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Decision

Matter of: Professional Security Corporation

File: B-410606

Date: January 13, 2015

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Elise Harris, Esq., Department of Health and Human Services; and John W. Klein, Esq., and Sam Q. Le, Esq., U.S. Small Business Administration, for the agencies. Robert T. Wu, Esq., Scott H. Riback, Esq., and Tania Calhoun, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest alleging that Small Business Administration improperly failed to conduct adverse impact analysis when accepting requirement into the section 8(a) program is denied when such an analysis was not required under the circumstances.

DECISION

Professional Security Corporation (PSC), of Hattiesburg, Mississippi, protests the decision by the U.S. Department of Health and Human Services, Centers for Disease Control and Prevention (CDC), and the Small Business Administration (SBA) to place a requirement for security guard services under the SBA's section 8(a) business development program through the award of contract No. 200-2014-59525 to Chenega Total Asset Protection LLC, of Anchorage, Alaska, an Alaskan Native Corporation (ANC). PSC argues that the SBA failed to perform a required adverse impact determination.

We deny the protest.

BACKGROUND

This protest involves the decision by the CDC and the SBA to place a requirement for security guard services at the CDC's Atlanta, Georgia, and Fort Collins, Colorado, offices under the SBA's section 8(a) business development program.

The contract at issue was awarded to Chenega for a price of \$71,125,166, consisting of one base period and four one-year option periods, utilizing other than competitive procedures in accordance with Federal Acquisition Regulation (FAR) §§ 6.302-5(a)(2)(i) and (b)(4), which exempt from full and open competition acquisitions made using the SBA's authority under 15 U.S.C. § 637(a)(16). Agency Report (AR), exh. 9, Tab B, Award Decision Memorandum, at 1; Tab G, Justification for a Sole-Source 8(a) Contract over \$20 million - CDC Atlanta & Fort Collins Security Guard Services (J&A), at 1.

Historically, the Atlanta-area guard services requirement had been performed by a concern known as Metropolitan Security Service, Inc. d/b/a Walden Security, a large business, who performed these services since March of 2000. Protest at 5. In 2012, the CDC decided to set aside the Atlanta-area guard services requirement for small businesses, conducting the procurement as a competitive small business set aside. See Walden Security, B-407022, B-407022.2, Oct. 10, 2012, 2012 CPD ¶ 291. PSC ultimately received the contract award pursuant to that procurement with Walden proposed to serve as the firm's subcontractor. Contracting Officer's Statement at 2; Protest at 7.

Subsequent to the contract award to PSC, a small business competitor for the requirement filed a size-status protest with the SBA. AR, exh. 11, Tab A, SBA Size Determination Memorandum, at 1. In responding to that protest, the SBA area office found that PSC was not a small business concern for purposes of the requirement because PSC was unduly reliant on Walden for performance of the contract, and that PSC was largely incapable of performing the requirement without Walden. Id. at 7. That decision was appealed by PSC to the SBA's Office of Hearings and Appeals (OHA), which affirmed the SBA area office's determination that PSC was other than small for that contract. Size Appeal of Professional Security Corporation, SBA No. SIZ-5548 (2014).

At the time of OHA's ultimate disposition of the size protest, PSC and Walden had been performing the requirement under the original base-year of the contract. Nonetheless, in light of the SBA's finding, the CDC elected not to exercise the remaining options of the contract, and instead to procure the Atlanta-area guard services requirement through a consolidation of that requirement with the agency's Fort Collins, Colorado, guard services requirement, which was then being performed by Chenega. AR, exh. 9, Tab G, J&A, at 2-4. On September 29, the agency informed PSC that the consolidated contract, including the Atlanta-area guard services requirement, was awarded to Chenega through the SBA's 8(a) business development program. Protest at 8-9. This protest followed.

DISCUSSION

PSC primarily argues that the CDC and SBA's decision to place the Atlanta-area guard services requirement in the 8(a) program violates the SBA's regulations

because the SBA failed to conduct an adverse impact analysis in accordance with 13 C.F.R. § 124.504.¹ Specifically, the protester argues that the SBA improperly failed to consider the adverse impact on PSC and “other similarly situated small businesses” that would have an opportunity to compete for the Atlanta-area guard services requirement, were the agency made to procure this requirement outside the section 8(a) program. Protest at 15. PSC also argues that the CDC failed to provide the SBA with all relevant facts, and if it had done so PSC asserts that the SBA would have found adverse impact on small businesses and not accepted the procurement for award as an 8(a) contract.² Protester’s Comments at 8.

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 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 CDC responds that an adverse impact analysis was not required here, because the requirement awarded to Chenega was a new requirement resulting from the consolidation of the Atlanta-area and Fort Collins guard service requirements.

¹ PSC raises various other challenges, including that the CDC’s decision to offer the requirement to the SBA was motivated by bad faith on the part of the agency toward PSC because the firm pursued previous protests related to the Atlanta-area guard services requirement, and that the decision was made based on undue union influence. Protest at 14. Since we find no basis to object to the decision to place the requirement with the 8(a) program, we need not address the other issues raised by PSC. However, we note with respect to PSC’s bad faith allegation, that the firm has not provided any evidence supporting its allegation of bad faith. See Empire Veterans Group, Inc., B-408866.2, B-408866.3, Dec. 17, 2013, 2013 CPD ¶ 294 at 5 (denying unsupported allegation of bad faith).

² The purportedly relevant information not supplied by the agency to the SBA was that there were eight small businesses, including PSC, interested in performing the Atlanta-area guard services requirement were it to be competed outside of the 8(a) program, and that PSC was the incumbent contractor on the Atlanta-area guard services contract. Id. at 15.

Legal Memorandum at 10-11. In this regard, the agency asserts that comparing any of the four option periods on Chenega's contract to a similar option period on PSC's prior contract leads to a price increase of 30 percent for Chenega's contract over PSC's contract. The agency argues that this increase in contract price exceeds the threshold for being considered a new requirement under the SBA's regulations, and thus exempted this procurement from an adverse impact analysis. Id. (citing Alpa Tech. and Servs., Inc., B-408762.2, Feb. 12, 2014, 2014 CPD ¶ 66 at 5, where our Office discusses the SBA's new requirement rules pertaining to an adverse impact analysis, i.e., 13 C.F.R. § 124.504(c)(1)(ii)).

At our Office's invitation, the SBA provided comments addressing the issues presented in PSC's protest. In response to the issue of whether the procurement was for a new requirement, the SBA responds that it reasonably relied on the CDC's determination that the procurement was a new requirement, and therefore, the SBA properly considered it to be a new requirement exempt from the requirement to conduct an adverse impact analysis. SBA Comments at 6. The SBA also argues that even if the procurement was not considered a new requirement, it still would not have performed an adverse impact analysis pertaining to PSC as the firm was an other-than-small incumbent contractor, and "should not benefit from a scheme designed to protect small business concerns." Id. at 8.

We need not address whether this was a "new requirement" under the SBA's regulations, because we agree with the SBA that since PSC was found to be an other-than-small incumbent under the Atlanta-area guard services contract, it was not a "small business" as contemplated in the SBA's regulatory framework pertaining to an adverse impact determination requirement. See 13 C.F.R. § 124.504(c)(1). Further, we agree with the SBA that the CDC was not required to identify PSC's incumbent contract in its offer letter to the SBA, as PSC was not a small business contractor with respect to that contract. See 13 C.F.R. § 124.502(c)(10) (requiring small business contractors who have performed the requirement in the past 24 months to be identified in the offer letter).³

Here, as noted, SBA conclusively found that PSC is not a small business for purposes of its performance on the incumbent Atlanta-area guard services contract. For instance, the SBA's OHA found that PSC was proposing to perform the contract by adopting Walden's entire incumbent workforce en masse, and that PSC was proposing, as its entire management team, the incumbent Walden management team to perform the contract. Size Appeal of Professional Security Corporation,

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.

supra. at 9. SBA's OHA also found that PSC did not, standing alone, have the resources or experience necessary to perform the Atlanta-area guard services requirement. Id. at 10-11. SBA's OHA concluded that PSC made virtually no contribution of employees or other value to the teaming arrangement with Walden "beyond Appellant's small business status." Id. at 10. Since PSC was found to be other-than-small by SBA's OHA with respect to its prior contract for the Atlanta-area guard services, we agree with the SBA that the agency was not required to consider any adverse impact on PSC owing to its performance on that contract.

PSC also argues that even if it was not a small business under the incumbent contract due to the OHA's ruling, it remains a small business ready to perform the requirement should it be competed again outside of the 8(a) program. Protester's Supp. Comments at 23. Further, PSC asserts that there are many other small businesses interested in the requirement. Id. According to PSC, these facts are enough to trigger a requirement for an adverse impact analysis. Id. We disagree.

As stated previously, 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). As the Act states, the adverse impact review process is designed to protect small business concerns that are performing government contracts awarded outside the 8(a) program. Id. Thus, the relevant consideration for the SBA is the impact on individual and groups of small businesses who are performing government contracts outside the 8(a) program, and with respect to the adverse impact on other small business programs, the number and value of contracts in the subject industry in the 8(a) business development program as compared with other small business programs. See 13 C.F.R. § 124.504(c)(3) (defining the SBA's considerations for adverse impact on other small business programs).

The Act's language clearly establishes that the adverse impact requirement is meant to protect other small businesses performing contracts outside of the 8(a) program, not to protect small businesses that might be interested in performing the requirement prospectively, as the protester argues. Further, such an interpretation is consistent with the "new requirement" rule, discussed above, which obviates the need for an adverse impact analysis for a new requirement, as "[w]here a requirement is new, no small business could have previously performed the requirement and, thus, SBA's acceptance of the requirement for the 8(a) BD program will not adversely impact any small business." 13 C.F.R. § 124.504(c)(1)(ii)(A). By its terms, this rule is predicated on the lack of adverse impact on small businesses since there are none who could have previously performed the requirements, and does not consider the impact on small businesses who would be interested in performing the new requirement prospectively.

Since PSC was not a small business under the incumbent contract, and no other small business concern is implicated with respect to performance of these requirements, we have no reason to question the SBA's position that an adverse impact analysis was not required. Further, as there were no other small business incumbents for the relevant requirements, we have no basis to disagree with the SBA that the CDC was not required to identify PSC, or any other small business that might be interested in performing the work prospectively, in its offer letter. As we determine that the CDC's offer of the requirement to the SBA was unobjectionable, and the SBA's acceptance of the requirement into the 8(a) program was likewise unobjectionable, we need not address the remainder of the issues raised by PSC in its protest.

The protest is denied.

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General Counsel