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Decision

Matter of: HRCI-MPSC PASS, LLC

File: B-408919; B-408919.2

Date: January 8, 2014

Laurel A. Hockey, Esq., John J. O'Brien, Esq., David S. Cohen, Esq., Gabriel E. Kennon, Esq., and Amy J. Spencer, Esq., Cohen Mohr LLP; Ralph R. Polachek, Esq., Law Firm of Ralph R. Polachek, Esq., for the protester. Richard B. Oliver, Esq., Brian Cruz, Esq., and J. Matthew Carter, Esq., McKenna Long & Aldridge LLP, for Alutiiq Pacific, LLC, an intervenor. Maj. John R. Longley, Department of the Army; and, Meagan K. Guerzon, Esq., and John W. Klein, Esq., Small Business Administration, for the agencies. Eric M. Ransom, Esq., and Edward Goldstein, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that agency improperly issued a sole-source bridge contract to an Alaska Native Corporation under the Small Business Administration's 8(a) program, after issuing an earlier competitive 8(a) solicitation, is denied where this significantly smaller and shorter-term bridge contract is not the same requirement as the follow-on contract that the agency intends to award pursuant to a competitive 8(a) set-aside.

DECISION

HRCI/MPSC PASS, LLC, of Anitoch, Tennessee, protests the decision of the Department of the Army to make a sole-source award under the Small Business Administration's 8(a) program to Alutiiq Pacific, LLC, of Anchorage, Alaska, an Alaska Native Corporation, under solicitation No. W912JB-13-R-4016, for professional administrative support services. The protester argues that the contemplated sole-source award is impermissible because the requirement has been previously accepted as a competitive procurement in the 8(a) program.

We deny the protest.

BACKGROUND

In 2009, the agency competitively awarded an 8(a) indefinite-delivery/indefinite-quantity (ID/IQ) contract to BPSA-MPSC LLC, JV for professional administrative support services in support of the National Guard on a nationwide basis. The contract had a 1-year base period of performance, plus four 1-year options, and a maximum value/ceiling of \$90 million (base and all options). By November 2011, the contract with BPSA-MPSC had reached its maximum value, and the Army began to prepare a new competitive 8(a) solicitation. However, to ensure continuation of services until a new 8(a) award could be made, the Army awarded a sole-source bridge contract to BPSA-MPSC. The bridge contract had a six-month base period and three 1-month options, and a maximum value of \$50 million (base and all options). With all options exercised, the contract period extended from November 15, 2011 to August 14, 2012. At the time of the bridge contract award, BPSA-MPSC had graduated from the 8(a) program, therefore, the contract was awarded outside of the 8(a) program. Agency Report (AR), at 2-3.

On April 3, 2012, the Army issued solicitation No. W912JB-R-4001, for the anticipated competitive 8(a) set-aside professional administrative support services procurement. The solicitation contemplated the award of an ID/IQ contract with a maximum value of \$100 million and a period of performance of one base year with four one-year options. The Army completed the 8(a) competition on November 21, and made an award to HRCI/MPSC. Another firm challenged the award in a protest filed with our Office, which we dismissed as academic after the Army represented that it intended to reevaluate the proposals. Dominion Dynamics Consulting, LLC, B-407810, Dec. 18, 2012. Subsequent to the reevaluation, award was made to another firm on June 12, 2013. HRCI/MPSC and Alutiiq Pacific then protested that award with our Office, and the Army again took corrective action; cancelling the award and reassessing whether the solicitation properly reflected the Army's needs. The Army also offered that, if necessary, it would issue a new or revised solicitation. As a result, we dismissed the protests as academic. HRCI/MPSC PASS, LLC, B-407810.2, July 23, 2013; Alutiiq Pacific, LLC, B-407810.3, July 23, 2013.

Due to the multiple delays in awarding a new 8(a) contract, the Army awarded another bridge contract to BPSA-MPSC on February 13, 2013. This bridge contract was for a six month base period and three one-month options, resulting in a maximum extension to November 14, 2013. With that date approaching, the Army issued the solicitation protested here for an 8(a) bridge contract with a 12-month base period and no options, specifying a "100% Direct [sole source] Alaska Native 8(a) award" with a contract ceiling amount of \$18 million. Solicitation at 26. The SBA accepted the requirement into the 8(a) program on behalf of Alutiiq Pacific, LLC, on September 10, 2013. The period of performance of the 8(a) bridge contract was later amended to a six-month base period with two 3-month option periods. Upon learning of the contemplated sole-source award to Alutiiq, HRCI/MPSC filed the subject protest.

DISCUSSION

HRCI/MPSC alleges that the procurement of the professional administrative support services through a sole source 8(a) award is precluded by 13 C.F.R. § 124.506(b) (2013), which, according to the protester, prohibits accepting a requirement for a sole-source 8(a) award where the requirement had previously been accepted for a competitive 8(a) award. HRCI/MPSC argues that this work has been performed by 8(a) contractors since at least 2009, and was most recently competed as an 8(a) set-aside under solicitation No. W912JB-R-4001.¹

Section 8(a) of the Small Business Act authorizes the Small Business Administration (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) (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) (2010); Rothe Computer Solutions, LLC d/b/a Rohmann Joint Venture, B-299452, May 9, 2007, 2007 CPD ¶ 92 at 3.

The section 8(a) program has both competitive and noncompetitive (that is, sole-source) components. Generally, where a procurement for services exceeds a certain threshold (currently \$4 million for non-manufacturing contracts), the requirement must be competed among qualified 8(a) program participants. 13 C.F.R. § 124.506(a)(2)(ii). Under certain circumstances, however, the competitive threshold dollar value does not apply when awarding a sole-source 8(a) contract to an Indian tribe-owned entity or an Alaska Native Corporation. Id. at § 124.506(b).

In implementing this statutory regime, the SBA has established limits on moving an existing requirement from the 8(a) competitive program to the 8(a) sole-source program. In relevant part, SBA's regulations provide as follows:

¹ HRCI/MPSC also alleges that the Army violated 13 C.F.R. § 124.502(c), where its letter offering this procurement to the SBA for a sole-source award did not include all required information. Our Office obtained the SBA's comments on the issue, and the SBA affirmatively advised our Office that the Army "did not violate 13 C.F.R. § 124.502(c) because its offer letter to SBA for award of [this contract] provided all of the information required by that regulation." SBA Response at 7. We have no basis to sustain the protest in this regard.

(1) A Participant concern owned and controlled by an Indian Tribe or an [Alaska Native Corporation] may be awarded a sole source 8(a) contract where the anticipated value of the procurement exceeds the applicable competitive threshold if SBA has not accepted the requirement into the 8(a) [Business Development] program as a competitive procurement.

* * * *

(3) There is no requirement that a procurement must be competed whenever possible before it can be accepted on a sole-source basis for a tribally-owned or [Alaska Native Corporation] -owned concern, but a procurement may not be removed from competition to award it to a tribally-owned or [Alaska Native Corporation]-owned concern on a sole-source basis.

Id. at § 124.506(b)(1) (emphasis added).

As set forth above, HRCI/MPSC argues that the SBA improperly accepted the requirement for award to Alutiiq on a sole-source basis since the very same requirement was recently competed under the 8(a) program under solicitation No. W912JB-R-4001. The agency responds that the particular requirement at issue--providing administrative support services to the National Guard for a six month base period plus two 3-month options periods with a ceiling amount of \$18 million--has not been previously accepted into the 8(a) business development program as a competitive procurement and, accordingly, that there is no restriction on the sole-source award of the requirement to an Alaska Native Corporation-owned entity such as Alutiiq Pacific.

The Army asserts that in determining whether a requirement has been accepted into the 8(a) business development program as a competitive procurement, our Office has previously referenced the SBA's regulations for determining whether a solicitation is for a "new requirement," which 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); see JXM, Inc., B-402643, June 25, 2010, 2010 CPD ¶ 158. The Army argues that because the bridge contract is for less than 20 percent of the value and maximum contract term solicited under solicitation No. W912JB-R-4001, the bridge contract should be considered different from the

requirement previously accepted into the 8(a) business development program as a competitive procurement.

At our Office's request, the SBA provided its views on the protest. We accord great weight to the SBA's interpretation of its regulations as to what constitutes a new requirement, unless the interpretation is unreasonable. NANA Servs., LLC, B-297177.3; B-297177.4, Jan. 3, 2006, 2006 CPD ¶ 4 at 10. Here, the SBA agrees that the Army has done nothing improper where the original contract was within the 8(a) program and the Army clearly intends to procure the follow-on contract as a competitive 8(a) set-aside, but is using this bridge contract only to provide continuity of service until the follow-on contract can be successfully awarded. According to the SBA, the facts of the case demonstrate that the requirements under the contract with Alutiiq are properly considered "new" as that concept would be applied under 13 C.F.R. § 124.504(c)(1)(ii)(C), when compared to the much larger contract anticipated by the previously issued solicitation (solicitation No. W912JB-R-4001).² In this regard, the SBA notes that the bridge contract is for a six month base period with two 3-month option periods and has a maximum value of \$18 million, whereas the contemplated competitive 8(a) award is for a five-year contract, including base and options, with a maximum value of \$100 million.³ Based on this record, as

² While agreeing that the requirement at issue would in fact constitute a "new" requirement under 13 C.F.R. § 124.504(c), the SBA also maintains that the "new requirement" standard, as it is defined under 13 C.F.R. § 124.504(c), is not directly applicable in this case. According to the SBA, that regulation pertains only to the "adverse impact" concept relating to the prohibition on SBA's acceptance of a follow-on contract into the 8(a) program where the predecessor contract was awarded to a small business other than through the 8(a) program. SBA Response at 5. We agree with the SBA that the "adverse impact" analysis of 13 C.F.R. § 124.504(c) does not strictly apply here since the prior similar requirements were not awarded to small businesses outside of the 8(a) program. However, the Army is correct that our Office has used the definition of a "new requirement" to determine whether a requirement procured through an Alaska Native Corporation on a sole-source basis had previously been competitively procured under the 8(a) program. See JXM, Inc., supra, at 4-5.

³ The protester argues that the scope of Alutiiq's contract ultimately will rival that of the contemplated competitive 8(a) award since, in the protester's view, the agency will be forced to significantly increase the dollar value and duration of the contract before is able to make a competitive 8(a) award. This allegation, however, merely anticipates improper agency action and is therefore dismissed as speculative and premature. See Computer Assocs. Int'l, Inc., B-292077.2, Sept. 4, 2003, 2003 CPD ¶ 157 at 4 (protests that merely anticipate prejudicial agency action are speculative and premature).

discussed above, we see no basis to object to the Army's decision to offer this bridge requirement to the SBA, or to the SBA's decision to accept the requirement, as an 8(a) sole-source award to Alutiiq Pacific.

The protest is denied.

Susan A. Poling
General Counsel