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Decision

Matter of: Radiance Technologies, Inc.

File: B-422615

Date: August 30, 2024

W. Brad English, Esq., Jon D. Levin, Esq., and Emily J. Chancey, Esq., Maynard Nexsen, PC, for the protester.
Wade L. Brown, Esq., and Timothy P. Wasyluka, Jr., Esq., Department of the Army, for the agency.
Kasia Dourney, Esq., and Alexander O. Levine, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging task order solicitation requirement for offerors to recertify their small business status is denied where the recertification requirement was within the agency's discretion and where the protester failed to demonstrate that the agency's actions were otherwise unreasonable.

DECISION

Radiance Technologies, Inc., of Huntsville, Alabama, challenges the terms of task order request for proposals (TORP) No. 24-005, issued by the Department of the Army for systems engineering and technical assistance services in support of the Army's Rapid Capabilities and Critical Technologies Office (RCCTO). Radiance, the incumbent contractor, objects to the solicitation's requirement that firms recertify their small business size status at the time of proposal submission. Radiance argues the requirement is unduly restrictive of competition and not authorized by law.

We deny the protest.

BACKGROUND

The Army issued the TORP on May 20, 2024, under the procedures of Federal Acquisition Regulation (FAR) subpart 16.5, to holders of the General Services Administration's (GSA) One Acquisition Solution for Integrated Services (OASIS) small business indefinite-delivery, indefinite-quantity (IDIQ) contract pool 4. Agency Report (AR), Tab 3, TORP Cover Page at 1; Contracting Officer's Statement and Memorandum

of Law (COS/MOL) at 1. The solicitation contemplated the issuance of a cost-plus-fixed-fee task order with a 3-year base period and one 2-year option period.¹ AR, Tab 4, TORP Instructions at 1, 3. The agency sought proposals for support services to the RCCTO, to include program management, scientific, engineering, logistics, financial, and ancillary services. AR, Tab 5, TORP Performance Work Statement at 1.

Prior to the issuance of the solicitation, the agency reviewed multiple capability statements for small business holders of the OASIS pool 4 contract available on the OASIS website. AR, Tab 18, GSA OASIS Capability Statements. On February 8, the agency issued a request for information (RFI) to identify potential OASIS pool 4 small businesses interested in participating in the upcoming procurement. AR, Tab 19, RFI.

Based on the relatively large number of responses received, the contracting officer recommended setting the solicitation aside for small businesses. COS/MOL at 2. The Army's Office of Small Business Programs and the Small Business Administration's (SBA) procurement center representative concurred with that recommendation. *Id.*; AR, Tab 21, Market Research Report.

The contracting officer then consulted the GSA OASIS ordering guide, which states, in relevant part, that:

Unless the order solicitation explicitly requires size/socioeconomic recertification at the order level, the [ordering contracting officer] shall rely on the size/socioeconomic status shown in the OASIS Contracts in accordance with 13 C.F.R. 121.404(a)(1)(i)(B) as the size/socioeconomic certification was required at the [multi-agency contract] level for award.

AR, Tab 22, GSA OASIS Ordering Guide at 12. Ultimately, the agency included a provision in the draft solicitation requiring offerors to recertify their small business status at the time of the task order proposal submission, as follows:

All offerors must re-certify their business size/socioeconomic status with submission of its proposal and prior to award of the task order.

COS/MOL at 3; AR, Tab 4, TORP Instructions at 7.

Shortly thereafter, a representative from Radiance contacted the contracting officer to share concerns regarding the draft solicitation, including the recertification requirement. COS/MOL at 3. Specifically, the Radiance representative indicated that the firm was currently unable to recertify as a small business--and would therefore not be eligible for task order award--and requested that the agency remove the recertification

¹ The requirement is a follow-on to task order W50RAJ-20-F-0014, which is currently being performed by Radiance. COS/MOL at 1. The previous task order was also awarded under GSA's OASIS contract for small businesses pool 4. *Id.*

requirement.² *Id.* The representative noted that based on Radiance’s OASIS small business certification at the time of the IDIQ award, if not for the current recertification requirement, “Radiance would still be considered a small business . . . up through . . . [December 19,] 2024.” *Id.*

The agency subsequently sought further guidance from GSA’s National Customer Service Center on the issue. *Id.* GSA stated that it was within the ordering agency’s discretion to seek a small business status recertification at the ordering level. *Id.*

Ultimately, the agency issued the instant solicitation with the requirement to recertify offerors’ small business status at the time of proposal submission. This protest followed.³

DISCUSSION

Radiance objects to the TORP’s size recertification requirement. Specifically, the protester alleges that the recertification provision is unduly restrictive of competition and not authorized by law. Protest at 4-6; Comments at 1-6. With respect to the latter argument, Radiance alleges that the contracting officer did not have the authority to require recertification because the regulation allowing for recertification, FAR clause 52.219-28(c), did not exist in 2014, *i.e.*, at the time Radiance was awarded its OASIS IDIQ contract.⁴ Protest at 4-5; Comments at 1-6.⁵

² Radiance also contacted the RCCTO competition advocate, complaining that the “RCCTO [c]ontracting [o]fficer [a]bused [h]er [d]iscretion” by including the solicitation recertification requirement. COS/MOL at 4; AR, Tab 41, Radiance White Paper at 2. The competition advocate reviewed the protester’s arguments and found that the contracting officer had not abused her discretion in requiring recertification. COS/MOL at 4.

³ While the task order will be in support of a Department of Defense organization, the OASIS multiple award IDIQ contracting vehicle was awarded by the GSA. Since the value of the order to be issued here exceeds \$10 million, the protest is within our Office’s jurisdiction. See 41 U.S.C. § 4106(f); *Analytic Strategies LLC; Gemini Indus., Inc.*, B-413758.2, B-413758.3, Nov. 28, 2016, 2016 CPD ¶ 340 at 4-5.

⁴ The protester represents that it was awarded its OASIS IDIQ contract in 2013. Comments at 1. Although it appears that the contract was awarded in 2014, see COS/MOL at 5, for purposes of our decision it does not matter which of the two dates we consider.

⁵ In its initial protest, Radiance also argued that the Army failed to conduct required market research before setting the requirement aside for small businesses but the protester subsequently withdrew this allegation. Protest at 6-8; Comments at 1 n.2.

The agency counters that the requirement is not unduly restrictive but instead is consistent with the terms of the underlying OASIS contract, its ordering guide, and applicable laws and regulations. COS/MOL at 1, 7-8. The agency also maintains that the recertification requirement was fully within the agency's discretion, and the protester fails to provide any regulation or other authority to argue otherwise. *Id.* at 4-7.

We have considered each argument and for the reasons discussed below, find no basis to sustain the protest.

Authority to Request Recertification

Radiance claims that the contracting officer did not have the authority to require a size recertification in the task order solicitation. Specifically, the protester asserts that when the firm was awarded the underlying OASIS IDIQ contract, the FAR clause relevant here, 52.219-28, did not contain subsection (c), which grants the contracting officer the explicit authority to require a size recertification on a task order solicitation.⁶ Protest at 5-6. According to the protester, "the regulation governing a given contract is the regulation in place at the time of the solicitation for that contract," meaning the regulation in place at the time proposals were solicited for the IDIQ rather than for the task order. Comments at 2. Moreover, Radiance asserts that FAR clause 52.219-28(c) cannot be applied retroactively. *Id.*; Protest at 6.

The agency disputes the protester's position, arguing that the applicable provision here is the SBA's regulation at 13 C.F.R. § 121.404(g)(3), which was promulgated in 2006 and became effective in 2007, well before the award of Radiance's OASIS contract. COS/MOL at 5 (*citing* 71 Fed. Reg. 66434 (Nov. 15, 2006) (final rule)). The Army notes that 13 C.F.R. § 121.404(g)(3) states, in relevant part, that:

Where the contracting officer explicitly requires concerns to recertify their size status in response to a solicitation for an order, SBA will determine size as of the date the concern submits its self-representation as part of its response to the solicitation for the order.

13 C.F.R. § 121.404(g)(3)(v).

⁶ FAR clause 52.219-28(c) provides:

If the Contractor represented that it was any of the small business concerns identified in 19.000(a)(3) prior to award of this contract, the Contractor shall rerepresent its size and socioeconomic status according to paragraph (f) of this clause or, if applicable, paragraph (h) of this clause, when the Contracting Officer explicitly requires it for an order issued under a multiple-award contract.

FAR clause 52.219-28(c) (SEPT 2023).

Further, the agency states that in addition to the SBA regulations, the GSA OASIS ordering guide, which specifically grants the contracting officer discretion to request recertification, provides an additional authority for the Army to require size recertification. COS/MOL at 6.

In its comments, Radiance challenges the Army's explanation, arguing that while 13 C.F.R. § 121.404(g)(3), which was in effect in 2013, contemplated situations where the contracting officer might require recertification, it never granted the contracting officer "the right to require recertification generally." Comments at 4. Instead, the protester contends that any authority for the agency to request recertification would have to be derived from the FAR and, as discussed above, the relevant FAR provision did not exist at the time the IDIQ contract was awarded in 2013. *Id.*

Responding to the agency's arguments, Radiance acknowledges that the SBA's explanatory comments on the 2006 final rule promulgating 13 C.F.R. § 121.404(g)(3) specifically advised that:

The final rule gives contracting officers the discretion to request size certifications for individual orders, but does not require them to do so.

Id. at 4 (*quoting* 71 Fed. Reg. at 66438). The protester points to our decision in *InuTeq, LLC*, B-411781, Oct. 21, 2015, 2015 CPD ¶ 324, and argues that our Office relied on the above SBA comment as "the source of the contracting officer's right to impose a recertification requirement." *Id.* (*citing InuTeq, LLC, supra*, at 5). Radiance asserts that our Office "afforded SBA's interpretation [the] so-called *Auer* deference when reaching that conclusion." *Id.* (*citing InuTeq, LLC, supra* and *Auer v. Robbins*, 519 U.S. 452 (1997)⁷).

Radiance alleges, however, that recently "the Supreme Court has taken steps to reign in agency deference," and under current "interpretative principles" regulations "have to say what they mean." *Id.* As a result, Radiance contends that "SBA's regulations cannot be reasonably interpreted as granting the contracting officer the right to require recertification." *Id.* at 5. Moreover, the protester urges our Office to "reconcile" the SBA regulations with the new post-*Chevron*⁸ "deference constraints." *Id.* (*citing Kisor v. Wilkie, supra* and *Loper Bright Enters. v. Raimondo*, No. 22-1219, 144 S.Ct. 2244, 2024 WL 3208360, at *6 (U.S. June 28, 2024)). We find the protester's arguments to be without merit.

⁷ *Auer* deference refers to a principle of a judicial review where courts defer to the agency's interpretation of a "genuinely ambiguous" regulation unless it is "plainly erroneous or inconsistent with the regulation." *Kisor v. Wilkie*, 588 U.S. 558, 574 (2019).

⁸ Referring to *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

When a firm is awarded an IDIQ contract (including a multiple award contract like OASIS) as a small business, the firm is generally considered a small business throughout the life of that contract and is not required to recertify its size status for each order issued under the contract. 13 C.F.R. §§ 121.404(a)(1)(i), (g); see *Enterprise Info. Servs., Inc.*, B-403028, Sept. 10, 2010, 2010 CPD ¶ 213 at 3. Agencies have the discretion, however, to request that offerors recertify their business status in response to a solicitation for an order. 13 C.F.R. §§ 121.404(a)(1)(i), (g); see *Technica Corp.*, B-413339, Sept. 19, 2016, 2016 CPD ¶ 264 at 3. If a solicitation expressly requires an offeror to recertify its size status in response to a solicitation for an order, the size status of the offeror will be determined as of the date of the recertification. 13 C.F.R. § 121.404(g)(3)(v).

In issuing its regulations regarding small business size determinations under multiple-award long-term contracts, SBA has specifically stated:

Allowing procuring agencies to request size certifications in connection with particular orders is consistent with the purposes of the Small Business Act (procurements meant for small businesses should be awarded to small businesses) The final rule gives contracting officers the discretion to request size certifications for individual orders, but does not require them to do so. . . .

71 Fed. Reg. 66434, 66438 (2006).

That principle has been long recognized in decisions issued by our Office.⁹ See, e.g., *The Oryza Grp., LLC*, B-416719, B-416719.2, Nov. 26, 2018, 2018 CPD ¶ 407 at 4; *Technica Corp.*, B-413339, *supra*; *InuTeq, LLC*, B-411781, Oct. 21, 2015, 2015 CPD ¶ 324 at 5; *Enterprise Info. Servs., Inc.*, *supra*. As these decisions demonstrate, we have repeatedly found that agencies have discretion to request that offerors recertify their business status at the task order level. This finding has been based on our examination of the pertinent SBA regulations, which, on their face, allow a contracting officer to seek recertification of firm's size status before placing an order. See, e.g., *Enterprise Info. Servs., Inc.*, *supra*, at 4, 4 n.6 (concluding that a contracting officer had discretion to require a size recertification before noting, as additional support, that this conclusion was consistent with the SBA's view, whose views we generally defer to). Thus, where our interpretation is consistent with the plain reading of the regulation, the

⁹ We also note that both the Court of Federal Claims and the SBA's Office of Hearings and Appeals have upheld this principle in numerous cases. See, e.g., *LB&B Associates, Inc. v. United States*, 68 Fed. Cl. 765, 772 (2005) (labeling the task order a "new contract" for which the agency was entitled to request recertification); see also, e.g., *Size Appeal of Safety and Ecology Corp.*, SBA No. SIZ-5177 (2010).

protester's suggestion that we should reconsider our conclusion based on new "deference constraints" articulated by *Loper* is without a basis.¹⁰

Further, as we noted in our prior decisions discussing the propriety of various procurement approaches used by agencies, under FAR section 1.102(d), an agency's chosen procurement procedure that is not prohibited by law or regulation is assumed to be permissible. See, e.g., *Sumaria Sys., Inc.*, B-418796, Sept. 9, 2020, 2020 CPD ¶ 296 at 5. Importantly, the FAR has never prohibited agencies from requiring offerors to recertify their business status at the task order level.

Accordingly, we find no basis to conclude that the agency lacked the authority to require small business status recertification at the order level, and therefore see no basis to sustain the protest ground.

Unduly Restrictive Requirement Allegation

The protester also alleges that the recertification provision is unduly restrictive of competition because it is an unnecessary restriction on who can compete for the task order; according to Radiance, small businesses already had to certify their socioeconomic status at the time of OASIS contract award. Protest at 5. Radiance also argues that recertification is not necessary to achieve the Army's stated purpose for requiring such recertification, namely, claiming small business credit for the issuance of the task order, because the firm is still considered small under the underlying OASIS contract. *Id.* at 3; Comments at 5-6. The Army defends its certification requirement as consistent with the purpose of the Small Business Act, that is, as requiring that procurements set aside for small businesses be awarded to small businesses. COS/MOL at 7 (*citing InuTeq, LLC, supra*).

¹⁰ Our consideration of the SBA's views on its regulations is consistent with the standard our Office has applied in considering the SBA's opinions on small business matters, including protests where we have invited the SBA to provide its views but ultimately reached a different interpretation based on what we considered to be the plain meaning of the applicable statutes or regulations. See, e.g., *Coast to Coast Comput. Prods., Inc.*, B-417500, B-417500.2, July 29, 2019, 2019 CPD ¶ 267 at 6 (rejecting the SBA's interpretation of the provisions of the Small Business Jobs Act of 2010 and its implementing regulations as not "supported by the applicable authority.").

Additionally, we find that the protester's references to, and reliance on, *Loper* are fundamentally misplaced. *Loper* involved an agency's interpretation of ambiguous provisions of a statute, as opposed to agency regulations. See *Loper, supra*. Further, even if the SBA's regulations were ambiguous, the agency's interpretation of its own ambiguous regulations would be entitled to deference under *Auer*, see *Kisor, supra*, which was not overturned by *Loper*.

In issuing a task or delivery order, agencies must ensure that all contractors holding the underlying multiple-award contracts have a “fair opportunity to be considered” for orders. 10 U.S.C. § 3406(c); FAR 16.505(b)(1)(i).¹¹ There are certain express exceptions to the fair opportunity rule, however. Under FAR section 16.505(b)(2)(F), a contracting officer may set aside a task order for small business concerns.

Here, the contracting officer’s decision to require a size recertification is part and parcel of the decision to set aside the task order to small businesses. Accordingly, the requirement is exempt from the agency’s general obligation to provide offerors with a fair opportunity to be considered for task order awards. See FAR 16.505(b)(2)(F).

At any rate, we find nothing objectionable or unduly restrictive about the agency’s recertification requirement. As an initial matter, we note that the decision to require offerors to recertify their size status at the task order level was authorized by law. As discussed above, 13 C.F.R. § 121.404(g)(3) provides a contracting officer with the authority to request a size certification in connection with the issuance of a task order. See *Technica Corp.*, *supra* at 3.

Further, although the protester argues the “requirement is not necessary to meet the Army’s needs,” Protest at 5, we find that the agency has, at a minimum, articulated a basis for why the requirement is reasonably related to the agency’s needs. As we have previously noted, a solicitation recertification requirement is consistent with the purpose of the Small Business Act, according to which procurements intended for small businesses should be awarded to small businesses. See *InuTeq, LLC*, B-411781, Oct. 21, 2015, 2015 CPD ¶ 324 at 5. The agency here reiterates that one of the reasons for its inclusion of the recertification provision was to further advance the goals of the small business program by ensuring that the task order is awarded to a firm that is currently a small business concern as opposed to a large business. COS/MOL at 7. We conclude that this basis--awarding the work to a firm that is small at the time of task order issuance--was reasonable and within the discretion of the contracting officer. The fact that the agency was not required to request such a recertification, and could have received small business credit without doing so, does not make it unreasonable or an abuse of discretion to have required such a recertification.

The protest is denied.

Edda Emmanuelli Perez
General Counsel

¹¹ We note that the protester cites the Competition in Contracting Act, 10 U.S.C. § 3206, in support of its argument that the recertification requirement is unduly restrictive. See Protest at 4. Since this is a task order solicitation, however, the standard we apply is whether the agency’s actions deprive IDIQ contract holders of a fair opportunity to compete for the task order. See FAR 16.505(b)(1)(i).