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Decision

Matter of: Alpa Technologies and Services, Inc.

File: B-408762.2

Date: February 12, 2014

Steven J. Koprince, Esq., Petefish, Immel, Heeb & Hird, LLP, for the protester. Tamekia W. Reese, Esq., United States Coast Guard, and Lara H. Hudson, Esq., and John W. Klein, 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 denied where the procuring agency and the SBA reasonably found that the requirements qualified as new under SBA's regulations.

DECISION

Alpa Technologies and Services, Inc., of Santa Clara, California, protests the decision by the United States Coast Guard and the Small Business Administration (SBA) to place a requirement for electronic maintenance and support services under the SBA's section 8(a) business development program through the issuance of task order request for quotes (TORFQ) No. HSCG44-13-J-PF8163. Alpa argues that the SBA improperly accepted this requirement into the 8(a) program without first determining whether acceptance would adversely impact the protester.

We deny the protest.

BACKGROUND

Alpa's Incumbent Contracts

In 2002, the Coast Guard awarded Alpa contract No. HSCG89-07-C-68AC05 for the provision of electronic maintenance and support services at shore units, floating units, unmanned remote sites, and for motor vehicles within the Thirteenth Coast

Guard District (District 13), which includes the states of Washington, Oregon, Idaho and Montana. Agency Report (AR) at 2. The contract was awarded as a competitive 8(a) set-aside under the SBA's 8(a) program, and had a total contract period of performance of five years. Id. On April 1, 2007, the Coast Guard awarded Alpa the follow-on contract for the same services in District 13. Like the predecessor contract, the follow-on contract was a competitive 8(a) set-aside. Id. Alpa performed this contract for five years.¹ Id. In June 2008, during Alpa's performance of the follow-on contract, Alpa graduated from the 8(a) program and therefore was no longer eligible for awards under the 8(a) program. Id.

On November 7, 2011, before Alpa's follow-on contract expired, the Coast Guard sought approval from the Director of the Department of Homeland Security, Office of Small and Disadvantaged Business Utilization (DHS OSDBU) to remove the requirement from the 8(a) program. AR, Tab 16, Coast Guard Request Letter, at 1. Specifically, the Coast Guard sought to compete the requirement as a 100-percent small-business set-aside under the General Services Administration's (GSA) Federal Supply Schedule (FSS) No. 70 (General Purpose Commercial Information Technology Equipment, Software and Services), pursuant to Federal Acquisition Regulation (FAR) part 12.² Id. The Director of the DHS OSDBU approved the Coast Guard's request on November 18. Id. at 3. The Coast Guard did not notify the SBA of its decision to remove the requirement from the 8(a) program. AR at 2, n.1.

On August 10, 2012, the Coast Guard issued a fixed-price task order, as a 100-percent small-business set-aside, to Alpa under Alpa's GSA schedule contract, for a base period of 3 months, with two 6-month options, in the amount of \$531,883.65. AR, Tab 14, Alpa GSA Schedule Award, at 1-2. The Coast Guard exercised both options under the task order.

¹ The follow-on contract was for a base period of six months, with four 12-month options. AR, Tab 16, Coast Guard Request Letter, at 2. The Coast Guard exercised all of the options in the follow-on contract and, on September 30, 2011, the agency modified Alpa's contract to extend the services for an additional 6 months. Id.

² In support of its request, the Coast Guard noted that Alpa had graduated from the 8(a) program. The agency also explained that its market research indicated that, while there were not any 8(a) companies capable of performing the requirement under the applicable North American Industry Classification System (NAICS) code, there were at least 10 small businesses capable of performing the requirement under the proper NAICS code. AR, Tab 16, Coast Guard Request Letter, at 2.

ILMS Contract and Task Order Solicitation

In November 2012, the Coast Guard decided to consolidate the requirement for electronic maintenance and support services in District 13, previously provided by Alpa, with the agency's other requirements for installation and logistics management services (ILMS), under a single indefinite-delivery/indefinite-quantity (ID/IQ) contract. AR at 1. By letter dated November 16, 2012, the Coast Guard offered the consolidated requirement to the SBA under the 8(a) business development program. AR, Tab 3, Coast Guard Offering Letter, at 1. The letter described the requirement as a new requirement for ILMS, but stated that the procurement included engineering and technical support services previously provided by Northstar Technology Systems, LLC. Id. at 1. As discussed below, while the requirement included electronic maintenance and support services in District 13 previously provided by Alpa, the letter did not mention this fact. Id.; Contracting Officer (CO) Statement at 4. The Coast Guard letter valued the offered acquisition at approximately \$295 million over five years. Id. at 3. By letter dated November 21, 2012, the SBA accepted the procurement. AR, Tab 4, SBA Acceptance Letter, at 1.

On January 10, 2013, the Coast Guard issued request for proposals (RFP) No. HSCG44-13-R-ILMS, as an 8(a) set-aside, under NAICS code 541330, Engineering Services, for the consolidated ILMS requirement. RFP at 1-2. Specifically, the RFP's statement of work included the following ILMS support services: (1) system documentation support; (2) system installation/de-installation of equipment; (3) system time compliance technical order support; (4) system field support; and (5) system management and engineering facilities. RFP, Statement of Work, at 1; CO Statement at 2-3. On May 17, after conducting the competition, the Coast Guard awarded four IDIQ contracts to the following companies: Alutiiq Pacific, LLC; LYNXNET, LLC; Chugach Information Technology; and TRITON Engineering Technology, LLC. CO Statement at 4.

On July 31, the Coast Guard notified Alpa that the electronic maintenance and support services previously provided by Alpa in District 13 would be competed under the ILMS IDIQ contract. AR, Tab 6, Coast Guard Email (July 31, 2013), at 1. On August 13, 2013, the Coast Guard issued the TORFQ, anticipating the issuance of a fixed-price task order for a base year, and four 12-month options. TORFQ at 1. The work under the TORFQ encompassed the work being performed by Alpa, and the cover email transmitting the TORFQ stated that Alpa is the incumbent for the requirement. AR, Tab 12, Coast Guard Email (Aug. 13, 2013), at 1; CO Statement at 5.

After evaluating the quotes, the Coast Guard recommended award of the task order to Alutiiq Pacific, LLC, in the amount of \$9,383,207.12 for the base year and options. CO Statement at 5.

Prior GAO Protest

On August 23, 2013, Alpa submitted a protest to our Office, arguing that the Coast Guard failed to notify the SBA in its 8(a) offering letter that the work to be performed under the consolidated ILMS solicitation would include Alpa's incumbent services.³ AR, Tab 7, Alpa Protest (Aug. 23, 2013), at 2. In this regard, Alpa asserted that if the Coast Guard had provided the SBA with an appropriate offering letter, the SBA would have conducted an adverse impact analysis in accordance with 13 C.F.R. § 124.504, and likely would have concluded that Alpa was adversely impacted by the Coast Guard's action. Id.

On September 12, the Coast Guard notified our Office of its intent to take corrective action, stating that the agency would provide the SBA with the additional information from Alpa's protest, and request a determination from the SBA either confirming or revising its acceptance of the ILMS requirement into the 8(a) program. AR, Tab 8, Notice of Corrective Action, at 2. Accordingly, because the corrective action granted the relief requested by the protest, our Office dismissed the protest as academic. AR, Tab 9, GAO Dismissal (Sept. 12, 2013), at 1.

SBA's Determination

On September 19, the Coast Guard requested that the SBA determine whether the additional information concerning Alpa's performance of the incumbent requirement triggered the need for an adverse impact requirement and a revised acceptance letter for the 8(a) program. AR, Tab 10, Coast Guard Letter (Sept. 19, 2013), at 3. In addition, the Coast Guard provided the SBA with the following documents: (1) the Coast Guard's November 16, 2012 offering letter; (2) the SBA's November 21, 2012 acceptance letter; (3) the TORFQ, dated August 13, 2013; and (4) Alpa's protest, dated August 23, 2013. Id.

On November 8, the SBA issued a letter responding to the Coast Guard's request. AR, Tab 11, SBA Determination (Nov. 8, 2013). Specifically, the SBA found that "[w]hile the [Coast Guard's] offering letter was flawed" because it did not state that Alpa was the incumbent for the District 13 electronic maintenance and support services, the agency's actions "did not result in a decision that was contrary to law or regulation." Id. at 6. The SBA found that "an adverse impact determination regarding Alpa was not required" because, pursuant to the SBA's regulations, "the requirement in question is a new requirement" and the "SBA need not perform an impact determination where a new requirement is offered to the 8(a) BD program." Id. The SBA also found that the requirement in question had not been released from the 8(a) program, and therefore, pursuant to the SBA's regulations, the SBA was not required to perform an impact determination on a requirement within the

³ This protest was docketed as B-408762.

8(a) program. Id. at 5-6. Finally, the SBA explained that it would not have found that Alpa had been adversely impacted even if it had conducted an impact determination, stating:

[E]ven if SBA had authorized the release of the requirement from the 8(a) BD program and SBA were to consider any claimed “adverse impact” suffered by [Alpa], SBA would look only at the claimed adverse impact that happened after the requirement was performed outside the 8(a) program (or since 2012). As such, the presumption of adverse impact would not apply because the requirement was not performed outside the 8(a) program for at least two years.

Id. This protest followed.

DISCUSSION

Alpa challenges the SBA’s determination that the ILMS requirement is exempt from an adverse impact analysis because it is either a “new” requirement or a “follow-on” requirement. In this regard, Alpa argues that SBA’s failure to conduct an adverse impact analysis was contrary to 13 C.F.R. § 124.504. Protester’s Comments (Dec. 27, 2013), at 2. Alpa also contends that, even if the requirement is new, SBA’s regulations require an impact analysis because multiple small business requirements were consolidated. As discussed below, we find reasonable the SBA’s determination that the requirement was new, and that an adverse impact analysis was therefore not required.⁴

Section 8(a) of the Small Business Act authorizes the 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). The Act affords the SBA and contracting agencies broad discretion in selecting procurements for the 8(a) program; our Office 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

⁴ The total value of the task order ultimately awarded to Alutiiq Pacific, LLC, was \$9,383,207.12. AR, Tab 10, Coast Guard Letter (Sept. 19, 2013), at 3; CO Statement at 5. Although the task order issued under the TORFQ is valued at less than \$10 million dollars, Alpa’s protest challenges the inclusion of the District 13 electronic maintenance and support services in the ILMS ID/IQ contract, rather than the task order. In addition, Alpa had no reason to know until the Coast Guard issued the TORFQ, that the Coast Guard intended to transfer this work to the ILMS ID/IQ. Accordingly, Alpa’s protest is timely and one over which our Office has jurisdiction. See LBM, Inc., B-290682, Sept. 18, 2002, 2002 CPD ¶ 157 at 6-7.

regulations may have been violated. 4 C.F.R. § 21.5(b)(3); JXM, Inc., B-402643, June 25, 2010, 2010 CPD ¶ 158 at 3.

Under the 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). The adverse impact review process 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. 13 C.F.R. § 124.504(c)(1)(i).

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.⁵ 13 C.F.R. §§ 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. 13 C.F.R. § 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.

⁵ With regard to a requirement that is created through a consolidation of existing requirements, the regulations provide as follows:

In determining whether the acceptance of a requirement would have an adverse impact on a group of small businesses, the 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.

13 C.F.R. § 124.504(c)(2).

13 C.F.R. § 124.504(c)(1)(ii)(C). SBA's regulations explain that an adverse impact analysis is not required for a new requirement because "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." 13 C.F.R. § 124.504(c)(1)(ii)(A).

First, Alpa challenges SBA's determination that the requirement at issue is "new" under the regulations, and therefore, exempt from an impact analysis. In this regard, the protester does not specifically disagree that the requirement is "new." Protest at 9-11; Protester's Comments (Dec. 27, 2013), at 10-11. Rather, the protester argues that the SBA's determination letter "simply asserts that the requirement is 'new' without providing any explanation as to how it arrived at this conclusion," and that "[b]ecause the SBA cannot demonstrate that it reasonably evaluated whether [the requirement] is new, its resulting [i]mpact [d]ecision cannot be upheld." Protest at 9.

In response to the protest, the SBA⁶ explains that the Coast Guard described the requirement as new, and that it was reasonable for the SBA to rely on the description provided by the Coast Guard. SBA Report (Dec. 18, 2013), at 7. As discussed below, we agree that the SBA's reliance on the Coast Guard's description was reasonable.

As explained above, 13 C.F.R. § 124.504(c)(1)(ii)(C) provides that a "modification" of an existing requirement will be considered "new" (and therefore exempt from the requirement to do an adverse impact analysis) where the "magnitude of change" between the original and modified requirements is at least 25 percent. The Coast Guard's letter to the SBA explained the following rationale for categorizing the requirement as "new": "[T]he ILMS procurement (at issue here) carries a maximum value of \$295 million. This figure dwarfs the price or dollar value of the [District 13] work that [Alpa] seeks to hold (approximately \$10 million which equates to 3% of the ILMS [ID/IQ Contract])." AR, Tab 10, Coast Guard Letter (Sept. 19, 2013), at 3.

In its response to the Coast Guard's request, the SBA found that "it was appropriate to identify the proposed procurement as a new requirement pursuant to 13 C.F.R. § 124.504(c)(1)(ii)(C)."⁷ AR, Tab 11, SBA Determination, at 4. In addition, the

⁶ At our Office's request, SBA provided its views on the protest.

⁷ SBA also noted, however, that, "given the associated procurement history, and given the provisions of 13 C.F.R. § 124.504(c)(2), the [Coast Guard] should have advised SBA of the work that was included that was previously performed by Alpa, both as a 8(a) BD program participant and under [Alpa's current FSS contract]." AR, Tab 11, SBA Response Letter, at 4. Ultimately, however, SBA concluded, based on its review, that "this flaw is not fatal." Id.

SBA stated that “pursuant to 13 C.F.R. § 124.504(c)(1)(ii)(C), the requirement in question is a new requirement,” and consequently, “as prescribed in 13 C.F.R. § 124.504(c)(1)(ii)(D), SBA need not perform an impact determination where a new requirement is offered to the 8(a) BD program.” Id. at 6. To the extent the protester argues that the SBA’s determination is not supported by the record, we think the Coast Guard’s letter provided an adequate basis for SBA to find that the requirement was “new.” Based on this record, we find no basis to sustain the protest.

Next, Alpa argues that, even if the requirement is new, SBA failed to conduct an impact analysis on new requirements where multiple small business requirements are consolidated, as required by 13 C.F.R. § 124.504(c)(2). As discussed above, this provision states 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.” 13 C.F.R. § 124.504(c)(2). It further explains that “SBA may find adverse impact to exist if one of the existing small business contractors meets the presumption [regarding the existence of an adverse impact] set forth in paragraph (c)(1)(i) of this section.” Id. Accordingly, the protester asserts that “[b]ecause the ILMS contract is a consolidation of small business requirements, the SBA must perform an adverse impact analysis even if the contract is ‘new.’” Protest at 11.

We find the protester’s argument here unavailing. While the SBA’s regulation requires an adverse impact analysis for new requirements where multiple small business requirements are consolidated, the SBA previously has taken the position—to which our Office has given deference—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. See Klett Consulting Group, Inc., B-404023, Dec. 20, 2010, 2010 CPD ¶ 301, at 5; Catapult Tech., Ltd., B-294936, B-294936.2, Jan. 13, 2005, 2005 CPD ¶ 14 at 6. With regard to the presumptions of adverse impact set forth in 13 C.F.R. § 124.504(c)(1)(i), as mentioned above, the SBA stated that a presumption of adverse impact would not apply to Alpa (even if the SBA had authorized the release of the requirement from the 8(a) program) since the requirement was not performed outside the 8(a) program for at least two years. AR, Tab 11, SBA Determination, at 6. Accordingly, the record supports the conclusion that, had SBA performed the required analysis at the time, it would have concluded that Alpa would not suffer adverse impact. Under these circumstances, it does not appear that Alpa has suffered any prejudice by SBA’s failure to perform an adverse impact analysis. See Catapult Tech., Ltd., supra.

Finally, Alpa argues that the Coast Guard removed the incumbent work from the 8(a) program by awarding a task order to Alpa under Alpa's FSS contract, after Alpa graduated from the 8(a) program, and therefore, the SBA was required to conduct an adverse impact analysis in accordance with 13 C.F.R. § 124.504(c). The SBA disagrees that the Coast Guard's procurement under the FSS removed the requirement from the 8(a) program, arguing that the "once 8(a), always 8(a)" rule applies. SBA Report (Dec. 18, 2013), at 3-5. Our Office has recognized that the FAR exempts task orders issued under FSS contracts from application of the set-aside withdrawal requirements found in FAR § 19.506. See Global Analytic Info. Tech. Servs., Inc., B-297200.3, Mar. 21, 2006, 2006 CPD ¶ 53 at 2; Millennium Data Sys, Inc., B-292357.2, Mar. 12, 2004, 2004 CPD ¶ 48 at 9; see also K-LAK Corp. v. United States, 98 Fed. Cl. 1, 7-8 (Fed. Cl. 2011). Nonetheless, in light of the SBA's position here that the requirement is new, as discussed above, the SBA would not be required to conduct an adverse impact analysis even if the SBA agreed that the requirement had been legally removed from the 8(a) program. Accordingly, the protester has not established prejudice from the SBA's actions.

In sum, we find that the SBA's conclusion that the requirement was "new" and therefore exempt from an adverse impact determination was reasonable.

The protest is denied.

Susan A. Poling
General Counsel