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Decision

Matter of: Suntek Systems, Inc.

File: B-412265

Date: December 22, 2015

Christopher R. Shiplett, Esq., Nishat Azam, Esq., and Danielle Natasha Hart, Esq., Randolph Law, PLLC, for the protester.

Scott N. Flesch, Esq., and CPT Harry M. Parent, Department of the Army, and Sam Q. Le, Esq., Small Business Administration, for the agencies.

Heather Weiner, Esq., and Jonathan L. Kang, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that the Small Business Administration (SBA) improperly accepted a requirement into the 8(a) program without first determining whether doing so would have an adverse impact on existing small business concerns is dismissed as untimely where the record shows that the protester knew or should have known of the factual basis for this allegation more than 10 days prior to raising it.

DECISION

Suntek Systems, Inc., of Lancaster, Pennsylvania, a small business, protests the decision of the Department of the Army, Mission and Installation Contracting Command Center, Fort Bragg, and the Small Business Administration (SBA) to place a requirement for advanced civil information management training under the SBA's section 8(a) business development program through the issuance of request for proposals (RFP) No. W91247-15-R-0056. Suntek argues that the SBA improperly accepted this requirement into the 8(a) program without first determining whether acceptance would adversely impact small businesses, such as the protester.

We dismiss the protest.

BACKGROUND

On August 31, 2015, the Army offered its requirement for advanced civil information management training to the SBA for award through SBA's 8(a) program. Agency

Report (AR), Tab 8, Agency's Offering Letter (Aug. 31, 2015). In response, the SBA contacted the agency contracting officer for additional information about the requirement.¹ SBA's Comments (Nov. 16, 2015), at 1. On September 2, the agency provided the SBA with a revised offering letter for the requirement. AR, Tab 10, Revised Offering Letter (Sept. 2, 2015). Specifically, the Army's revised letter stated that the requirement was a "new" requirement, with an anticipated dollar value of \$3,819,335.40. Id. at 1. The letter also stated that the agency anticipated award of a contract on a sole-source basis to a particular 8(a) company.² On September 2, the SBA notified the Army that the requirement had been accepted into the 8(a) program. AR, Tab 11, SBA's Acceptance Letter (Sept. 2, 2015), at 1.

On September 11, the Army issued the RFP for the requirement as a sole-source set-aside under SBA's 8(a) program. RFP at 1. The solicitation anticipated the award of a fixed-price, indefinite-delivery, indefinite-quantity contract, for a base ordering period, with one 12-month optional ordering period. Id. at 1-2. As relevant here, the solicitation included Defense Federal Acquisition Regulation Supplement (DFARS) clause 252.219-7009, section 8(a) Direct Award, which states that "[t]his contract is issued as a direct award between the contracting office and the 8(a) Contractor pursuant to the Partnership Agreement between the [SBA] and the Department of Defense." RFP at 64. Proposals were due by September 18. Id.

On September 14, Suntek e-mailed the Army, asking for information regarding the requirement. AR, Tab 14, Protester Email Chain (Sept. 14-17, 2015), at 3. Specifically, the protester stated:

This is an official Request for Information on the intent of Fort Bragg MICC to solicit/award the Advanced Civil Information Management (ACIM) Training contract as a Sole Source 8a Contract . . . as opposed to a Full and Open competition as it has been the last three iterations of this Contract.

If this Contract is going to be issued under a Sole Sourced assignment[,] could you inform us of your intended date of Award[?]

Id.

¹ The SBA states that it was told by the contracting officer that the price of the requirement had been adjusted more than 25 percent. SBA's Comments (Nov. 16, 2015), at 2.

² The letter identified Telum Corporation as the 8(a) company. AR, Tab 10, Revised Offering Letter (Sept. 2, 2015), at 2.

On September 17, the contracting officer advised Suntek that, “our market research was clear that I could fulfill the Government’s requirement with an 8(a) firm and that is the route we took,” and that, “[t]he anticipated date of award is [on or about] 18 Sep 2015.” Id. at 2.

Thereafter, Suntek requested additional information from the agency, including a copy of the solicitation. AR, Tab 21, Email Chain Requesting RFP (Sept. 22, 2015), at 2. On September 22, the contracting officer sent Suntek a copy of the RFP. Id. at 1. On September 28, the contracting officer notified Suntek that the award had been made to Telum Protection Corporation. This protest was filed on October 5.

DISCUSSION

Suntek challenges the SBA’s determination that the requirement is exempt from an adverse impact analysis because it is a “new” requirement.³ The Army and SBA respond that the protest is untimely because Suntek filed its protest more than 10 days after it should have known of SBA’s acceptance of the requirement into the 8(a) program. In this regard, the agencies assert that Suntek knew, or should have known, that SBA had accepted the requirement into the 8(a) program, when it received a copy of the solicitation. Suntek disagrees, arguing that it did not know that the requirement had actually been offered and accepted into the 8(a) program, until it learned that the contract had been awarded. For the reasons discussed below, we conclude that the protest was untimely filed with our Office, and dismiss it on that basis.

GAO’s Bid Protest Regulations contain strict rules for the timely submission of protests. Under these rules, a protest based on other than alleged improprieties in a solicitation must be filed no later than 10 calendar days after the protester knew, or should have known, of the basis for protest, whichever is earlier. 4 C.F.R. § 21.2(a)(2). Our timeliness rules reflect the dual requirements of giving parties a fair opportunity to present their cases and resolving protests expeditiously without unduly disrupting or delaying the procurement process. Verizon Wireless,

³ Under the Small Business Act’s implementing regulations, the SBA may not accept any procurement for award as an 8(a) contract if doing so would have an adverse impact on an individual small business, a group of small businesses in a specific geographical location, or other small business programs. 13 C.F.R. § 124.504(c); see also Alpa Techs. and Servs., Inc., B-408762.2, Feb. 12, 2014, 2014 CPD ¶ 66 at 5-6. The adverse impact review process is designed to protect small business concerns that are performing government contracts awarded outside the 8(a) program. Id. The requirement for the SBA to conduct an adverse impact analysis does not apply to new requirements, except where a new requirement is created through a consolidation of existing requirements being performed by two or more small business concerns. 13 C.F.R. §§ 124.504(c)(1)(ii), (2).

B-406854, B 406854.2, Sept. 17, 2012, 2012 CPD ¶ 260 at 4. Although Suntek's protest is based upon information contained in the solicitation, we note that the timeliness of the protest is governed by section 21.2(a)(2) of our regulations, which requires that a protest be filed within 10 days after the basis of protest is known or should have been known, rather than section 21.2(a)(1), which concerns alleged improprieties in a solicitation and requires that a protest be filed prior to the time set for receipt of initial proposals, because as previously discussed, Suntek did not receive the RFP until after the closing date for receipt of initial proposals. AR, Tab 14, Protester Email Chain (Sept. 14-17, 2015), at 2; RFP at 1. In this regard, this case is similar to cases where a solicitation defect only became apparent after the closing date for receipt of proposals, and we held that the alleged impropriety had to be protested not later than 10 days after the defect became apparent. See Armorworks Enters., LLC, B-400394, B-400394.2, Sept. 23, 2008, 2008 CPD ¶ 176 at 6; LBM, Inc., B-290682, Sept. 18, 2002, 2002 CPD ¶ 157 at 6-7.

Here, we find that Suntek's arguments are untimely and not for consideration. As mentioned above, the Army issued the RFP on September 11, with a closing date for receipt of proposals of September 18. RFP at 1. Although the agency advised Suntek on September 18 of its decision to use the 8(a) program for the requirement, Suntek did not receive a copy of the RFP on the date it was issued because the solicitation was not publicly posted. AR, Tab 14, Protester Email Chain (Sept. 14-17, 2015), at 2. On September 22, however, after the solicitation's closing date, and upon Suntek's request, the Army provided Suntek with the RFP, which identified the requirement as an 8(a) directed award. AR, Tab 14, Protester Email Chain (Sept. 14-17, 2015), at 2; RFP at 64. Although the protester asserts that it did not know, based on the terms of the solicitation, whether the requirement had actually been offered and accepted into the 8(a) program, we note that, under SBA's regulations, an agency cannot conduct an 8(a) competition prior to SBA's acceptance of the procurement into the 8(a) program. 13. C.F.R. § 124.504(b).

The SBA, which provided comments to our Office in response to the protest, explains that "[i]f [it] had not yet accepted the procurement, the Army would have been barred by § 124.504(b) from issuing a solicitation and accepting offers for the contract as an 8(a) procurement." SBA's Comments (Nov. 16, 2015), at 2. The SBA also states that, "[b]ecause Suntek received a copy of the solicitation after offers were due, Suntek should have known that SBA had already accepted the procurement into the 8(a) program." Id.

Suntek contends that its arguments arise from the date of contract award, and therefore argues that its obligation to protest did not rise until that date. We conclude, based on the regulatory provisions cited by the SBA, above, that the protester knew or should have known that the SBA had accepted the requirement into the 8(a) program based on the terms of the solicitation, which the protester received on September 22. Cf. Solers, Inc., B-404032.3, 404032.4, Apr. 6, 2011, 2011 CPD ¶ 83 at 8 n.8 (a protester may presume that an agency will act properly

in following regulations). Suntek, however, did not file its protest until October 5-- which was 13 days after it received the solicitation from the agency. Accordingly, any protest challenging the offer and acceptance of this requirement into the 8(a) program, or the SBA's determination that the requirement is exempt from an adverse impact analysis because it is a "new" requirement, is untimely because Suntek filed its protest more than 10 days after it knew, or should have known of SBA's acceptance of the requirement into the 8(a) program. 4 C.F.R. § 21.2(a)(2).

The protest is dismissed.

Susan A. Poling
General Counsel