



Decision

Matter of: Donnelly & Moore Corporation

File: B-404480

Date: February 16, 2011

Robert E. Korroch, Esq., Francis E. Purcell, Jr., and Khaliah Wrenn, Esq., Williams Mullen, for the protester.

Kelly McKallagat, Esq., Department of the Navy, and Kenneth Dodds, Esq., Small Business Administration, for the agencies.

Charles W. Morrow, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Award of three sole-source 8(a) contracts to the same contractor is unobjectionable where the acceptance of the requirements into the section 8(a) program did not violate any regulations and were at fair market prices.

DECISION

Donnelly & Moore (D&M) Corporation, of New York, New York, protests the award of three sole-source contracts (Nos. N000104-10-M-QV71, N000104-10-M-QV72, and N000104-10-M-QV73), by the Department of the Navy, Naval Inventory Control Point (NAVICP) under the Small Business Administration's (SBA) section 8(a) program to eDataTech, of Seaside, California, for various information technology services.

We deny the protest.

BACKGROUND

The information technology services being acquired here are on behalf of the Naval Post Graduate School (NPS) and the Defense Language Institute Foreign Language Center (DLIFLC). In 2009, the NPS and DLIFLC undertook a collaborative effort to establish a new educational network for DLIFLC, as part of a partnership entitled "Team Monterey" between the Army and the Navy to provide online educational services from the DLIFLC's and NPS's shared facility in Monterey, California. The effort required replacing DLIFLC's existing military network (.mil) with a completely new separate educational network (.edu). Agency Report (AR) at 2.

There were three requirements identified by the team to accomplish the goal of establishing the .edu network: (1) core network support, (2) application support, and (3) helpdesk-desktop information technology support. The core network support required designing fiber cable, routers, switches and cable plants to implement an .edu network independent of the .mil network, and required a team of engineers that specialized in the design, procurement, installation, and support of an enterprise class network. Application support required developing programs to take DLIFLC's educational software from proprietary source code to open source applications; the work required programmers, web designer/developers, database administrators, and web content managers. The helpdesk-desktop information technology requirement involved providing front-line support for students, faculty, and staff with respect to computer resources and issues, including setup, configuration, and troubleshooting of desktop and laptop computers involving the new network. AR at 2-3.

In May 2010, NPS contacted NAVICP to procure the three .edu network requirements. The NAVICP contract specialist determined that the requirements were suitable for the award of sole-source contracts under the 8(a) program, due to the dollar value of the requirements and the agency's familiarity with eDataTech, which was successfully performing an existing 8(a) contract for NPS at the Monterey facility. After consulting eDataTech regarding its capabilities in mid-August, on September 10, the Navy separately offered each requirement to the SBA under the 8(a) program for separate sole-source awards to eDataTech. On September 13, the SBA accepted each requirement into the 8(a) program on behalf of eDataTech. The Navy furnished solicitations for each requirement to eDataTech on September 16, eDataTech submitted its proposals on September 17, and the Navy awarded three sole-source contracts to eDataTech on September 28. The core network support contract was at a price of \$2,250,805, the application support contract was at a price of \$2,295,777, and the helpdesk-desktop information technology contract was at a price of \$2,787,433. Just prior to these awards, on September 24, D&M contacted, for the first time, the NAVICP contracting specialist and the SBA to make them aware of its capabilities and interest.¹ AR at 3-4. In November, D&M discovered these awards and this protest followed.

¹ Since 2009, D&M, which is an 8(a) contractor, had performed two separate competitively awarded 8(a) contracts awarded by the Army for information technology services for the DLIFLC to support the .mil network at the Monterey facility. One contract was for mission support that involved software development, data center management, database support, and application development services related to the .mil network. The other contract was for desktop support of the .mil network at DLIFLC, which entailed user support for students and faculty in classrooms and labs. Protest at 3.

D&M argues that the Navy violated the applicable regulations governing the placement of work into the 8(a) program because it neglected to provide the SBA with the required information, that the Navy improperly divided the requirements in order to make sole-source awards to eDataTech instead of competing these requirements, that eDataTech had an unfair competitive advantage arising from an organizational conflict of interest (OCI), and that the awards were not at fair market prices.

DISCUSSION

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) (2010); Rothe Computer Solutions, LLC d/b/a/ Rohman J.V., B-299452, May 9, 2007, 2007 CPD ¶ 92 at 3; Designer Assocs., Inc., B-293226, Feb. 12, 2004, 2004 CPD ¶ 114 at 4.

The section 8(a) program has both competitive and noncompetitive components, depending on the dollar value of the requirement. See 13 C.F.R. § 124.506(a) (2010); NANA Servs., LLC, B-297177.3, B-297177.4, Jan. 3, 2006, 2006 CPD ¶ 4 at 3. Generally, where the acquisition value exceeds \$4 million,² a section 8(a) contract must be competed among section 8(a) firms; section 8(a) acquisitions with values less than \$4 million generally are awarded on a noncompetitive basis. FAR § 19.805-1(a); NANA Servs., LLC, *supra*. In order to obtain the information necessary for the SBA to determine that an offered requirement is eligible and appropriate for award under the 8(a) program (whether on a competitive or a noncompetitive basis), the SBA's regulations require that contracting agencies furnish detailed information about a procurement when offering it for inclusion in the program. 13 C.F.R. § 124.502; C. Martin Co., Inc., B-292662, Nov. 6, 2003, 2003 CPD ¶ 207 at 3. In this regard, 13 C.F.R. § 124.502(c) sets forth 17 enumerated items which must be identified in a contracting agency's letter offering work for inclusion in the SBA's 8(a) program. See also FAR § 19.804-2(a). As a general matter, the SBA is entitled to rely on a contracting agency's representations. C. Martin Co., Inc., *supra*, at 7.

D&M argues that the sole-source contracts were improper because the Navy violated applicable regulations in that the letters offering the requirements to the SBA under

² This threshold amount is \$6.5 million for certain manufacturing acquisitions. FAR § 19.805-1(a)(2).

the 8(a) program failed to include pertinent information. Specifically, D&M asserts that the agency's offering letter did not mention D&M and its existing contract with the Army at DLIFLC or indicate that the procurement was therefore for a repetitive acquisition. D&M asserts that 13 C.F.R. § 124.502(c) and FAR § 19.804-2 required that this information be provided in the Navy's offering letter to the SBA.

As discussed previously, the record reflects that the Navy undertook a new effort with the Army to migrate DLIFLC's network from .mil to .edu, including helpdesk-desktop support for the new network. Thus, the Navy explains (and the SBA agrees³) that the requirements being procured by the Navy are new requirements, not a repetitive acquisition, because they are not the same as those procured by the Army from D&M. The SBA further advises that the SBA's regulations do not require procuring agencies to disclose information concerning prior acquisitions of other procuring agencies, even in situations where the agencies have partnered together or the services are rendered at the same facility. SBA Report at 3. Indeed, an offering letter to the SBA under the 8(a) program involving proposed sole-source awards for a new requirement need only mention those 8(a) firms that have expressed an interest in being considered for the award. 13 C.F.R. § 124.502(c)(14). Here, D&M did not express any interest in these requirements until after the agency had offered them to the SBA.

D&M further argues that the procurements were improperly divided into several requirements to fall under the \$4 million threshold, which would trigger the requirement to competitively acquire these requirements, in order to award sole-source contracts to eDataTech. Under FAR § 19.805-1(c), "[a] proposed 8(a) requirement with an estimated value exceeding the applicable competitive threshold amount shall not be divided into several requirements for lesser amounts in order to use 8(a) sole source procedures for award to a single firm." The Navy states, and the SBA agrees, that the three requirements reasonably were considered to be separate and distinct because each requirement required a different set of skills to perform. In this regard, as pointed out by the SBA, the Army previously acquired the application support and helpdesk-desktop support services for the .gov network under separate contracts, and posits that it is not unreasonable for the Navy to also acquire these services under separate contracts. Based on our review, given the SBA's position, we find that the agency's decision to acquire these distinct services under three separate 8(a) contracts has not been shown to have been undertaken with the intent to circumvent the prohibition in FAR § 19.805-1(c).

D&M argues that eDataTech had an unfair competitive advantage arising from an OCI. This argument is primarily based on contacts that the Navy had with eDataTech regarding its capabilities and ability to meet the requirements. For example, on September 8, the contract specialist, and the NPS program manager

³ We solicited and obtained the SBA's views regarding D&M's protest.

participated in a teleconference with eDataTech to ensure that eDataTech understood the requirements and was capable of performing each requirement. D&M argues that this circumstance shows that eDataTech assisted with the preparation of the performance work statements (PWS) for these requirements since it reviewed the PWS prior to the SBA's acceptance of the requirements into the 8(a) program, and this constitutes an OCI under FAR § 9.505-2(a)(1), which generally prohibits a contractor from supplying a system or services on the basis of work statements growing out of their services. We find no merit to this contention. We first note that this regulation does not apply where the contractor is the sole source for the services. FAR § 9.505-2(b)(1). In any case, as discussed above, the work requirements here were developed through a collaborative effort between NPS and DLIFLC; D&M provides no evidence that it was eDatatech that drafted the PWSs.

D&M suggests that eDatatech may have benefited from its relationship with NPS officials under its other 8(a) contracts and had prior knowledge of the Navy's requirements, as evidenced by the short time taken for eDatatech to submit its proposal for the present requirements once they were provided RFQs. However, before recommending a sole-source award to the SBA under the 8(a) program, an agency should consider the qualifications of the 8(a) contractor to ensure that the contractor will be able to satisfy the agency's requirements. FAR §§ 19.803; 19.804-1. In so doing, we see nothing in the applicable regulations that would prohibit an agency, prior to sending the offering letter to the SBA or issuing of a solicitation for the services, from discussing with the potential sole-source 8(a) contractor the PWS that the contractor will be expected to perform. Moreover, the SBA regulations contemplate that 8(a) contractors will market their capabilities to agencies and that this may lead to sole-source 8(a) awards. 13 C.F.R. § 124.501(e). Indeed, such communications would appear to be necessary before an agency could nominate a particular 8(a) contractor for a sole-source contract, given that a formal competition among potential 8(a) contractors is neither contemplated nor permitted where a sole-source award under the 8(a) program is to be the end result. See 13 C.F.R. § 124.503(e).

As to D&M's arguments that eDatatech's relationship with NPS officials may have led to its sole-source awards, D&M has provided no evidence of improper action on the part of either eDatatech or the agency. Government officials are presumed to act in good faith, and a protester's claim that contracting officials were motivated by bias or bad faith must be supported by convincing proof; our Office will not attribute unfair or prejudicial motives to procurement officials on the basis of inference or supposition. Operational Support and Servs., B-299660.2, Sept. 24, 2007, 2007 CPD ¶ 182 at 3.

D&M finally challenges the Navy's determination that eDataTech's contract prices represented fair market prices for these services. In this regard, the FAR provides that "[a]n 8(a) contract, sole source or competitive, may not be awarded if the price of the contract results in a cost to the contracting agency which exceeds a fair market price." FAR § 19.806(b). A "fair market price" with regard to the small

business program is defined as “a price based on reasonable costs under normal competitive conditions and not on lowest possible costs.” FAR § 19.001. In order to ensure that awards made to 8(a) participants do not exceed the fair market price, the FAR requires that contracting officers “estimate the fair market price of the work to be performed by the 8(a) contractor,” and that in estimating the fair market price, the contracting officer (as appropriate) use cost or price analysis, and consider recent award prices for the same or similar work, commercial prices for similar products and services, available in-house cost estimates, data (including cost of pricing data) submitted by the SBA or the 8(a) contractor, and data obtained from any other Government agency. FAR § 19.807. Our Office generally will not question an agency’s fair market price determination, except to the extent that it is not reasonably based or there is a showing of fraud or bad faith. NANA Servs., LLC, *supra*, at 8.

The record reflects that the contracting officer determined the prices for these sole-source contracts to represent fair market prices after considering an independent government estimate (IGE) for each requirement, the commercial prices for similar labor categories of two other 8(a) vendors, and negotiating the prices downward with eDataTech. Supp. AR at 2-3. In developing the IGE, the Navy utilized online staffing resources, General Services Administration catalog prices, and experience with similar contracts, including D&M’s 8(a) contracts with DLIFLC for the Army. The IGEs for each of the three requirements were close to each contract price: the core support IGE was \$2.3 million and contract price was \$2,250,805, the application support IGE was \$2.3 million and contract price was \$2,295,777, and the helpdesk-desktop information technology IGE was \$2.8 million and contract price was \$2,787,433.⁴ Moreover, the agency reasonably found that eDataTech’s prices were comparable to the commercial prices of other 8(a) vendors performing similar

⁴ D&M notes the labor costs included in the IGEs approximate the labor costs included in eDataTech’s proposals, and suggests that the IGEs likely received significant input from eDataTech, such that the IGEs could not be relied upon in determining the eDataTech contract prices represented fair market prices. However, D&M has produced no evidence supporting this supposition. Moreover, even assuming that eDataTech was made aware of the IGE prior to submitting its proposal, we find no regulation that would prohibit this practice in the context of negotiating a sole-source 8(a) award.

services.⁵ In sum, based on our review, we find the agency had a reasonable basis for determining the contract prices represented fair market prices for these services.

The protest is denied.

Lynn H. Gibson
General Counsel

⁵ While D&M states that the lower labor rates under its 8(a) contracts would have been a better measure of fair market prices for these services, the agency states that D&M rates were taken into account in developing the IGEs.