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**Comptroller General
of the United States**

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

Decision

Matter of: Sigmatech, Inc.

File: B-296401

Date: August 10, 2005

E. Ray McKee, Jr., Esq., for the protester.
Vera Meza, Esq., Department of the Army, and Laura Mann Eyester, Esq., Small Business Administration, for the agencies.
Sharon L. Larkin, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest challenging bundling of system engineering and support services with other requirements under a single-award blanket purchase agreement (BPA) issued under awardee's Federal Supply Schedule contract is timely, where record does not demonstrate that protester knew of basis for protest until task orders for work, which the protester had previously performed, were issued under the BPA, and the protester filed its protest within 10 days thereafter; GAO resolves doubts regarding timeliness in favor of protesters.
 2. Protest challenging bundling of system engineering and support services with other requirements under a single-award BPA issued under awardee's Federal Supply Schedule contract is sustained, where agency failed to perform bundling analysis or satisfy the requirements of Federal Acquisition Regulations §§ 7.107 (a), (b); 10.001(c)(2); and 19.202-1.
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DECISION

Sigmatech, Inc. protests the placement of two task orders with Sverdrup Technology, Inc. under blanket purchase agreement (BPA) No. W56HZV-04-A-0005, awarded by the United States Army Tank-Automotive and Armaments Command (TACOM) for engineering and support services under request for quotations (RFQ) No. DAAE07-03-Q-N287. Sigmatech, a small business contractor that has previously performed system engineering and technical assistance (SETA) support services under a separate contract with another office of the Army, contends that the agency improperly bundled this requirement with other support services performed under the BPA.

We sustain the protest.

BACKGROUND

On March 26, 2004, TACOM awarded a single-source BPA to Sverdrup under the firm's General Services Administration (GSA) schedule contract. This BPA, estimated at a value of \$130,100,946 over a 5-year period, contemplates performance of a wide range of program and engineering services for the Army's Program Executive Office for Ground Combat Systems (PEO-GCS). The BPA currently supports, among other activities, the Robotic Systems Joint Project Office (RSJPO), which is also known as the Unmanned Ground Vehicles Project Office.

Prior to the award of this BPA, program and engineering support services were provided under an indefinite-delivery/indefinite-quantity (ID/IQ) contract issued in 1999 by TACOM to Camber Corporation. Camber's contract, which expired in December of 2004, did not support the RSJPO.

Instead, for the past 15 years, support for the RSJPO was provided under contracts issued by the Army's Aviation and Missile Command (AMCOM) to small business concerns. In 2000, the agency awarded an ID/IQ contract to Sigmatech, under which orders were placed for SETA services for the RSJPO,¹ and options were exercised under this contract until 2004 (after award of the Sverdrup BPA discussed above), with performance continuing into 2005. In 2004, the agency awarded Sigmatech a BPA, which also contemplated performing SETA services for the RSJPO. Sigmatech was among those firms that received awards as part of the small business reserves under the ID/IQ contract and the BPA.

In October of 2002, the RSJPO came under the "cognizance" of the PEO-GCS. At about the same time, TACOM began its acquisition strategy for replacing the contract supporting the PEO-GCS held by Camber. On February 18, 2003, TACOM issued a "sources sought" notice for services required by the PEO-GCS. This notice identified that the required services included support for the following disciplines: engineering, technical, management, information management, product/quality assurance, testing, logistics, and program/project management. According to the notice, support was to be provided for several program management offices throughout the United States and overseas, including the Abrams, Stryker, Bradley, Future Combat Systems, JLW 155, and "Unmanned Gunned Vehicles."² The notice

¹ One of the task orders issued under the 2000 ID/IQ contract was valued in excess of \$5,000,000.

² The parties agree that the term "Unmanned Gunned Vehicles" was incorrect, and that the correct program office is the "Unmanned Ground Vehicles Project Office."

indicated that a base number of 200,000 hours per year, with a possibility of up to 400,000 hours per year, would be required under a 5-year contract. The notice sought information about interested firms, their past performance, and whether the firms were 8(a) or historically underutilized business zone (HUBZone) concerns. Agency Report (AR), Tab 11, Sources Sought Notice (Feb. 18, 2003).

TACOM received 45 responses to the “sources sought” notice from both large and small businesses, including a response from Sigmatech. Sigmatech’s response stated that the firm was a small business, but not an 8(a) or HUBZone concern. After reviewing the responses, TACOM decided to obtain the services for the PEO-GCS with a single award BPA for 5 years under GSA Federal Supply Schedule (FSS) 871, for professional engineering services.

On September 23, 2003, the agency asserts it sent a letter to Sigmatech, advising the firm of its change in acquisition strategy. Specifically, the letter stated that “[o]ur acquisition strategy is to award a single Blanket Purchase Agreement for 5 years of services under the GSA Multiple Award Schedule 871 for Professional and Engineering Services.” The letter further advised that the agency would not provide Sigmatech with the solicitation because “the Government will not release this solicitation to those companies not included on the solicitation mailing list.” AR, Tab 13, Letter from TACOM Contracting Officer to Sigmatech (Sept. 23, 2003). Sigmatech denies receiving this letter and the agency has provided no evidence that Sigmatech did receive the letter.³

On December 5, 2003, TACOM issued an RFQ to nine GSA Schedule 871 contract holders for program and engineering services for the PEO-GCS. The solicitation, which was open to both large and small businesses, stated that award would be limited to Schedule 871 vendors who could perform tasks under six special item numbers identified on the schedule. The RFQ generally sought program management, technical, logistics, and information technology support for the successful operation of the agency’s weapon system acquisition mission. RFQ, §§ A.1(a)(2), C.1, and attach. 1. The RFQ did not identify specific program offices that would be supported (unlike the “sources sought” notice). The RFQ was not provided to Sigmatech because the firm did not hold a GSA Schedule 871 contract. Sverdrup and Camber, both large businesses, were the only two vendors to respond to the RFQ. TACOM selected only Sverdrup for award and issued the firm a BPA on March 26, 2004.

On April 29, 2005, TACOM issued two task orders under the Sverdrup BPA for program support for the RSJPO.⁴ These two task orders specifically covered the

³ Sigmatech has provided this Office with two affidavits denying receipt, including an affidavit from the addressee of the letter.

⁴ These task orders are scheduled to expire on July 31, 2005.

SETA work performed by Sigmatech under the AMCOM contracts. Sigmatech was notified by e-mail on April 29 that its AMCOM work would thereafter be performed by Sverdrup under the TACOM BPA.

Sigmatech protests the award of the BPA and task orders, contending that the SETA services for the RSJPO are improperly bundled under the TACOM BPA.

TIMELINESS

The agency initially asserts that Sigmatech's protest is untimely filed. In this regard, the agency first contends that Sigmatech knew, or should have known, its basis for protest as early as either the February 18, 2003 "sources sought" notice or Sigmatech's February 24 response to that notice. These documents, the agency argues, show that Sigmatech knew, or should have known, that the RSJPO services were going to be procured by TACOM under a different contract vehicle, and thus Sigmatech should have protested at that time. However, the "sources sought" notice is not a solicitation, and since our Office only hears protests of solicitations, Pancor Corp., B-234168, Mar. 29, 1989, 89-1 CPD ¶ 328 at 2, Sigmatech's protest would have been premature at that point. Lockheed Martin Sys. Integration--Owego, B-287190.2, B-287190.3, May 25, 2001, 2001 CPD ¶ 110 at 16 n.10.

The agency next asserts that the protest is untimely because it was not filed within 10 days of the agency's September 23, 2003 letter that informed Sigmatech that the contract would be competed only among FSS 871 holders. However, Sigmatech denies receiving this letter, and in any event the RFQ still had not been issued (it was not issued until December 5), so a protest again would have been premature. Id.

The agency also asserts that the firm did not diligently pursue its protest after submitting its response to the "sources sought" notice. Had it done so, the Army argues, Sigmatech would have discovered that the services would be procured only through TACOM under a BPA issued to an FSS 871 contractor, and that Sigmatech would be ineligible to compete because it did not hold an FSS 871 contract.⁵ However, nothing in the record (other than the September 23 letter that Sigmatech denies receiving) indicates that Sigmatech should have known that the TACOM BPA would be the vehicle used to procure the RSJPO services. Indeed, as noted above,

⁵ The Army also asserts that Sigmatech is not an interested party to protest the award of the BPA, or task orders issued thereunder, because the firm does not hold an FSS 871 contract. However, Sigmatech is not protesting its eligibility to compete under the RFQ, but rather the fact that a portion of the services procured thereunder should have been procured separately and set aside for small businesses. Since Sigmatech is a small business that can perform the SETA services that are asserted to be improperly bundled, the firm has the direct economic interest sufficient to protest this issue before our Office. 4 C.F.R. § 21.0(a).

the agency did not “release” a copy of the RFQ to Sigmatech, from which the firm may have been able to determine a basis for protest, or specifically notify Sigmatech that the SETA work it was performing for RFJPO was to be “bundled” into the BPA. In fact, even after award of the Sverdrup BPA in 2003, AMCOM placed orders for these services with Sigmatech extending into 2005, and recompeted the requirement. Thus, on this record, we cannot conclude that Sigmatech’s failure to earlier become apprised of the Army’s asserted plan to obtain these services through the Sverdrup BPA was the result of a lack of diligent pursuit of this information by the protester. In this regard, we resolve doubts over issues of timeliness in favor of protesters. See LBM, Inc., B-290682, Sept. 18, 2002, 2002 CPD ¶ 157 at 7.

The record before us indicates that it was not until February 2005 that Sigmatech was informed by telephone of the Army’s plan to procure the SETA services solely through the Sverdrup BPA, and subsequent written communications from the agency during February, March, and April suggested that this plan was not final even then. In fact, the AMSCOM ombudsman stated as recently as April 21, 2005 that TACOM was “considering my recommendations” to compete the requirement and include small businesses in this competition. As he informed Sigmatech, based on his discussions with TACOM, “I believe there is a very high probability that they will issue a competitive RFP for the [SETA] services—and I see no reason that Sigmatech will be precluded from competing.” Protest, attach. 9, E-mail from AMSCOM Ombudsman to Sigmatech (Apr. 21, 2005). The agency does not deny that TACOM was still considering whether to compete the requirement during this time. Given that we resolve doubts of timeliness in favor of the protester, we cannot on this record find Sigmatech’s protest to be untimely.

The record shows that on April 29, Sigmatech was informed in writing that the SETA services it was currently performing were going to be performed under the TACOM BPA effective May 1. Sigmatech protested to our Office within 10 days of this letter, and we find that its protest was timely filed. 4 C.F.R. § 21.2(a)(1) (2005).

BUNDLING

Sigmatech protests the “roll up” of the RSJPO services into the TACOM BPA awarded to Sverdrup. It contends that the agency improperly bundled the SETA services for the RSJPO with the TACOM program and engineering services, and that the agency did not conduct any bundling analysis or give proper notice to Sigmatech or the Small Business Administration (SBA) in order to allow Sigmatech a fair opportunity to compete for these services. The SBA also asserts that the Army violated bundling regulations here.

The Small Business Act, 15 U.S.C. § 632, defines bundling as:

consolidating 2 or more procurement requirements for goods or services previously provided or performed under separate smaller

contracts into a solicitation of offers for a single contract that is likely to be unsuitable for award to a small-business concern due to—

- (A) the diversity, size, or specialized nature of the elements of the performance specified;
- (B) the aggregate dollar value of the anticipated award;
- (C) the geographical dispersion of the contract performance sites; or
- (D) any combination of the factors described in subparagraphs (A), (B), and (C).

15 U.S.C. § 632(o)(2) (Supp. 2004); see also 13 C.F.R. § 125.2(d)(1)(i); Federal Acquisition Regulation (FAR) § 2.101. The term “separate smaller contract” is defined as “a contract that has been performed by 1 or more small business concerns or was suitable for award to 1 or more small business concerns.” 15 U.S.C. § 632(o)(3); 13 C.F.R. § 125.2(d)(1)(ii).

When a proposed acquisition involves bundled requirements, the agency must first conduct market research to determine whether the bundling is necessary and justified, given the potential impact on small business participation, by ascertaining whether the government will derive measurably substantial benefits from the bundling and quantifying these benefits. FAR § 7.107(a), (b). In addition, the agency must, at least 30 days before issuing a solicitation, provide its acquisition package to the SBA procurement representative for review and also provide a statement why the (1) proposed acquisition cannot be divided into reasonably smaller lots for small businesses, (2) delivery schedules cannot be established that will encourage small business participation, (3) proposed acquisition cannot be structured so to make it likely that small businesses can compete for the prime contract, (4) consolidated construction project cannot be acquired as separate discrete projects, or (5) bundling is necessary and justified. FAR § 19.202-1(e). Furthermore, within the same 30 days, an agency must notify any affected incumbent small business concerns of the Government’s intention to bundle the requirement. FAR § 10.001(c)(2).

Here, the record shows that TACOM did not perform any bundling analysis or notify the SBA or Sigmatech of its acquisition strategy. However, the agency argues that FAR §§ 7.107(a), (b); 10.001(c)(2); and 19.202-1 do not apply to the task orders or the BPA issued under Sverdrup’s FSS contract because these provisions applying bundling rules to FSS contracts were implemented after TACOM had completed the development of its acquisition plan.

The requirements that agencies perform a bundling analysis and notify the SBA when requirements are bundled were specifically made applicable to BPAs and orders placed against FSS contracts by a Federal Register notice published October 20,

2003, with an “effective date” of October 20, 2003.⁶ 68 Fed. Reg. 60,000 (Oct. 20, 2003); FAR § 8.404(a). The FAR states that “[u]nless otherwise specified . . . FAR changes apply to solicitations issued on or after the effective date of the change.” FAR § 1.108(d)(1). Since the solicitation that led to the award of the BPA was not issued until December 5, 2003, which was after the effective date of the revised bundling regulations, the agency was required to comply with these regulations, even though at the time the Army finished its acquisition planning the regulations had not gone into effect.

The Army next argues that these FAR bundling requirements do not apply because the SETA services previously performed by Sigmatech were not bundled with the other requirements and were merely a “follow on” to the Camber contract. However, the record shows that, for the past 15 years, the SETA services for the RSJPO have been provided by small businesses (including Sigmatech) under AMCOM contracts. These services were not, as the agency contends, a “follow on” to the Camber contract previously issued by TACOM because, although SETA services were provided under the Camber contract, this support for the RSJPO was not provided by Camber. Even after the RSJPO came under the control of TACOM, the Army still procured the RSJPO services from small businesses through the AMCOM contracts and BPAs for example, through exercising options under the ID/IQ contract as recently as 2004 (with performance into 2005) and through the BPA issued to Sigmatech in 2004, all as part of small business reserves. Thus, the inclusion of the RSJPO SETA services in Sverdrup’s BPA is a consolidation of two or more procurement requirements that were previously performed by small businesses under separate, smaller contracts.

We also find that the procurement appears to result in a single contract (the Sverdrup BPA and resulting task orders)⁷ that is unsuitable for award to small businesses due to its size and the aggregate dollar amount of the anticipated award. In this regard, the estimated contract value is approximately \$130 million over a 5-year period and only two large businesses (and no small businesses) responded to the RFQ that resulted in the BPA award.

We thus conclude, under these circumstances, that the consolidation of the SETA services for the RSJPO under the Sverdrup BPA meets the definition of bundling under the Small Business Act. However, the record shows that the Army failed to perform a bundling analysis as required by FAR § 7.107(a), (b), or comply with the

⁶ Prior to this notice, the FAR was silent as to whether the bundling rules applied to FSS awards or orders thereunder.

⁷ A “single contract” that may be unsuitable for award to a small business concern includes orders placed against an indefinite-quantity contract under an FSS contract. FAR § 2.101; 13 C.F.R. § 125.2(d)(1)(iii).

requirements of FAR § 19.202-1 in providing notice of bundling to the SBA. The record further shows that the agency failed to provide notice to Sigmatech (the incumbent small business concern) of its intent to bundle the requirements and thus failed to comply with FAR § 10.001(c)(2). We sustain the protest on these bases.

We recommend that the Army conduct an analysis in accordance with FAR § 7.107 to determine whether it was necessary and justified for the SETA services for the RSJPO to be bundled with the services included under the Sverdrup BPA, or whether these services should remain reserved for small businesses. We also recommend that once this analysis is complete, the agency provide its acquisition package to the SBA procurement center representative as required by FAR § 19.202-1. If it is determined that the SETA services for the RSJPO were improperly bundled and should be set aside for small businesses, we recommend that the Army compete the requirement among small businesses. We further recommend that the protester be reimbursed its reasonable costs of filing and pursuing its protest. The protester shall file its certified claim for costs, detailing the time expended and costs incurred, with the agency within 60 days of receipt of this decision.

The protest is sustained.

Anthony H. Gamboa
General Counsel