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Decision

Matter of: Analytica LLC

File: B-422681.3; B-422681.4

Date: November 26, 2024

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DIGEST

Protest that the agency unreasonably found the protester ineligible for award for failure to hold the required Small Business Administration (SBA) 8(a) contract is denied; the protester was acquiring the contract from another firm, and the record demonstrates that, because the SBA had not waived the required termination of that contract or authorized the novation without the waiver, the contracting officer reasonably concluded that the protester was not an eligible contract holder as required by the solicitation.

DECISION

Analytica LLC, of Bethesda, Maryland, protests the decision to eliminate Analytica from award consideration under request for proposals (RFP) No. 70SBUR24R00000009, issued by the Department of Homeland Security to provide support services to the United States Citizenship and Immigration Services (USCIS) Office of the Chief Data Officer. Analytica contends that USCIS unreasonably found the protester ineligible for award.

We deny the protest.

BACKGROUND

USCIS issued the RFP to holders of the General Services Administration's (GSA) One Acquisition Solution for Integrated Services (OASIS) small business 8(a) pool 1 contract. Agency Resp. to Small Business Administration (SBA) Comments, exh. 2, Conformed RFP at 3. The RFP contemplated the issuance of a task order for data strategy support services (DSSS3) to the offeror whose proposal represented the best value to the government, considering technical approach, corporate experience, and price. *Id.* at 36-37. Proposals were due by April 19, 2024. *Id.* at 1.

Potomac Management Solutions, LLC, held an OASIS 8(a) contract. Protest at 2. In October 2023, Potomac and Analytica entered into an asset purchase agreement whereby Analytica acquired certain assets from Potomac, including its OASIS 8(a) contract. *Id.* at 4. Also in October 2023, Analytica and Potomac sought GSA approval --pursuant to Federal Acquisition Regulation (FAR) section 42.1202¹--for a novation agreement whereby Potomac agreed to novate the OASIS 8(a) contract to Analytica. *Id.* At the same time, Potomac and Analytica sought the Small Business Administration's (SBA's) approval of the novation pursuant to 13 C.F.R. § 124.518(c). *Id.* (We discuss below 13 C.F.R. § 124.518(c).) In March 2024, Potomac and GSA executed a modification to Potomac's OASIS 8(a) contract that recognized the novation and changed the contract holder from Potomac to Analytica. *Id.*; see Req. for Dismissal, exh. 4, GSA Novation Agreement. It would not be until August 19, 2024, that GSA notified the protester that SBA approved the substitution request under 13 C.F.R. § 124.518(c). *Id.*, citing exh. 2, Email from GSA to Analytica (noting that the "Substitution Request we submitted to SBA has been approved").

Twenty offerors, including the protester, submitted proposals in response to the DSSS3 RFP by the April 19, 2024, deadline. Agency Resp. to SBA Comments at 3. After evaluating the proposals, USCIS issued the task order to Analytica. Req. for Dismissal, exh. 1, Task Order Award. Two unsuccessful offerors, Anika Systems, Inc., and Amaze Technologies, LLC, protested the issuance of the task order with our Office; GAO dismissed the protests when the agency indicated that it was taking corrective action that would include further investigation into whether Analytica was an eligible OASIS 8(a) pool 1 contract holder at the time of proposal submission. See *Anika Sys., Inc.*, B-422681, July 29, 2024 (unpublished decision); *Amaze Techs., LLC*, B-422681.2, July 29, 2024 (unpublished decision).

USCIS's investigation established that a GSA contracting officer had novated the contract prior to the deadline for proposal submission; however, an SBA lead business opportunity specialist confirmed that, as of August 6, 2024, the SBA had not approved a waiver request under 13 C.F.R. § 124.515 nor a substitution under 13 C.F.R. § 124.518(c). Req. for Dismissal, exh. 5, Contracting Officer Memo to File at 4.

¹ Section 42.1202 of the FAR describes the method for determining the contracting officer responsible for "processing and executing novation and change-of-name agreements."

Because the contract novation was not complete prior to proposal submission, the agency concluded that Analytica was not eligible for task order award. Req. for Dismissal at 5. On June 14, USICS prepared a contract modification that stated, “[a]fter a thorough investigation by the Contracting Officer, it has been determined that Analytica has not obtained SBA approval to assume the Potomac Management Solutions OASIS 8(a) contract and should not have submitted a proposal for this action until that SBA approval was received.” *Id.*, exh. 6, Contract Modification. While the agency did not issue the modification, the unexecuted modification would have terminated Potomac’s 8(a) contract for the convenience of the government. *Id.* On August 8, USCIS notified Analytica that the agency found the protester ineligible for award. Protest, exh. 4, Email from Agency to Protester at 1. This protest followed.²

DISCUSSION

Analytica challenges the agency’s decision to eliminate its proposal from the competition. Specifically, Analytica argues that GSA had approved the contract novation from Potomac to the protester prior to the deadline for proposal submission, and “USCIS has no basis to and cannot question the validity of a novation that has already been approved by another agency.” *Id.* at 4. Analytica asserts that “GSA approved the novation pursuant to FAR 42.1204” and that “approval of the novation is dispositive of its validity.” *Id.* at 9. Moreover, the protester contends that, as of the proposal submission deadline, “SBA had not disapproved the substitution or requested that GSA terminate the OASIS 8(a) Contract.” *Id.* at 10. The protester argues that, in the partnership agreement (PA) between SBA and GSA, SBA delegated authority to approve the novation of Potomac’s contract to GSA. Protest at 8-9. As discussed below, we agree with USCIS that Potomac and Analytica failed to satisfy the regulatory requirements for novating Potomac’s OASIS 8(a) contract to the protester and that, consequently, the agency reasonably found Analytica ineligible.

Novation entails the “[r]ecognition of a successor in interest to Government contracts when contractor assets are transferred.” FAR 42.1200. If a contractor wants the government to recognize a successor in interest to its contracts, the contractor must submit a written request to the responsible contracting officer. FAR 42.1203(a). To affect the novation, the responsible contracting officer executes a novation agreement with the transferor and the transferee. FAR 42.1204(h).

Section 8(a) of the Small Business Act, 15 U.S.C. § 637(a), authorizes the SBA to contract with other government agencies, and to subcontract the performance of those contracts to qualified 8(a) program participants. Pursuant to SBA regulations, a procuring activity must generally offer and the SBA must accept a procurement requirement for award as an 8(a) contract. See 13 C.F.R. § 124.501-504. The Act

² The value of the task order issued to Analytica is above \$10 million. Agency Resp. to SBA Comments, exh. 5, Award Notice at 7. This protest is thus within our jurisdiction to hear protests of task orders placed under civilian agency indefinite delivery, indefinite quantity (IDIQ) contracts. 41 U.S.C. § 4106(f)(1)(B).

offers broad discretion to the SBA and federal procuring activities in selecting procurement requirements that are suitable for award under the 8(a) program. 15 U.S.C. § 637(a) (stating that a contracting officer is authorized to issue a contract to the SBA for “any specific Government procurement” as long as the SBA is “competent and responsible to perform”).

Special rules, however, apply for changes of ownership involving participants in SBA’s 8(a) program. Where an 8(a) concern that received a contract will no longer perform, the 8(a) contract must be terminated for the convenience of the government unless the SBA Administrator waives the termination requirement, which the Administrator may do when ownership and control of the concern that is performing the 8(a) contract will pass to an acquiring firm that would otherwise be eligible to receive the award directly as an 8(a) contract. 13 C.F.R. § 124.515(b)(2). In specific circumstances, SBA may authorize another 8(a) firm to complete performance and, in conjunction with the procuring activity, permit novation of an 8(a) contract without invoking the termination for convenience or waiver provisions of § 124.515. 13 C.F.R. § 124.518(c). In sum, an 8(a) contract must be terminated for convenience if the 8(a) contractor to which it was awarded transfers ownership or control of the firm or if the contract is transferred or novated for any reason to another firm unless the Administrator of the SBA waives the requirement for contract termination. FAR 19.812(e).

USCIS argues that it properly found Analytica ineligible for award for failure to hold the OASIS 8(a) contract at the time the protester submitted its proposal. Req. for Dismissal at 5. The agency claims that the only two exceptions to the rule that when there is a change in ownership of an 8(a) contractor, the 8(a) contract must be terminated “are when the SBA Administrator waives termination (13 CFR 124.515) or permits substitution pursuant to a novation without invoking the waiver requirement (13 CFR 124.518(c))”; the agency further argues that both exceptions require action by the SBA Administrator, whose authority is “nondelegable.” *Id.* at 1-2, *quoting* 15 U.S.C. § 637(a)(21)(B) (noting that “[t]he Administrator may, on a nondelegable basis, waive the requirements of subparagraph (A),” which discusses the termination of a contract if the owner or owners upon whom eligibility was based relinquish ownership or control of such concern). In other words, the agency argues, when Potomac and Analytica agreed to transfer Potomac’s OASIS 8(a) contract from Potomac to Analytica, the SBA Administrator had the sole authority to waive the requirement that Potomac’s 8(a) contract be terminated because Potomac was relinquishing control. USCIS asserts that, because SBA had not “waive[d] the otherwise mandatory termination requirement” or otherwise permitted the novation without invoking the waiver requirement prior to the deadline for proposal submission, the agency was required to find that Analytica was not an eligible OASIS 8(a) contract holder and was thus ineligible for award. Req. for Dismissal at 6-7.

Analytica does not address USCIS’s contention that waiver of the termination requirement or granting permission of a novation without invoking the termination requirement is a nondelegable responsibility of the SBA Administrator. See Resp. to Req. for Dismissal. Instead, without refuting the agency’s argument, the protester

reiterates that “USCIS cannot reasonably question GSA’s approval of the novation and Mod 2 speaks for itself and demonstrates Analytica became the OASIS 8(a) Contract holder effective March 7, 2024.” *Id.* at 4. On the contrary, the agency’s argument--based in regulation and uncontroverted by the protester--is that SBA’s waiver of the termination requirement or approval of the novation without the waiver could not have been delegated to GSA and that, therefore, SBA’s authorization for the substitution of contractors under the 8(a) OASIS contract was also required. Because the record supports USCIS’s unchallenged claim, we find to be without merit the protester’s contention that GSA, using delegated authority, waived the termination requirement on behalf of the SBA.

Analytica also contends that GSA’s approval alone was sufficient. See Protest at 6-7. In support of that assertion, the protester contends that USCIS’s corrective action notices in the two prior protests “acknowledged that Analytica held the OASIS 8(a) Contract on the date it submitted its proposal for the Task Order based on GSA’s approval of the novation in March 2024.” *Id.* at 7. Those corrective action notices stated that “[t]he Agency has no information about whether the SBA: (i) approved the novation agreement (13 CFR 124.518(c)), or (ii) waived the termination for convenience requirement (13 CFR 124.515).” *Anika Sys., Inc., supra*, Supp. Notice of Corrective Action at 2; *Amaze Techs., LLC, supra*, Supp. Notice of Corrective Action at 2. For that reason, “the Agency elected to take corrective action to get answers from SBA and GSA about Analytica’s eligibility.” *Id.* Here, the protester misrepresents the agency determinations in the corrective action notices; those notices in no way support Analytica’s claim that USCIS acknowledged the protester held the OASIS 8(a) contract at the time of proposal submission.

The only other support Analytica asserts for its claim that GSA’s approval alone was sufficient to novate the contract is an attempt to distinguish this case from the facts in *Engility Corp.*³ See Protest at 7. In its notices of corrective action, the agency stated that it

generally agrees [with the holding in *Engility Corp.*] that the novation agreement between Potomac and Analytica is technically a matter of contract administration for the exiting OASIS 8(a) Pool 1 contract. *However*, the task order the Agency intends to award is technically a new contract open only to OASIS 8(a) Pool 1 contract holders. Therefore, Analytica’s eligibility for that new contract is a matter of contract formation and not contract administration, a distinction noted by the GAO in *Engility*, above.

Anika Sys., Inc., supra, Supp. Notice of Corrective Action at 2; *Amaze Techs., LLC, supra*, Supp. Notice of Corrective Action at 2. Analytica states that the agency in *Engility* had not approved the novation, unlike in this case, where GSA has approved

³ *Engility Corp.*, B-416650, B-416650.2, Nov. 7, 2018, 2018 CPD ¶ 385.

the novation. Protest at 7, *citing Engility, supra, generally*. As an initial matter, USCIS cited *Engility* for the simple proposition that GAO has jurisdiction to consider the allegation that Analytica was ineligible for award based on its failure to hold the OASIS 8(a) contract at the time of proposal submission. More important, the task order competition in *Engility* was “unrestricted,” and *Engility* did not consider whether contract novation was dependent on SBA’s waiver of the required termination of an 8(a) contract; SBA and its regulations played no part in the procurement. *See Engility, supra* at 2. In short, *Engility* is inapposite to the issue at the heart of this protest. In summary, Analytica provides no credible support for its contention that GSA’s approval alone was sufficient to novate Potomac’s 8(a) contract to the protester.⁴

SBA Comments

GAO requested SBA’s comments on the reasonableness of the agency’s determination that Analytica was ineligible for award. In SBA’s view:

Potomac and Analytica submitted a substitution request to GSA and SBA in good faith based on grounds that the substitution would serve the parties’ business development needs. 13 C.F.R. § 124.518(c). GSA internally processed the novation and, by e-mail dated February 23, 2024, notified representatives from Potomac, Analytica, and SBA that final approval was imminent. GSA approved the novation by modifying Potomac’s OASIS contract on March 7, 2024, well before the Task Order solicitation was issued and Analytica submitted its offer. Lastly, SBA has provided its authorization based on a determination that the novation would serve the business development needs of Analytica and Potomac. There is no evidence in the protest file indicating that Analytica knew or should have known that SBA had not authorized Potomac’s substitution request. Likewise, the file contains no information suggesting Potomac or Analytica encouraged GSA to approve the novation without SBA’s involvement. Based on the foregoing, we do not believe Analytica should be deemed ineligible for the Task Order by operation of SBA rules.

SBA Comments at 10-11. In essence, SBA contends that Analytica is eligible for award since, notwithstanding that SBA’s novation authorization occurred after Analytica

⁴ The protester also claims that “the fact that SBA was still processing the substitution request as of when GSA approved the novation does not invalidate GSA’s approval of the novation.” Protest at 11. The protester argues that “13 C.F.R. § 124.518(c) does not prohibit SBA from authorizing the substitution after the procuring agency has approved the novation.” *Id.* at 12. This is both accurate and irrelevant; what is pertinent is that SBA had not authorized the novation and waived the otherwise required termination of the OASIS 8(a) contract until after award of the order. While we do not discuss each of the protester’s allegations, we considered all of them and found that none provide a basis on which to sustain the protest.

submitted its proposal, SBA after the proposal submission due date, in fact, authorized the novation. We disagree with the SBA's conclusion.

Generally, our Office affords discretion to the SBA's interpretation of its own regulations if the interpretation is reasonable. *ASRC Fed. Sys. Sols., LLC*, B-420443, B-420443.2, Apr. 12, 2022, 2022 CPD ¶ 96 at 12. An SBA interpretation is reasonable where it is consistent with SBA's interpretation of its own regulations, the FAR, and the solicitation. *MIRACORP, Inc.*, B-416917, Jan. 2, 2019, 2019 CPD ¶ 50 at 5. While our Office will give deference to an agency's reasonable interpretation of its own regulations, where the language of a regulation is plain on its face, and its meaning is clear, there is no reason to move beyond the plain meaning of the text. *ASRC Fed. Data Network Techs., LLC*, B-418028, B-418028.2, Dec. 26, 2019, 2019 CPD ¶ 432 at 10. As discussed below, the relevant regulations are clear on their face, and SBA's arguments provide no basis on which we would depart from well-settled doctrine and look beyond the plain text of regulations.

The USCIS contracting officer, in an email to SBA, explained that FAR section 19.812(e) required termination of Analytica's contract. Req. for Dismissal, exh. 3, Email from Contracting Officer to SBA at 11-12, *quoting* FAR 19.812(e) ("An 8(a) contract, whether in the base or an option year, must be terminated for convenience if the 8(a) contractor to which it was awarded transfers ownership or control of the firm or if the contract is transferred or novated for any reason to another firm, unless the Administrator of the SBA waives the requirement for contract termination (13 CFR 124.515)."). The contracting officer relayed to SBA that, in USCIS's view, "if Analytica LLC did not have the waiver from the SBA the GSA Contracting Officer should have terminated the Potomac Management Solutions, LLC GSA OASIS IDIQ contract, and not permitted Analytica LLC to take over the same contract through the novation mod they executed." *Id.* at 12. The language of FAR section 19.812(e) is plain on its face; it requires termination of an 8(a) contract unless the SBA Administrator waives that required termination.

The requirement imposed by 13 C.F.R. § 124.515 is also plain on its face: "An 8(a) contract . . . must be performed by the Participant that initially received it unless a waiver is granted under paragraph (b) of this section." 13 C.F.R. § 124.515(a). The SBA Administrator may waive the requirements of paragraph (a)(1) when ownership and control of the concern that is performing the 8(a) contract will pass to another 8(a) contractor, but only if the acquiring firm would otherwise be eligible to receive the award directly as an 8(a) contract. 13 C.F.R. § 124.515(b)(2). Moreover, 13 C.F.R. § 124.518(c) is equally plain that "SBA may authorize" the substitution of one 8(a) firm for another and, "permit novation" of an 8(a) contract without invoking the termination for convenience or waiver provisions of § 124.515 only under certain limited circumstances.

Nevertheless, SBA asserts that it "has recently proposed a new regulation that would explicitly permit an agency to novate a joint venture's 8(a) contract to the lead 8(a) managing venturer with SBA's authorization." SBA Comments at 8, *citing* 89 Fed. Reg. 68274, 68303 (Aug. 23, 2024). The facts of this case do not concern the novation of a joint venture's 8(a) contract to the lead managing 8(a) venturer, and SBA does not explain why

this proposed rule, if adopted, would apply here. See SBA Comments at 8. Instead, SBA argues that “[13 C.F.R.] § 124.518(c) contains now-obsolete holdover references to the requirement for termination (or a waiver) when an 8(a) contract is transferred or novated to another 8(a) firm.” *Id.* at 9. USCIS argues that “SBA’s comment ignores that, regardless of whether a novated 8(a) contract is novated or transferred, and regardless of what the newly amended subsection of § 124.515(a)(1) may say, the unchanged version of § 124.515(a) continues to *require* the transferor to perform (and precludes performance by the transferee or successor) *unless* a waiver is granted by the SBA.” Agency Resp. to SBA Comments at 9. We agree with USCIS. SBA provides no authority for the proposition that GAO should follow a proposed rule, rather than an existing regulation, and we aware of none.⁵

Because the regulations at issue are plain on their face, GAO need not look beyond the text of those regulations. *ASRC Fed. Data Network Techs., LLC, supra*. Moreover, we agree with Anika that SBA has crafted an “Analytica-specific exemption to its own rules.” Anika Resp. to SBA Comments at 6; see SBA Comments at 10-11. In so doing, SBA, ironically, urges GAO to ignore a clearly stated requirement for the transfer of an 8(a) contract, namely, SBA’s waiver of the required termination of the contract or its authorization of the substitution and its granting of permission for a novation without waiving termination. An agency, however, does not have license to ignore SBA regulations in its evaluation. *Attainx, Inc.*, B-421216, B-421216.2, Jan. 12, 2023, 2023 CPD ¶ 45 at 9. For that reason, SBA’s interpretation of the regulations is unreasonable. SBA had not waived the termination of Potomac’s OASIS 8(a) pool 1 contract after it had been acquired by Analytica, nor had SBA permitted novation without waiver; the agency thus reasonably found Analytica was not eligible for task order award.

The protest is denied.

Edda Emmanuelli Perez
General Counsel

⁵ SBA opines that it “believes this issue is more aptly addressed through policy clarifications and on-going trainings with our partner agencies than through the bid protest mechanism.” SBA Comments at 11. We agree with Anika that “adjudicating whether Analytica was a valid OASIS 8(a) Pool 1 contract holder at the time of proposal submission--and thus can be an eligible offeror and awardee--is precisely what bid protests are for.” Anika Resp. to SBA Comments at 8.