for these services to compete and because of this protest.

Neither follow-on acquisitions nor new requirements require an adverse impact analysis.

Id. at 1. The SBA letter stated NGB's contract -0042 was a "pragmatic work around in order to ensure [that] Blue Ridge could get paid for their past due invoices and that NGB had a contract vehicle under which NGB could pay Blue Ridge moving forward." Id. at 2. The SBA letter also stated that NGB never intended, and the SBA never agreed, to remove this requirement from the 8(a) program. Id. The NGB then issued solicitation No. W9133L-12-R-0048 as a competitive procurement limited to 8(a) certified concerns. This protest followed.

Section 8(a) of the Small Business Act, 15 U.S.C. § 637(a) (2006), authorizes the SBA to enter into contracts with government agencies and to arrange for performance through subcontracts with socially and economically disadvantaged small business concerns. Federal Acquisition Regulation (FAR) § 19.800. The Act affords the SBA and contracting agencies broad discretion in selecting procurements for the 8(a) program; accordingly, 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) (2012); Rothe Computer Solutions, LLC d/b/a/Rohmann J.V., B-299452, May 9, 2007, 2007 CPD ¶ 92 at 3.

Blue Ridge argues that the solicitation was improperly set aside as an 8(a) competition because the SBA failed to perform an adverse impact analysis under 13 C.F.R. § 124.504(c). Blue Ridge also argues that it is adversely impacted by the decision to set aside the solicitation as an 8(a) award, given that it is a small business, but is no longer a certified 8(a) contractor.

The SBA contends that no adverse analysis was required because the work solicited here is a "follow-on" to shuttle bus service contracts performed under Blue Ridge's 8(a) contracts, which provided the same basic services under the 8(a) program.⁴ The SBA contends that this requirement is, therefore, subject to the "once 8(a), always 8(a)" rule, set forth at 13 C.F.R. § 124.504(d), which, the SBA contends, precludes removing follow-on requirements from the 8(a) program unless they are specifically released by the SBA from the program for non-8(a) competition. SBA Report (Aug. 13, 2012) at 2-6. In such cases, the SBA reports, there is no requirement for an adverse impact analysis.

Alternatively, the SBA contends that if this requirement were not considered a follow-on requirement, then it would be considered a "new requirement" under 13 C.F.R. § 124.504(c)(1)(ii), for which no adverse impact analysis would be required

⁴ Our Office provided the SBA with two opportunities to comment on issues raised by Blue Ridge in its protest. Blue Ridge responded to both of SBA's submissions.

under applicable regulations. SBA Report (Sept. 25, 2012) at 3; 13 C.F.R. § 124.504(c)(1)(ii)(D). The SBA contends that this would be so because the shuttle bus services previously obtained under the 8(a) program will be significantly expanded by this solicitation; in fact, SBA notes that the expansion of services here will lead to a price adjustment of at least 25 percent over the previous contracts. SBA Report (Sept. 25, 2012) at 3; 13 C.F.R. § 124.504(c)(1)(ii)(C); see Klett Consulting Group, Inc., B-404023, Dec. 20, 2010, 2010 CPD ¶ 301, at 5.

As a general matter, we accord SBA's interpretation of its own regulations, such as those regarding the 8(a) program, great weight. Singleton Enters.-GMT Mech., A Joint Venture, B-310552, Jan. 10, 2008, 2008 CPD ¶ 16 at 3. Here, while Blue Ridge clearly disagrees with SBA's interpretation of its regulations as applied to the facts in this case, we see no basis to conclude that SBA's determination that no adverse impact analysis was required was inconsistent with applicable SBA regulations. Id.

Blue Ridge's primary argument that an adverse impact analysis is required is premised upon its award of contract -0042 when Blue Ridge was no longer a certified 8(a) contractor. Thus, Blue Ridge contends that the solicitation under protest here is not a follow-on to the previous 8(a) contract, given that the services are being performed by other than a certified 8(a) contractor; in fact, Blue Ridge contends that contract -0042 and the current solicitation were for a new requirement, rather than being a follow-on to the 8(a) contract, given that the current services are of a much greater magnitude than the 8(a) contracts--\$2.5 million per year as compared to \$100,000 per year.

As noted by the SBA, it is apparent that NGB never intended for contract -0042 to remove this shuttle bus service requirement from the 8(a) program. NGB described action No. 0042 as a modification and treated it as the practical equivalent of a modification to the 8(a) contract during the contracting process. AR, Tab 2, Contracting Officer Statement at 1. The contents of contract -0042, quoted above, make clear that it was intended to be a modification of Blue Ridge's 8(a) contract to provide for increased performance costs. We see nothing in the record to support the protester's assertion that the purpose of the -0042 contract was to remove the contract from the 8(a) program. Thus, we agree with the SBA that contract -0042 can be considered a follow-on to the initial 8(a) contract, and that therefore the current solicitation can also be considered to be a follow-on to the 8(a) contract. See Madison Servs., Inc., B-400615, Dec. 11, 2008, 2008 CPD ¶ 225 (adverse impact analysis not required because of "extraordinary circumstances," where the services were not put under the 8(a) program as was intended by the procuring agency, but were instead erroneously made small business set-asides).

Moreover SBA explains that the fact that the requirement has increased in magnitude more than 25 percent does not mean that it is not a follow-on to the prior 8(a) contract under 13 C.F.R. § 124.504(d).⁵ In this regard, the SBA states that the “new requirement” provision in 13 C.F.R. § 124.504(c)(1)(ii) only addresses situations where the requirement is not in the 8(a) program and is designed to protect small business concerns that are performing government contracts awarded outside the 8(a) program. See Madison Servs., Inc., supra, at 4.

Under the circumstances, and, given the deference we accord the SBA’s interpretation of its regulations, we find the SBA’s determination--i.e., that the current solicitation is a follow-on to the previous contracts to obtain these services under the 8(a) program, and, is thus subject to the “once 8(a), always 8(a)” rule--is not inconsistent with applicable SBA regulations. In this regard, the pertinent regulation provides, “where a procurement is awarded as an 8(a) contract, its follow-on or renewable acquisition must remain in the 8(a) . . . program unless the SBA agrees to release it for non-8(a) competition.”⁶ 13 C.F.R. § 124.504(d)(1). For procurements covered by this regulation, no adverse impact analysis is required. We cannot find the SBA’s position in this regard to be inconsistent with applicable regulations.

The protest is denied.

Lynn H. Gibson
General Counsel

⁵ In fact, the protester admits that the dramatic increase in the level of services under contract -0018 occurred more than a year prior to the execution of contract -0042, which addressed this issue. This is also consistent with the SBA’s view that contract -0042, and thus the current solicitation, are follow-ons to the 8(a) contract -0018.

⁶ There is a provision in 13 C.F.R. § 124.504(d) that allows agencies and 8(a) contractors that are leaving the 8(a) program to request that the SBA release the procurement for non-8(a) competition. Blue Ridge made no such request to SBA under this regulation.