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**Comptroller General
of the United States**

**United States Government Accountability Office
Washington, DC 20548**

Decision

Matter of: Enterprise Information Services, Inc.

File: B-403028

Date: September 10, 2010

Alexander J. Brittin, Esq., Brittin Law Group, P.L.L.C., and Jonathan D. Shaffer, Esq., Smith Pachter McWhorter PLC, for the protester.

Behn M. Kelly, Esq., Col. Mary E. Harney, and Col. Thomas J. Hasty III, Department of the Air Force, and Kenneth Dodds, Esq., Small Business Administration, for the agencies.

Louis A. Chiarella, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Where a competitive request for task order proposals issued under a long-term multiple-award indefinite-delivery/indefinite-quantity contract limits competition to small disadvantaged business concerns, procuring agency properly may require firms to re-certify as to their small business size status as of the time they submit their task order proposals.

DECISION

Enterprise Information Services, Inc. (EIS), of Vienna, Virginia, protests the terms of task order request for proposals (Task Order RFP) No. FA8773-10-R-6008, issued by the Department of the Air Force for network services in furtherance of the agency's enterprise network services acquisition (ENSA) procurement. EIS asserts that the solicitation improperly requires offerors to re-certify their small business size status as of the time they submit their task order proposals.

We deny the protest.

The solicitation contemplates the issuance of a task order under the successful offeror's General Services Administration (GSA) 8(a) streamlined technology

acquisition resources (STARS) contract.¹ The 8(a) STARS contract is a multiple-award, indefinite-delivery/indefinite-quantity (ID/IQ) government-wide acquisition contract (GWAC) set aside for section 8(a) small disadvantaged business concerns.² The 8(a) STARS GWAC was originally awarded by GSA on June 1, 2004, with a 3-year base period and two 2-year options.³ At the time of contract award, all contract holders were required to certify their size eligibility under one of the GWAC's eight functional area North American Industry Classification System (NAICS) codes. In May 2009, GSA exercised the second option under the 8(a) STARS GWAC for the period from June 1, 2009, to May 31, 2011; GSA required contract holders to re-certify their size status as part of the exercise of this contract option.

The solicitation at issue here states that the Air Force is conducting a "100% 8(a) small business set-aside" procurement among those 8(a) STARS contract holders within the designated functional area (and NAICS code) applicable to the ENSA task order. Task Order RFP at 1. Additionally, the solicitation requires each vendor to re-certify its current status as a small business concern as of the date of proposal submission. *Id.*, Amend. 001, at 1. The agency's reason for this requirement is "to ensure that the task order award would go to a small business [concern] for which the Air Force would receive 8(a) credit." Contracting Officer's Statement, July 6, 2010, at 5.

This protest relates solely to the solicitation's re-certification requirement. Specifically, EIS asserts that the Air Force lacks a reasonable basis to require firms to re-certify their small business size status as of the time they submit task order proposals.⁴ The protester states that it certified its size status when submitting its

¹ The total estimated value of the task order being issued is approximately \$87.7 million. Agency Report (AR), Tab 7I, ENSA Acquisition Plan, at 1. As the value of the task order is in excess of \$10 million, our Office has jurisdiction to review this protest. See 10 U.S.C. § 2304c(e)(1) (2006).

² Section 8(a) of the Small Business Act authorizes the Small Business Administration (SBA) to enter into contracts with government agencies and to arrange for performance of the contracts by awarding subcontracts to socially and economically disadvantaged small businesses. 15 U.S.C. § 637(a) (2006).

³ Orders under the 8(a) STARS GWAC are required to be issued in accordance with Federal Acquisition Regulation (FAR) § 16.505, which governs orders under indefinite-delivery contracts. See AR, Tab 11B, 8(a) STARS Contract Ordering Guide, June 2010, at 18 (available online at www.gsa.gov/8astars).

⁴ EIS acknowledges that it no longer qualifies as a small business concern as of January 1, 2010, and that it graduated from the 8(a) business development program on November 22, 2008, even before the exercise of the current 8(a) STARS GWAC option. Protest at 8-9.

initial proposal to GSA for award of its 8(a) STARS GWAC, and re-certified its size status in May 2009 prior to exercise of the current contract option. EIS maintains that its small business status for purposes of receiving task orders was established by this last re-certification and that it remains in effect for the duration of the current 8(a) STARS GWAC option. EIS asserts that, because the 8(a) STARS GWAC option here was properly exercised by GSA, any task order issued under the option would be considered an award to an 8(a) small business concern for which the ordering agency may claim 8(a) credit. Since, in its view, the agency's rationale for requiring recertification--claiming credit for award to an 8(a) small business--is not valid, EIS concludes that the decision to require recertification is arbitrary and an abuse of discretion. As explained below, we see nothing improper in the challenged requirement.

The purpose of the 8(a) business development program as it relates to government acquisitions is to ensure that a fair proportion of all government contracts be placed with eligible small disadvantaged business concerns. 15 U.S.C. § 637(a); FAR § 19.201(a). Implicit in this is the notion that the work under a contract, or task order, will actually be performed by the small disadvantaged business concern. Toward this end, the FAR is designed, for example, to ensure that 8(a) contractors actually perform a majority of the work under a set-aside contract. FAR §§ 19.811-3(e), 52.219-14. The size re-certification requirement in the Task Order RFP here is consistent with these purposes. See LB&B Assocs., Inc. v. United States, 68 Fed. Cl. 765 (2005); CMS Info. Servs., Inc., B-290541, Aug. 7, 2002, 2002 CPD ¶ 132 at 2.

The agency's decision to require re-certification also is consistent with the regulatory scheme applicable here. As a general rule, an 8(a) contractor's eligibility is determined as of the date that the concern submits its initial offer. FAR § 19.805-2(b); 13 C.F.R. § 124.507(b)(4). Similarly, the determination of a business's size status also occurs as of the date the concern submits a written self-certification that it is small to the contracting activity as part of its initial offer.⁵ FAR § 19.301-1(a); 13 C.F.R. § 121.404(a). A concern that qualifies as a small business at the time it receives a contract is generally considered a small business throughout the life of that contract. 13 C.F.R. § 121.404(g).

However, for purposes of contracts with durations of more than 5 years ("long-term contracts"), including GWACs, a contracting officer must request that a concern re-certify its small business size status no more than 120 days prior to the end of the fifth year of the contract, and no more than 120 days prior to exercising any option thereafter. Id., § 121.404(g)(3). Additionally, a contracting officer has the discretion

⁵ An 8(a) contractor's eligibility is based on, among other things, whether the concern is a small business under the NAICS code assigned to the solicitation requirement. 13 C.F.R. §§ 121.401; 124.507(b)(2)(i) (competitive 8(a) procurements); 124.503(c)(1)(iii) (noncompetitive 8(a) procurements).

to require concerns to re-certify their size status in response to a solicitation for an order under a long-term contract; where the contracting officer requires concerns to do so, SBA will determine size as of the date the concern submits its self-representation as part of its response to the solicitation for the order. *Id.*, § 121.404(g)(3)(v). If a contractor represents (or SBA determines) that the concern is other than small, the contracting agency can no longer count the options or orders issued pursuant to the contract towards its various small business goals. *Id.*, § 121.404(g)(3); FAR § 19.301-2(d).

In this regard, when issuing its final rule amending the regulations regarding small business size determinations under GWACs, multiple-award schedule contracts, and other long-term contracts, the SBA specifically stated:

Agencies are increasingly conducting complex multi-year, multi-million dollar procurements as competitions for orders under the [multiple-award schedule] program, where offerors submit “quotes” that exceed, in terms of volume and complexity, proposals. Allowing procuring agencies to request size certifications in connection with particular orders is consistent with the purposes of the Small Business Act (procurements meant for small businesses should be awarded to small businesses) The final rule gives contracting officers the discretion to request size certifications for individual orders, but does not require them to do so. . . .

71 Fed. Reg. 66434, 66438 (2006).

Here, the 8(a) STARS GWAC has a total duration, including options, of 7 years. It therefore meets the definition of a long-term contract to which the provisions of 13 C.F.R. § 121.404(g)(3) apply. As a result, we conclude that the Air Force contracting officer has the discretion under the applicable regulations to request a size re-certification in connection with the submission of task order proposals.

Our view is consistent with that of SBA, the agency responsible for administering the Small Business Act (and whose views we solicited in connection with this protest).⁶ SBA agrees that the contracting agency has the discretion to request a size re-certification in connection with submission of task order proposals, and if a firm cannot certify that it is a small business concern in response to such a request, the firm is ineligible for award. SBA Letter to GAO, Aug. 23, 2010, at 3.

⁶ We note that, as a general rule, our Office will defer to SBA’s judgment in matters such as this, which fall squarely within its responsibility for administering the Small Business Act. *CMS Info. Servs., Inc.*, *supra*, at 3 n.6.

In challenging the Air Force's decision to require re-certification, EIS argues that the decision is unreasonable because re-certification is not necessary to achieve the Air Force's stated purpose for requiring recertification, namely, claiming 8(a) credit for issuance of the task order. EIS' argument misses the mark. The fact that a contract holder like EIS that is no longer small could continue to receive orders under the ID/IQ contract here, see FAR § 19.804-6(c), or that the Air Force could receive 8(a) credit for issuing such an order, does not make it unreasonable or an abuse of discretion for the contracting officer to request a size re-certification in connection with the submission of task order proposals.⁷ As explained above, requesting re-certification under these circumstances is presumptively proper and reasonable, given that doing so furthers the statutory goals of the 8(a) program and is permitted by the applicable regulations.⁸

EIS also argues that the Air Force's decision to request re-certification of firms' size status as of the time they submit their task order proposals is improper as it amounts to retaliation against EIS for the filing of previous protests.

Government officials are presumed to act in good faith; we will not attribute unfair or prejudicial motives to procurement officials on the basis of mere inference or supposition. Saturn Landscape Plus, Inc., B-297450.3, Apr. 18, 2006, 2006 CPD ¶ 70 at 3. Where a protester alleges bad faith, it must provide credible evidence clearly demonstrating same. TPL, Inc., B-297136.10, B-297136.11, June 29, 2006, 2006 CPD ¶ 104 at 21.

⁷ Similarly, the requirement under FAR § 16.505(b)(1) to provide each contract holder a "fair opportunity" to be considered for each order does not preclude the contracting officer from also exercising "broad discretion in developing appropriate order placement procedures," including re-certification of size status. See LB&B Assocs., Inc. v. United States, 68 Fed. Cl. at 772-73.

⁸ In any event, the record shows that, prior to issuance of the Task Order RFP, the Air Force contracting officer received guidance from both GSA and SBA that requesting size re-certification was appropriate to accomplish the stated objective of ensuring that the agency could properly receive 8(a) credit for the ENSA task order. See AR, Tab 11A, GSA 8(a) STARS Contract Frequently Asked Questions, at 2; Tab 11B, GAA 8(a) STARS Contract Ordering Guide, at 6; Tab 11C, 8(a) STARS Industry Partners Guidance. As a result, we think the contracting officer reasonably concluded "that the only way to be certain that the Air Force should and would receive 8(a) credit in a proper manner and in the spirit of the 8(a) and small business programs is to require that offerors re-represent their size status with their [task order] proposal upon submittal." AR, Tab 10U, Contracting Officer Email, June 3, 2010.

EIS has furnished no evidence whatsoever to support its allegation of retribution; it merely infers bad faith based on the fact that it filed earlier protests. The record, however, indicates that the Air Force has had a longstanding desire to ensure that the ENSA task order would go to a business concern for which the agency could properly receive 8(a) credit. Further, the record indicates that the Air Force held numerous discussions with various SBA and GSA officials regarding how to ensure that the task order would in fact be one for which the contracting agency would properly receive 8(a) credit. While the protester disagrees with the Air Force's position here--that task orders issued to business concerns such as EIS who have graduated from the 8(a) program and/or are no longer small are not ones for which the contracting agency may receive 8(a) credit--we conclude that EIS has presented no evidence that the agency acted in bad faith.

The protest is denied.

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Acting General Counsel