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Decision

Matter of: Azimuth, Inc.

File: B-409711; B-409711.2

Date: July 21, 2014

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Timothy L. Felker, Esq., William N. Lovelady, Esq., and Robert M. Sundberg, Esq., Department of the Army, Corps of Engineers, and Alison M. Mueller, Esq., and John Klein, Esq., Small Business Administration, for the agencies.
Susan K. McAuliffe, Esq., and Edward Goldstein, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest of contracting agency's offer and Small Business Administration's (SBA) acceptance of requirement under SBA's section 8(a) program is denied where the record does not show bad faith on the part of government officials or that applicable regulations were violated.

DECISION

Azimuth, Inc., of Morgantown, West Virginia, protests the decision by the Corps of Engineers, Army Geospatial Center, and the Small Business Administration (SBA) to contract with Chenega Technical Innovations, LLC, of Dumfries, Virginia (an Alaska Native Corporation), under the SBA's section 8(a) Business Development Program, for ENFIRE systems (instrument set, reconnaissance and surveying systems). The protester argues that the Corps acted in bad faith and that the agencies violated applicable regulations in deciding to contract with Chenega under the 8(a) program.

We deny the protest.

BACKGROUND

In 2007, the Corps awarded Azimuth a service-disabled veteran-owned small business set-aside contract to provide necessary supplies and services to integrate hardware for six systems under the combat terrain information systems (CTIS) program, including the ENFIRE system (software development and training services for the systems were procured separately by the agency). This contract had a maximum value of approximately \$191 million with a period of performance, including options, from June 25, 2007 through June 24, 2012. On May 3, 2012, the Corps extended Azimuth's contract by 6 months, from June 24, 2012 to December 23, 2012.

In February 2013, the agency issued a small business set-aside solicitation, RFP No. W5J9CQ-13-R-0002, to meet its larger CTIS needs, combining, among other things, system integration, software modification, training, technical support and additional logistics support services. Contracting Officer (CO) Statement at 4.

In May 2013, the agency awarded Azimuth a 6-month sole-source bridge contract (June through November 2013) for the delivery of 48 ENFIRE 5.0 systems. Amended Protest at 3. The sole-source award was supported by a Justification and Approval (J&A) in which the agency determined that, for production of such a limited number of systems during a limited 6-month contract performance period, the sole-source bridge contract to Azimuth would prevent duplication costs (related to an estimated 2-month start-up period for a new contractor) and delays in meeting then-current field scheduling until the agency completed its larger CTIS procurement.¹ Id. at Exhibit C.

On August 13, 2013, the Corps awarded the contract for the larger CTIS requirement under solicitation No. W5J9CQ-13-R-0002. Azimuth filed a protest with our Office on September 3, challenging the agency's award to another contractor. On September 30, we dismissed the protest as academic after the agency advised

¹ The protester alleges that the agency's prior J&A determination that only Azimuth could meet its ENFIRE 5.0 systems needs, at that point in time, should require the agency to make a new interim award to Azimuth for its current ENFIRE 6.0 needs. We disagree. Each procurement must stand on its own, and an agency may pursue any legally unobjectionable procurement option among the alternatives available to it. See NANA Servs., LLC, B-297177.3, B-297177.4, Jan. 3, 2006, 2006 CPD ¶ 4 at 11-12. Our review of the record supports the agency's contention that the prior J&A reflects the circumstances of a separate requirement. The J&A concerns a determination made at a different point in time based on the agency's then current needs and prior to Chenega's expression of interest. Legal Memorandum at 14; SBA Report at 4.

our Office that it intended to take corrective action which included making a new award decision. Azimuth Inc., B-408840, Sept. 30, 2013.

As explained by the Corps, the agency had interim ENFIRE systems requirements that needed to be addressed while the agency was implementing its corrective action in response to Azimuth's prior protest. Accordingly, the Corps explored various options to address these requirements, including using existing contract vehicles and using government personnel. CO Statement at 4-5.

In November, a principal from Chenega contacted the agency to express the firm's interest in helping the agency meet its ENFIRE systems needs. In December, the agency met with Chenega to review its capabilities and considered the option of satisfying its interim needs by offering the requirement to the SBA under the 8(a) program with a request for a sole-source award to Chenega. Id. at 5-6.

By letters to the SBA in January and February 2014, the agency offered the requirement at issue here, an 18-month bridge contract to meet an interim need for 192 ENFIRE 6.0 systems plus training and tech refresh services, to the SBA for placement in the 8(a) program with a request for a sole-source award to Chenega. Id. at 6. The SBA accepted the requirement into the 8(a) program.² Id. On February 21, solicitation No. W5J9CQ-14-R-0005 was issued to Chenega for the current interim requirement. Id.

In March, the contracting agency cancelled the initial procurement (RFP No. W5J9CQ-13-R-0002) that had been at issue in Azimuth's prior protest and issued a new solicitation (RFP No. W5J9CQ-14-R-0002) for its CTIS-related work. The new solicitation included, among other things, requirements for hardware and software integration, and for training and logistics support services; the solicitation anticipated award of a 1-year contract with 4 option years. Id. at 7.

Azimuth filed the current protest with our Office on April 11, amended it on April 14, and supplemented it on May 23, raising various contentions against the propriety of the placement of the Corps' interim requirement under the 8(a) program using a sole-source award to Chenega. Azimuth, which is not an 8(a) contractor, alleges

² To the extent the protester challenges the agency's failure to issue a public notice of the 8(a) procurement at issue, such challenge provides no basis to sustain the protest. See FAR § 5.202(a)(4) (establishing that agencies are not required to publish solicitations for sole-source contracts under the 8(a) program); John Sullivan, B-231115, July 12, 1988, 88-2 CPD ¶ 39 at 2. In any event, even if there had been a requirement for the agency to provide such notice, prejudice is a necessary element of a viable protest and the protester has not shown that it suffered prejudice, as required, in this regard. See McDonald-Bradley, B-270126, Feb. 8, 1996, 96-1 CPD ¶ 54 at 3.

that the Corps was motivated by bad faith in placing the requirement in the 8(a) program in order to avoid making an award to Azimuth. Azimuth further contends that the Corps offered the interim requirement as a bridge contract in the 8(a) program in contravention of applicable regulations. In this regard, the protester contends that the Corps did not follow Federal Acquisition Regulation (FAR) § 19.804 (which sets forth a number of factors an agency should consider when determining whether a requirement should be offered to the SBA for the 8(a) program). Azimuth also argues that the SBA failed to follow regulatory requirements when it accepted the interim requirement into the 8(a) program. In this regard, Azimuth asserts that the SBA violated 13 C.F.R. § 124.504 (2014) by failing to consider whether Azimuth would suffer an adverse impact as a consequence of placing this bridge contract under the 8(a) program.³

DISCUSSION

Section 8(a) of the Small Business Act, 15 U.S.C. § 637(a) (2006), authorizes SBA to enter into contracts with government agencies and to arrange for performance through subcontracts with socially and economically disadvantaged small business concerns. FAR § 19.800. The Act affords SBA and contracting agencies broad discretion in selecting procurements for the 8(a) program; accordingly, 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); Rothe Computer Solutions, LLC d/b/a Rohmann J.V., B-299452, May 9, 2007, 2007 CPD ¶ 92 at 3.

As a general matter, government officials are presumed to act in good faith; consequently, a protester's claim that contracting officials were motivated by bad faith must be supported by convincing proof; our Office will not attribute unfair or prejudicial motives to procurement officials on the basis of inference or supposition. Basic Concepts, Inc., B-299545, May 31, 2007, 2007 CPD ¶ 98 at 3-4; Shinwa Elecs., B-290603 et al., Sept. 3, 2002, 2002 CPD ¶ 154 at 5 n.6.

³ In its supplemental protest, Azimuth also speculates that an award to Chenega was improper due to an alleged organizational conflict of interest since Azimuth recently learned that Chenega is a current SETA (i.e., systems engineering and technical assessment) contractor for the agency. The challenge, however, filed approximately 5 weeks after Azimuth's initial protest, is untimely since the protester knew of the anticipated award to Chenega, at the latest, by the time it filed its initial protest, and should have known of this basis for protest at that time. 4 C.F.R. § 21.2(a)(2) (2014); see Professional Rehab. Consultants, Inc., B-275871, Feb. 28, 1997, 97-1 CPD ¶ 94 at 2. To the extent the protester argues that it was not aware that Chenega was a SETA contractor at the time it filed its protest, and only learned the fact as a consequence of its further investigation of Chenega, Azimuth fails to explain why this information was not available at the time it filed its protest.

Here, we have considered all of the protester's assertions in support of its allegation that the agency officials were motivated by bad faith. We conclude that they do not provide convincing proof that the government's actions were the result of bias against Azimuth. Rather, Azimuth's contentions in this regard are based wholly on speculation and innuendo.

For example, Azimuth notes the agency's failure to inform the protester about the placement of the interim requirement under the 8(a) program, yet Azimuth does not establish that the agency was required to provide it with such information where it was not a contractor under the 8(a) program or otherwise a party to the transaction. See John Sullivan, B-231115, supra (rejecting allegation of bad faith where there is no requirement for the publication of an agency's proposed procurement action under the noncompetitive procedures of the 8(a) subcontracting program). Azimuth also highlights Chenega's request that a supplier enter into a nondisclosure agreement (NDA), speculating that the agency directed Chenega to use the NDA to keep Azimuth from learning of the bridge contract. Chenega and the Corps deny the allegation, maintaining that Chenega requested the NDA as a matter of its own business practice. Azimuth further contends that the agency acted in a "clandestine" manner when it limited its offer to the SBA to 192 ENFIRE systems, rather than a slightly higher quantity listed on an earlier budget plan. If the agency had ordered the higher quantity, Azimuth contends that the procurement would have been valued in excess of \$20 million and it would have been required to publish a justification and approval under FAR § 6.303-1. Protester Comments at 5-6. The record, however, shows that the quantity offered to the SBA was determined based on agency programmatic needs and availability of funding. CO Statement at 5. Our review of the record also shows that the budget plan document cited by Azimuth is dated October 2013, before the agency learned of Chenega's interest in the work, and confirms that the agency had budgeted less than \$20 million for the ENFIRE systems prior to its consideration of Chenega for the work. Agency Report at Tab 6, Budget Item Justification Sheet. In sum, the record does not establish clear and convincing proof of bad faith by agency officials.⁴

Azimuth's remaining contentions are also without merit. For example, the protester contends that the agency failed to consider all of the factors listed under FAR § 19.804-1 when it placed the requirements at issue under the 8(a) program.

⁴ Azimuth also highlights the fact that the agency did not require Chenega to meet first article testing requirements. The protester, however, does not show that such testing was required. In addressing this point, the agency also reports that the ENFIRE 6.0 system has been successfully tested and approved by the Army's Central Technical Support Facility. CO Statement at 5.

FAR § 19.804-1 provides guidance for determining whether a requirement should be placed in the 8(a) program. While Azimuth contends the factors listed in FAR § 19.804-1 are mandatory, the agency points out that the language used in the regulation is permissive in that it presents a recommended course of action including factors that “should” be considered (versus the use of mandatory language). See e.g., Universal Canvas, Inc., B-226996, June 5, 1987, 87-1 CPD ¶ 576 at 2-3. The Corps’ report explains that the agency did in fact consider all of the listed factors in its review, to include: its future plans to acquire ENFIRE systems within its budget and available funding; quantity and delivery requirements; that the specific requirement had not been acquired as a small business aside; the agency’s lack of performance problems with 8(a) firms; the impact of delays being limited by the additional time available under the bridge contract’s option period; that the time for even a limited competition could affect field scheduling; and that Chenega had demonstrated its capability of performing the bridge requirement. CO Statement at 5-6. As noted above, contracting officers maintain broad discretion in awarding contracts to the SBA under the 8(a) program based upon mutually agreeable terms and conditions. Under the circumstances, we find that the agency reasonably complied with the regulatory guidelines at issue.

Azimuth also argues that SBA improperly accepted the requirements awarded to Chenega into the 8(a) program without first determining whether doing so would have an adverse impact on Azimuth, a small business concern, as required by 13 C.F.R. § 124.504(c).⁵ Under the SBA’s regulations, procurements may not be accepted for award under the 8(a) program 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 adverse impact review process is designed to protect small business concerns that are performing government contracts awarded outside the 8(a) program. Id. SBA presumes adverse impact to exist where a 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

⁵ The protester also contends the agency failed to meet the regulatory requirement under 13 C.F.R. §§ 124.502(c)(9) and (10) to provide historical procurement information for the specific requirement (192 ENFIRE 6.0 systems, along with associated training and tech refresh services). We find no reason to question the agency’s failure to mention that it had previously acquired a different amount and model (5.0) of the ENFIRE system from Azimuth, without the training and tech refresh services required in the interim requirement of ENFIRE 6.0 systems. CO Statement at 6-7. Further, our review of the record confirms that during the protest, SBA reviewed all of the protester’s concerns and that SBA has no objection to the sufficiency of the information provided and considered by the agency. SBA Report at 5.

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).

The requirement for the SBA to conduct an adverse impact analysis does not apply to new requirements, except where a new requirement is created through a consolidation of existing requirements being performed by two or more small business concerns. 13 C.F.R. §§ 124.504(c)(1)(ii), (2). The SBA regulations define a new requirement as one that previously has not been procured by the relevant procuring activity. 13 C.F.R. § 124.504(c)(1)(ii). The SBA regulations also 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). SBA's regulations explain that an adverse impact analysis is not required for a new requirement because "no small business could have previously performed the requirement and, thus, [the] 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).

Here, the SBA reports that its acceptance of the requirement at issue under the 8(a) program was proper since the current requirement is a new requirement for the agency's current interim ENFIRE 6.0 needs plus associated training and tech refresh services. In this regard, SBA reports that bridge contracts are almost always treated as new requirements, and that they therefore do not require an adverse impact analysis since, by their nature, they are fulfilling a specific requirement (and typically, as here, are shorter in duration and smaller in scope and price than an agency's anticipated larger procurement for additional work). SBA Report at 7-8.

Further, the Corps and SBA report that the bridge requirement at issue reflects a price difference of more than 25 percent as compared to the protester's prior contracts that included ENFIRE systems integration and production, or to the value of the cancelled initial solicitation and the ongoing procurement that includes ENFIRE systems requirements.⁶ In this regard, the bridge contract at issue has an

⁶ To the extent the protester has argued that the SBA should have used the unit price of a single ENFIRE system as the basis for comparison, rather than the overall contract value, it offered no support for this assertion.

estimated dollar value of \$19.4 million whereas Azimuth's 2007 contract had a potential value of \$191 million (and actual orders valued at \$79.9 million), Azimuth's May 2013 6-month bridge contract had a value of \$2.8 million, and the cancelled small business set-aside solicitation had (and the re-solicitation of the requirement has) a maximum value of \$97.5 million. Given this record, we have no basis to conclude that the SBA violated applicable regulations when it concluded that the bridge requirement at issue was "new" and accepted it under the 8(a) program.⁷

The protest is denied.

Susan A. Poling
General Counsel

⁷ The SBA also reports that even if this was not considered a new requirement, Azimuth failed to show that it should have been presumed to have been adversely impacted. In this regard, the firm does not meet the requirement of 13 C.F.R. § 124.504(c) that the small business was performing the work at the time of, or within 30 days of, the offering of the requirement to the SBA for placement in the 8(a) program. SBA Report at 8. Additionally, to the extent Azimuth has argued that Chenega lacks the capability to produce the ENFIRE systems, it is not an interested party to challenge the award in this regard. As discussed above, the requirement was properly placed in the 8(a) program and the protester is not an 8(a) firm eligible for award. 4 C.F.R. § 21.0(2); see Kuwait Leaders Gen. Trading & Contracting Co., B-401015.2, May 21, 2009, 2009 CPD ¶ 113 at 4.