



Decision

Matter of: AHNTECH, Inc.

File: B-401092

Date: April 22, 2009

Leigh T. Hansson, Esq., Gregory S. Jacobs, Esq., and Steven D. Tibbets, Esq., Reed Smith LLP, for the protester.

Lt. Col. Mark E. Allen, Department of the Air Force, and John W. Klein, Esq., and Kenneth Dodds, Esq., Small Business Administration, for the agency.

Nora K. Adkins, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Small Business Administration (SBA) properly accepted requirement for operations, maintenance and support of an Air Force range into the 8(a) program without determining whether acceptance would have an adverse impact on an existing small business that had been performing similar services at the range where based on the record there is no reason to object to the SBA and the Air Force decision that the services to be obtained under the 8(a) program constituted a new requirement.

DECISION

AHNTECH, Inc. of San Diego, California protests the decision by the Department of the Air Force, Air Force Special Operations Command (AFSOC) and the Small Business Administration (SBA) to place a requirement for operations, maintenance and support of the Melrose Range in New Mexico under the SBA's section 8(a) program for award on a sole-source basis to Glacier Technologies, LLC of El Paso, Texas, an Alaska Native Corporation.

We deny the protest.

On November 16, 1999, the Air Force's Air Combat Command (ACC) awarded a small business set-aside contract to AHNTECH for operation support of its 11 primary training ranges (PTR), which included both the bombing and gunnery range and the electronic combat range at Melrose. This contract ended on July 31, 2007. The Air Force and AHNTECH entered into a follow-on contract on August 1, 2007. Contracting Officer's Statement (COS) at 2. At that time, AHNTECH was aware that

the Melrose Range portion of the contract would become an AFSOC asset and would come off ACC's PTR contract at the end of fiscal year 2008.¹ Protest at 3. Nearing the end of the follow-on contract the Air Force realized it would not have any services at Melrose Range beyond ACC's PTR contract option end date of September 30, 2008. To address the gap in services, ACC exercised an option to extend AHNTECH's services to March 31, 2009. COS at 2-3.

During this option period, ACC and AFSOC reviewed their mission needs and determined that AFSOC's needs were significantly different from ACC's and could not be supported by ACC's PTR contracts. AFSOC began developing a new Comprehensive Range Plan for the Melrose Range, which focused on AFSOC's core missions to "support joint, integrated [special operations forces] missions, and [Department of Defense] air and ground training." COS at 3. AFSOC decided to award its own contract for the Melrose Range at the expiration of ACC's PTR contract and conducted market research to determine if there were eligible 8(a) businesses that could perform this work. Upon completion of its market research, AFSOC identified Glacier as an 8(a) company capable of performing the work and requested the SBA's approval.

On December 4, the SBA accepted AFSOC's Melrose Range requirement into the 8(a) program and provided approval of a direct award to Glacier. In so doing, the SBA stated that it had determined that AFSOC's Melrose Range requirement would be considered a new requirement and thus an adverse impact determination regarding the 8(a) contract award's effect on small business concerns was not needed. AFSOC notified ACC of the anticipated award to Glacier, and on January 16, 2009, ACC notified AHNTECH that it should proceed with its required phase-out plan. On January 26, 2009, AFSOC's Director of Small Business received a letter from AHNTECH requesting documentation of the SBA's adverse impact determination. On February 2, the AFSOC Director of Small Business responded to AHNTECH's letter stating that the SBA had accepted and approved AFSOC's request to pursue an 8(a) award and that the SBA had concluded that an adverse impact determination was not required.

AHNTECH filed a protest to our Office on February 9 arguing that AFSOC's use of the 8(a) program was improper and that an adverse impact determination was required but not done.

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.

¹ The change of responsibilities to AFSOC was a result of the Defense Base Closure and Realignment Commission decisions, which would have resulted in closing the base if the base had not been reassigned to AFSOC. COS at 2.

15 U.S.C. § 637(a) (2006). The Act affords the 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) (2008); Rothe Computer Solutions, LLC d/b/a Rohmann J.V., B-299452, May 9, 2007, 2007 CPD ¶ 92 at 3.

Under the Small Business Act's implementing regulations, the SBA is precluded from accepting into the 8(a) program a procurement for which the contracting agency had previously "issued a solicitation for or otherwise expressed publicly a clear intent to reserve the procurement as a small business or small disadvantaged business set-aside prior to offering the requirement to SBA for award as an 8(a) contract . . . [except] under extraordinary circumstances." 13 C.F.R. § 124.504(a) (2008). Moreover, these regulations preclude the SBA from accepting 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).

AHNTECH first argues that the SBA's acceptance of the Melrose Range requirement under the 8(a) program was contrary to its regulations because the Air Force previously expressed a clear intent to reserve the requirement for small businesses by virtue of its obtaining these services from a small business for the last 8 years. In this regard, AHNTECH asserts that this history should be enough evidence for our Office to interpret the SBA's regulations to include circumstances where a requirement has been, as it alleges the Melrose Range requirement was, historically set aside for small businesses.

The SBA states that it determined that AFSOC did not intend to reserve this requirement for small businesses since it did not issue a solicitation for the pending Melrose Range requirement as a small business set-aside, nor did it issue a pre-solicitation notice or synopsis expressing its intent to solicit offers for the pending requirement. In addition, the SBA does not support AHNTECH's argument that 13 C.F.R. § 124.504(a), by its language, applies merely because a requirement has been historically set aside for small businesses. Further, we will not interpret the regulation's language to preclude the removal of a requirement for the 8(a) program that was allegedly historically set-aside for small businesses. As the agency responsible for promulgating the applicable regulations, the SBA's interpretation of the regulations, that is, what constitutes "express[ing] a clear intent to reserve the requirement for small businesses," deserves great weight, and we defer to the SBA's interpretation so long as that interpretation is reasonable. NANA Servs., LLC, B-297177.3, B-297177.4, Jan. 3, 2006, 2006 CPD ¶ 4 at 10. AHNTECH has provided no basis for us to disagree with the SBA's interpretation of 13 C.F.R. § 124.504(a) as not including requirements that were allegedly historically set-aside for small businesses.

Additionally, AHNTECH claims that the SBA was required, but failed, to perform an analysis as to whether the 8(a) award would have an adverse impact on individual

small business, a group of small businesses in a specific geographical location, or other small business programs as was required by 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. 13 C.F.R. § 124.504(c). The SBA presumes adverse impact to exist where the 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).

As indicated above, the Air Force and the SBA assert that an adverse impact analysis was not required because AFSOC's Melrose Range requirement was considered to be a new requirement. In this regard, the SBA's regulations provide that the "SBA need not perform an impact determination where a new requirement is offered to the 8(a) [business development] program." 13 C.F.R. § 124.504(c)(1)(ii)(D). The SBA's regulations define a "new requirement" as a requirement that has not previously been procured by the relevant procuring activity. 13 C.F.R. § 124.504(c)(1)(ii) and (2). The rationale for exempting new requirements from adverse impact analysis under the SBA's regulations is that "[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) [business development] program will not adversely impact any small business." 13 C.F.R. § 124.504(c)(1)(ii)(A). The regulations further 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." 13 C.F.R. § 124.504(c)(1)(ii)(C).

The Air Force and the SBA disagree with AHNTECH's assertion that its work under the ACC contracts was substantially similar to the AFSOC Melrose Range requirements to be obtained under the 8(a) program. The SBA's analysis established that AHNTECH's contracts were awarded by ACC and the pending requirement will be awarded by AFSOC; that ACC and AFSOC have different missions; and that as a result AFSOC will use the Melrose Range in a different manner, which will require different operations, maintenance and support services. The Air Force has explained the significant difference in the missions of ACC and AFSOC and how this relates to the range and support services required. Moreover, the SBA has confirmed the Air Force's analysis finding a difference in value between the AFSOC requirement and the ACC requirement as much greater than the 25 percent required to meet the regulation's new requirement definition for the expansion or modification of existing requirements.

AHNTECH has not rebutted the Air Force's and the SBA's explanation regarding the differences between those previously performed by AHNTECH and those contemplated under this 8(a) contract. For example, AFSOC requires support for new aircraft not currently operated on the Melrose Range, use by special operations ground troops, and live fire support for AC-130 gunships. COS at 3-4; AR Tab 2.1, AFSOC/A3 Statement of Work Analysis. Under these circumstances, we have no basis to object to the SBA's and Air Force's analyses and interpretation as to why the Melrose Range requirement to be obtained under the 8(a) program was new. Thus, we find that the SBA properly accepted AFSOC's Melrose Range requirement into the 8(a) program without an adverse impact analysis.²

The protest is denied.

Gary L. Kepplinger
General Counsel

² AHNTECH also argues AFSOC's offering letter did not provide adequate acquisition history to support the SBA's determination that no adverse impact determination was required. The record shows, however, that the SBA ultimately obtained all of the information that should have been provided. We have no basis to conclude that the discrepancies in the initial offering letter, which were ultimately resolved, support a finding that the SBA violated its regulations by ultimately accepting this requirement into the 8(a) program. See C. Martin Co., Inc., B-292662, Nov. 6, 2003, 2003 CPD ¶ 207 at 5.