



Decision

Matter of: Klett Consulting Group, Inc.

File: B-404023

Date: December 20, 2010

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

Manjinder Singh, Bara Infoware, Inc., for the intervenor.

Capt. Bernal Rodriguez, Department of the Army, and Kenneth Dodds, Esq., Small
Business Administration, for the agencies.

Matthew T. Crosby, Esq., and Sharon L. Larkin, 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 professional services requirement into its 8(a) program without first determining whether acceptance would adversely impact protester is denied where record supports SBA and Army determinations that services to be obtained under 8(a) program constituted a new requirement and, therefore, an adverse impact determination was unnecessary.

DECISION

Klett Consulting Group, Inc., of Virginia Beach, Virginia, protests the decision by the Department of the Army, Mission and Installation Contracting Command, Army Reserve Contracting Center, and the Small Business Administration (SBA) to place a requirement for engineering support services under SBA's 8(a) business development program through the award of a sole-source contract to Bara Infoware, Inc., of San Ramon, California.

We deny the protest.

BACKGROUND

On September 21, 2005, the Army Reserve Contracting Center awarded an indefinite-delivery/indefinite-quantity (ID/IQ) contract on an unrestricted basis to TAD PGS, Inc., of Brandenton, Florida, for professional services at Army Reserve

facilities within a three-state area under the responsibility of the 63rd Regional Readiness Command (“63rd RRC”). Agency Report (AR), Tab 5, Contract No. W91LV2-07-D-0014, at 1, 3; Contracting Officer’s Statement at 1. The three-state area consisted of California, Arizona, and Nevada. AR, Tab 5, Contract No. W91LV2-07-D-0014, at 3. The term of the contract was to expire on September 30, 2010. Id.

On September 30, 2005, the Army Reserve Contracting Center awarded an ID/IQ contract as a total small business set-aside to Klett for engineering professional services at Army Reserve facilities within a four-state area under the responsibility of the 90th Regional Readiness Command (“90th RRC”). AR, Tab 4, Contract No. W911S1-05-D-0028, at 1, 5. The four-state area consisted of Arkansas, Texas, New Mexico, and Oklahoma.¹ Id. at 5. The term of the contract was to expire on September 29, 2010. Id. at 46. Thirteen delivery orders were issued during the term of the contract at a combined value of \$7,073,000. Contracting Officer’s Statement at 2.

Pursuant to the 2005 round of the Department of Defense base realignment and closure process, on October 1, 2009, the 63rd Regional Support Command (“63rd RSC”)—a new entity—was established and assumed responsibility for real property ownership and base operations in the seven states that, until then, were served collectively by the 63rd RRC and the 90th RRC. Id. at 1. At some point during the spring of 2010, and as a result of the pending expiration of the Klett and TAD PGS contracts, the Army Reserve Contracting Center identified a 1-year requirement for engineering support services in the seven states under the responsibility of the 63rd RSC. Id. at 2; see also AR, Tab 11, Acquisition Strategy for 63rd RSC Engineering Support Services, at 1.

On May 27, 2010, SBA’s San Francisco District Office submitted a letter to the Army Reserve Contracting Center expressing interest on behalf of Bara, an SBA 8(a) business development program participant, in performing the professional services requirement that would arise following expiration of the TAD PGS contract. AR, Tab 6, SBA Search Letter, May 27, 2010, at 1. The SBA letter requested that the Army reserve the requirement for negotiation of an 8(a) sole-source award to Bara. Id. at 2.

During June, the Army and Bara communicated regarding Bara’s ability to meet the consolidated seven-state engineering support services requirement. Contracting

¹ The contract appears to have contemplated the provision of services in a fifth state, Louisiana. AR, Tab 4, Contract No. W911S1-05-D-0028, at 5. Throughout the record and throughout the parties’ filings with our Office, however, the parties consistently describe this contract’s geographic coverage as encompassing only the four above-named states. Consequently, throughout this decision we refer to this contract’s geographic coverage as involving only the four above-named states.

Officer's Statement at 2; AR, Tab 7, Bara Capability Presentation. Based on these communications, as well as the May 27 SBA letter and an analysis by the 63rd RSC Supervisory Facility Management Specialist, the Army on July 6 submitted a letter to SBA's San Francisco District Office offering the seven-state 63rd RSC engineering support services requirement for award as an 8(a) sole-source contract to Bara.² Contracting Officer's Statement at 2; AR, Tab 8, Army 8(a) Reservation Letter, July 6, 2010.

By letter on July 7, SBA's San Francisco District Office accepted the requirement for award as an 8(a) sole-source contract to Bara. AR, Tab 9, SBA 8(a) Reservation Acceptance Letter, July 7, 2010, at 1. The letter stated that in accordance with 13 C.F.R. § 124.504(c), SBA had determined that acceptance of the requirement as an 8(a) sole-source contract would not have an adverse impact on a small business or businesses located in the geographic area of the requirement. Id. at 1-2.

On August 18, Klett submitted a letter to SBA's San Francisco District Office objecting to SBA's acceptance of the requirement as an 8(a) program contract. AR, Tab 12, Klett Letter to SBA, Aug. 18, 2010. The letter explained that Klett was a service-disabled, veteran-owned small business that had been performing the four-state 90th RRC contract for the preceding 5 years. Id. at 1-2. The letter asserted that placement of the seven-state 63rd RSC requirement in the 8(a) program would have an adverse impact on Klett and other small businesses. Id. at 2.

In response to Klett's letter, SBA's San Francisco District Office on August 25 and August 31 requested additional information from the Army Reserve Contracting Center. AR, Tab 14, SBA E-Mail to Army, Aug. 25, 2010; AR, Tab 15, SBA E-Mail to Army, Aug. 31, 2010. In response to the SBA requests, the Army Reserve Contracting Center on September 13 submitted a revised, more detailed 8(a) program offering letter. AR, Tab 16, Army 8(a) Reservation Letter, Sept. 13, 2010. Among other things, the revised letter stated that the Army considered the requirement to be "new" because it combined efforts previously procured through the Klett 90th RRC contract and the TAD PGS 63rd RRC contract. Id. at 3. The revised letter also stated that the estimated value of the 63rd RSC requirement was \$3.4 million.³ Id. at 1.

² Although the Army's July 6 letter specified the place of performance as various locations through California, the Army clarified via e-mail on July 7 that the intended place of performance was the seven states covered by the Klett 90th RRC contract and the TAD PGS 63rd RRC contract. AR, Tab 8, Army 8(a) Reservation Letter (addendum), July 6.

³ In a document executed 1 week later, the Army estimated the value of the requirement to be \$3,498,137. AR, Tab 3, Independent Government Cost Estimate; see also Contracting Officer's Statement at 1.

On September 16, SBA again accepted the requirement for award as an 8(a) sole-source contract to Bara. AR, Tab 17, SBA 8(a) Reservation Acceptance Letter, Sept. 16, 2010. The SBA letter repeated the statement that SBA had determined that acceptance of the requirement would not have an adverse impact on a small business or businesses located in the geographic area of the requirement. Id. at 1-2.

On September 22, SBA's San Francisco District Office informed Klett via letter that SBA regulations do not require an adverse impact determination when a requirement is new. AR, Tab 18, SBA Letter to Klett, Sept. 22, 2010, at 1. The SBA letter further informed Klett that both SBA and the Army considered the seven-state 63rd RSC requirement to be a new requirement. Id. at 1.

One day after receiving the SBA letter, Klett filed this protest.

DISCUSSION

Klett advances two protest contentions. First, Klett argues that the Army provided SBA with insufficient information related to the seven-state 63rd RSC requirement, and that had SBA received sufficient information, SBA would have determined that accepting the requirement for award to Bara would have an adverse impact on Klett. Protest at 3-5. Second, Klett argues that the seven-state 63rd RSC requirement does not qualify as a new requirement under SBA regulations, and, therefore, SBA and the Army improperly invoked the SBA regulation that exempts new requirements from adverse impact determinations. Comments at 5-7. We disagree with both contentions.

Section 8(a) of the Small Business Act authorizes SBA to contract with other government agencies and to arrange for the performance of those contracts via subcontracts awarded to socially and economically disadvantaged small businesses. 15 U.S.C. § 637(a) (2010). The Act affords SBA and contracting agencies broad discretion in selecting procurements for the 8(a) program; 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); JXM, Inc., B-402643, June 25, 2010, 2010 CPD ¶ 158 at 3.

Under the Act's implementing regulations, 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). The adverse impact concept is designed to protect small business concerns that are performing government contracts awarded outside the 8(a) program. Id. SBA presumes adverse impact to exist where a small business concern has performed the specific requirement for at least 24 months; the small business is performing the requirement at the time it is offered to the 8(a) program, or its performance of the requirement ended within

30 days of the procuring activity's offer of the requirement to the 8(a) program; and the dollar value of the requirement that the small business is or was performing is 25 percent or more of its most recent annual gross sales. Id. § 124.504(c)(1)(i).

The concept of adverse impact 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. Id. § 124.504(c)(1)(ii), (2). The SBA regulations define a new requirement as one that previously has not been procured by the relevant procuring activity. Id. § 124.504(c)(1)(ii). The SBA regulations also provide that:

[t]he expansion or modification of an existing requirement will be considered a new requirement where the magnitude of change is significant enough to cause a price adjustment of at least 25 percent (adjusted for inflation) or to require significant additional or different types of capabilities or work.

Id. § 124.504(c)(1)(ii)(C). The rationale for exempting new requirements from an adverse impact analysis, the regulations explain, is that “[w]here a requirement is new, no small business could have previously performed the requirement and, thus, [the] SBA’s acceptance of the requirement for the 8(a) [business development] program will not adversely impact any small business.” Id. § 124.504(c)(1)(ii)(A).

To avoid adverse impacts, and to obtain other information necessary for SBA to determine that an offered requirement is eligible and appropriate for award under the 8(a) program, the SBA regulations require that contracting agencies furnish detailed information about a procurement when offering it for acceptance under the 8(a) program. Id. § 124.502; see also Federal Acquisition Regulation (FAR) § 19.804-2. Among the information required to be included in the offering letter are the requirement’s acquisition history, if any, and the names and addresses of any small business contractors that have performed the requirement within the previous 24 months. 13 C.F.R. § 124.502(c)(9), (10); FAR § 19.804-2(a)(8).

Klett’s first protest contention is that the Army provided SBA with insufficient information regarding the seven-state 63rd RSC requirement, and that with sufficient information, SBA would have determined that placement of the requirement in the 8(a) program would adversely impact Klett. Protest at 3-5. In its comments on the Army’s report filed in response to the protest, the only specific information that Klett alleges the Army failed to provide to SBA is that two small businesses—Klett and its subcontractor under the 90th RRC contract—were performing requirements that were to be consolidated. Comments at 4.

The record reflects that, as a result of Klett’s August 18 letter, SBA’s San Francisco District Office recognized that the Army initially had not provided certain information specified in 13 C.F.R. § 124.504(c). AR, Tab 14, SBA E-Mail to Army, Aug. 25, 2010; AR, Tab 15, SBA E-Mail to Army, Aug. 31, 2010. The record further

reflects that, also as a result of Klett's letter, SBA's San Francisco District Office requested, and the Army provided, additional information described in 13 C.F.R. § 124.504(c). AR, Tab 14, SBA E-Mail to Army, Aug. 25, 2010; AR, Tab 15, SBA E-Mail to Army, Aug. 31, 2010; AR, Tab 16, Army 8(a) Reservation Letter, Sept. 13, 2010. In addition to providing further information described in 13 C.F.R. § 124.504(c), the Army's revised 8(a) program offering letter also explained why the Army considered the requirement to be new and responded to the SBA questions regarding differences between the current requirement and the predecessor requirements. AR, Tab 16, Army 8(a) Reservation Letter, Sept. 13, 2010.

At our Office's request, SBA provided its views on the protest. Regarding the issue of the sufficiency of the information that the Army submitted to SBA, SBA asserts that "[t]o the extent the Army initially failed to provide SBA with all of the pertinent information, the Army has corrected the deficiencies and SBA has received all pertinent information." SBA Report at 3. As the agency responsible for promulgating the regulations setting forth the required contents of an agency's letter offering a procurement requirement as an 8(a) contract, SBA's interpretation of the regulations deserves great weight. NANA Servs., LLC, B-297177.3, B-297177.4, Jan. 3, 2006, 2006 CPD ¶ 4 at 6. The record here, taken together with the deference that we accord to SBA in interpreting the requirements of its regulations, does not provide a basis to sustain Klett's protest that the Army provided SBA with insufficient information regarding whether placement of the seven-state 63rd RSC requirement in the 8(a) program would adversely impact Klett. See id. at 7.

Moreover, the record reflects that the only two specific items of information that the protester alleges the Army failed to provide to SBA were either provided to SBA or not required by SBA regulations. With regard to the first item of information, although Klett alleges that the Army failed to notify SBA that Klett, a small business, was performing requirements that were to be consolidated, Comments at 4, the Army's revised 8(a) program offering letter to SBA described Klett as a service-disabled, veteran-owned small business that had performed the four-state 90th RRC contract.⁴ AR, Tab 16, Army 8(a) Reservation Letter, Sept. 13, 2010, at 1. With regard to the second item of information, although Klett alleges that the Army failed to notify SBA that Klett's small business subcontractor was performing requirements that were to be consolidated, Comments at 4, neither the relevant SBA regulations nor the FAR identify a small business subcontractor's performance of a requirement to be offered for acceptance to the 8(a) program as one of the items of information that an offering agency must provide to SBA. See 13 C.F.R. § 124.502(c); FAR § 19.804-2. In this regard, SBA's response to Klett's protest explains that the adverse impact concept applies only to small business prime contractors, and not to small business subcontractors. SBA Report at 3. Given the deference we accord to SBA's

⁴ Klett's August 18 letter to SBA's San Francisco District Office also provided this information to SBA. AR, Tab 12, Klett Letter to SBA, Aug. 18, 2010.

interpretation of regulations that it promulgates, such as those regarding the 8(a) program, Singleton Enters.-GMT Mech., A Joint Venture, B-310552, Jan. 10, 2008, 2008 CPD ¶ 16 at 3, we have no basis to agree with Klett's position that the regulation encompasses information regarding subcontractors.

Klett's second protest contention is that the seven-state 63rd RSC requirement does not qualify as a new requirement under the SBA regulations. Comments at 5-7. The Army and SBA disagree and assert that because it qualifies as a new requirement, the SBA regulations expressly render an adverse impact determination unnecessary. Army Memorandum of Law at 14-15; SBA Report at 3.

Klett advances two arguments in opposition to the agencies' position, each based on a separate subsection of the relevant SBA regulation. Klett first points to language in the regulation providing that the expansion or modification of an existing requirement qualifies as a new requirement where the expansion or modification requires significant or different types of capabilities of work. Comments at 6 (citing 13 C.F.R. § 124.504(c)(1)(ii)(C)). Klett contends that the seven-state 63rd RSC requirement is not a new requirement because the tasks and labor categories associated with Klett's four-state 90th RRC contract are very similar to those of the seven-state 63rd RSC requirement. Comments at 6.

While there is no dispute that the type and location of work previously performed by Klett will be subsumed in the contract at issue here, SBA's regulations simply do not apply to this situation. Specifically, the SBA regulations provide that the expansion or modification of an existing requirement will be considered a new requirement when it "require[s] significant additional or different types of capabilities or work" or "where the magnitude of change is significant enough to cause a price adjustment of at least 25 percent (adjusted for inflation)." 13 C.F.R. § 124.504(c)(1)(ii)(C). It is the latter component of the regulation that the Army and SBA rely on in asserting that the seven-state 63rd RSC requirement constitutes a new requirement.

In its report to our Office, the Army explains that the \$3.498 million estimated value of the seven-state 63rd RSC requirement, which has a period of performance of 1 year, represents an 88 percent increase over the actual value of the final year of Klett's four-state 90th RRC contract. Army Memorandum of Law at 15. Because this magnitude of change exceeds the 25 percent threshold established in the regulation at issue, the Army asserts that the seven-state 63rd RSC requirement constitutes a new requirement under the regulation. Id. In its submission to our Office, SBA agrees with the Army that the magnitude of change between Klett's four-state 90th RRC contract and the seven-state 63rd RSC requirement fits within the regulatory definition of a new requirement, but SBA arrives at this conclusion through a different calculation. SBA Report at 3. SBA explains as follows:

In comparing requirements, SBA considers the overall value of the existing contract, including options, with the overall value of the requirement offered into the 8(a) program Klett's five-year

contract had a total value of over \$7 million. The subject one-year requirement has an estimated value under \$3.5 million, which is over 50 percent less than the value of Klett's contract

Id. (internal citations omitted). SBA further explains:

[E]ven if we were to compare the requirements based on the annual value, the subject requirement has a value more than 25 percent greater than Klett's most recent option period (\$1.8 million). Finally, the subject requirement is also new because it requires significant additional work by incorporating work in three states (Arizona, Nevada and California) performed under a different contract.

Id. (internal citations omitted). Based on the record, we agree with the Army and SBA that SBA reasonably determined that under the subsection of the regulation at issue, the seven-state 63rd RSC requirement was new, and no adverse impact analysis was required.

As a final matter, Klett points to a separate subsection of the regulation which provides that:

. . . SBA will consider the effects of combining or consolidating various requirements being performed by two or more small business concerns into a single contract which would be considered a "new" requirement as compared to any of the previous smaller requirements. SBA may find adverse impact to exist if one of the existing small business contractors meets the presumption [regarding the existing of an adverse impact] set forth in paragraph (c)(1)(i) of this section.

13 C.F.R. § 124.504(c)(2). Klett asserts that two small businesses—Klett and its subcontractor under the four-state 90th RRC contract—are performing a requirement to be consolidated and that Klett has demonstrated that it meets the presumption of adverse impact set forth in paragraph (c)(1)(i) of the SBA regulation.⁵ Comments at 5, 7.

The regulatory subsection cited by Klett, however, refers to two or more requirements that presently are being performed by two or more small business concerns. Only one of the requirements at issue in this protest (the four-state 90th

⁵ Specifically, Klett asserts that Klett performed the requirement for at least 24 months; Klett was performing the requirement at the time that it was offered to the 8(a) program; and that the dollar value of the requirement was 25 percent or more of Klett's most recent annual gross sales. Comments at 5; see also 13 C.F.R. § 124.502(c)(1)(i).

RRC requirement) was being performed by a small business concern, Klett; the other requirement (the three-state 63rd RRC requirement) was performed by a large business, TAD PGS. Moreover, SBA asserts that the regulation's reference to "two or more small business concerns" means small business prime contractors, and not subcontractors. SBA Report at 3. Accordingly, we find no merit to Klett's position that the regulation encompasses subcontractors.

Moreover, even an affirmative showing by Klett that the circumstances described in 13 C.F.R. § 124.504(c)(2) exist here would be unavailing. SBA previously has taken, and we have given deference to, the position that because this regulation provides that SBA "may," rather than "shall," find adverse impact if the circumstances described in the regulation exist, SBA has the discretion to accept a requirement into the 8(a) program in appropriate circumstances, even where one or more contractors met the presumption of adverse impact. Catapult Tech., Ltd., B-294936, B-294936.2, Jan. 13, 2005, 2005 CPD ¶ 14 at 6.

The protest is denied.

Lynn H. Gibson
Acting General Counsel