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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Catapult Technology, Ltd.

File: B-294936; B-294936.2

Date: January 13, 2005

Cyrus E. Phillips IV, Esq., for the protester.
Timothy B. Mills, Esq., and Mary Beth Bosco, Esq., Patton Boggs LLP, for Bowhead Information Technology Services, an intervenor.
Terence W. Carlson, Esq., Department of Transportation, and John W. Klein, Esq., and Kenneth W. Dodds, Esq., Small Business Administration, for the agencies.
Paula A. Williams, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that the Small Business Administration (SBA) improperly accepted information technology services requirement into section 8(a) business development program is denied where, under the SBA's interpretation of its regulation, the protester does not appear to meet the condition for a presumption that accepting the requirement would cause it adverse impact and the applicable regulation does not preclude the SBA from deciding to accept a consolidated requirement into the section 8(a) business development program, even if the adverse impact presumption is met.

DECISION

Catapult Technology, Ltd. protests the decision by the Department of Transportation (DOT) and the Small Business Administration (SBA) to contract with Bowhead Information Technology Services, an Alaskan Native Corporation, under the SBA's section 8(a) business development program for information technology (IT) infrastructure operations and maintenance services at the DOT headquarters in Washington, DC.[1] Catapult, which was performing some of the offered services prior

[1] Section 8(a) of the Small Business Act authorizes the SBA to enter into contracts with government agencies and to arrange for performance of such contracts by awarding subcontracts to socially and economically disadvantaged small business concerns. 15 U.S.C. § 637(a) (2000).

to the section 8(a) offering, alleges that the SBA improperly accepted these IT requirements into the section 8(a) business development program.[2]

We deny the protest.

The DOT consists of the Office of the Secretary of Transportation and 10 operating administrations each of which has its own individual data center, help desk, desktop computer maintenance contract, common software licenses and unique telephone services, making the sharing of information between organizations cumbersome. Agency Report (AR), exh. 4, Acquisition Plan, at 7. The agency reports that the requirement, which was offered to the SBA, will consolidate the IT infrastructure contracts of these 10 operating administrations into a single common operating environment. According to DOT, this will create a more mission effective, secure, and cost efficient computing environment that will provide common IT services to all of DOT. Contracting Officer's Statement at 2-3.

The record shows that in fiscal year (FY) 2004, the agency had awarded two contracts for IT support services--one to Catapult for services such as network operations and "help desk" support, and the other to Bowhead for computer "help desk" services. As it relates to this protest, the Catapult contract, DTOS59-04-C-00408, originated from a task order issued as the result of an unrestricted competition among contractors under a DOT multiple-award, indefinite-delivery/indefinite-quantity (ID/IQ) contract known as "VANITS" to provide IT support for the then existing Transportation Administrative Service Center (TASC) within DOT. When the TASC was abolished by DOT, the Catapult task order (T020001) was novated from the terminated VANITS contract into a stand-alone contract DTOS59-04-C-00408.[3] That stand-alone contract incorporated the task order terms and conditions, including the 1-year option for FY05 and FY06 performance. AR, exh. 3, Catapult's Contract; Contracting Officer's Statement at 3-4.

By letter dated August 11, 2004, DOT offered the consolidated IT requirement to the SBA under the 8(a) business development program. The letter described the

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[2] Catapult is a small business contractor that participates in the SBA's small disadvantaged business and business development programs.

[3] The record indicates that this stand-alone contract, effective December 31, 2003, was initially funded at a value of $3,543,808.26. AR, exh. 3, Catapult's Contract, at 3-4. This amount was later increased by $95,587.60 under modification No. 1; by $82,709.47 under modification No. 2; by $12,375.99 under modification No. 4; and decreased by $53,502.33 under modification No. 5, for a total FY04 value of $3,680,978.99. The record further indicates that the total value of Catapult's contract for FY04 was $4,815,976.22 ($1,134,997.23 under the VANITS contract plus $3,680,978.99 under the stand-alone contract). Supplemental AR, at 2 (Dec. 1, 2004).

requirement as a consolidation project planned to create a centrally managed IT support operation and advised the SBA of the current 8(a) contractors providing IT support services to the individual operating administrations within the agency. The DOT letter valued the offered acquisition at approximately $200 million over 5 years and recommended Bowhead for a sole-source award. Offering Letter from DOT to the SBA at 1-2. By letter dated August 19, the SBA accepted the procurement, stating that a determination had been made that "acceptance of this procurement will cause no adverse impact on another small business concern." AR, exh. 2, Letter from the SBA to Contracting Officer. On September 24, Catapult was told of the agency's decision not to exercise the FY05 option under Catapult's stand-alone contract. Thereafter, on September 30, a sole-source ID/IQ contract was awarded to Bowhead through the section 8(a) business development program.[4] Contracting Officer's Statement at 4-5.

Catapult protests the SBA's decision to accept these consolidated IT requirements into the section 8(a) business development program, asserting that the decision contravenes the regulations governing acceptance of procurements for award under the program. Specifically, the protester alleges that it was performing 90 percent of DOT's total IT support services that have now been consolidated into the challenged award and that the dollar value of the requirement Catapult was performing for the last 12 months was 25 percent or more of its annual gross sales.[5]

The Small Business Act affords the SBA and contracting agencies broad discretion in selecting procurements for inclusion in the section 8(a) program and we will not consider a protest challenging a decision to place a requirement under the section 8(a) program absent a showing by the protester of possible bad faith on the part of government officials, or that specific laws or regulations have been violated. 4 C.F.R. § 21.5(b)(3) (2004); C. Martin Co., Inc., B-292662, Nov. 6, 2003, 2003 CPD ¶ 207 at 3. Here, Catapult does not allege, and the record does not show, that either DOT or the SBA acted in bad faith and, as discussed below, we find no violation of law or regulation.

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[4] Federal Acquisition Regulation (FAR) § 19.805-1(b)(2) permits the award of sole-source contracts to concerns owned by Indian tribes or Alaska Native Corporations, without regard to the dollar thresholds that would otherwise require a competitive 8(a) procurement. See 15 U.S.C. § 637(a)(16)(A); FAR § 19.805-1(a)(2); 13 C.F.R. § 124.506(b) (2004).

[5] To the extent Catapult challenges the agency's refusal to exercise the FY05 option of its stand-alone contract, this issue is not for our review since a contracting agency's decision whether to exercise an option is a matter of contract administration outside the scope of our bid protest function. 4 C.F.R. § 21.5(a); American Consulting Servs., Inc., B-276149.2, B-276537.2, July 31, 1997, 97-2 CPD ¶ 37 at 9.

As relevant here, the implementing regulations in effect at the time this requirement was accepted into the section 8(a) business development program state that:

> SBA will not accept a procurement for award as an 8(a) contract if the circumstances identified in paragraphs (a) through (d) of this section exist.
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> * * * * *
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> (c) Adverse impact. SBA has made a written determination that acceptance of the procurement for 8(a) award would have an adverse impact on an individual small business, a group of small businesses located in a specific geographical location, or other small business programs. The adverse impact concept is designed to protect small business concerns which are performing Government contracts awarded outside the 8(a) [business development] program . . . .

13 C.F.R. § 124.504; Korean Maint. Co., B-243957, Sept. 16, 1991, 91-2 CPD ¶ 246 at 2. The regulation provides that the SBA will presume adverse impact exists where a small business has been performing the requirement and the requirement represents 25 percent or more of the small business contractor's most recent annual gross sales. For a multiyear requirement, the dollar value of the last 12 months of the requirement would be used to determine whether a small business would be adversely affected by the SBA's acceptance of the offered requirement. 13 C.F.R. § 124.504(c)(1)(i)(C).

Where a requirement is "new," i.e., it has not been previously purchased by the procuring agency, the adverse impact rule does not apply--with one exception. 13 C.F.R. § 124.504(c)(1)(ii). The exception, which is relevant to this protest, relates to the situation where multiple contracts are being consolidated. The regulation addresses that situation as follows:

> In determining whether the acceptance of a requirement would have an adverse impact on a group of small businesses, SBA will consider the effects of combining or consolidating various requirements being performed by two or more small business concerns into a single contract which would be considered a "new" requirement as compared to any of the previous smaller requirements. SBA may find adverse impact to exist if one of the existing small business contractors meets the presumption set forth in paragraph (c)(1)(i) of this section.

13 C.F.R. § 124.504(c)(2).

The SBA reports to our Office that, contrary to the statement in its acceptance letter to DOT, the SBA had not specifically considered whether acceptance of the offered IT requirements would adversely affect Catapult or any other small business concern, because the SBA believed the offered requirement was "new" and therefore, consistent with its regulations, the SBA was not required to perform an adverse impact analysis. SBA Report at 2, 3 (Dec. 6, 2004). However, the SBA acknowledges that where, as here, a new requirement is a consolidation of two or more requirements previously performed by a group of small businesses, under the regulatory guidance found in 13 C.F.R. § 124.504(c)(2), the SBA is required to conduct an adverse impact analysis.

The SBA contends, however, that the failure to conduct an adverse impact analysis did not prejudice Catapult, for two reasons. First, according to the SBA, Catapult did not meet the 25-percent dollar value threshold for the presumption of adverse impact under the SBA's regulations. Specifically, the SBA explains that from its review of the pleadings filed in response to Catapult's protest, including DOT's report and supplemental report, Catapult received "approximately $4.8 million over the last 12 months of its performance of the [DOT] requirement that has already been consolidated into the Bowhead contract, which is well short of 25 percent of Catapult's claimed annual gross sales ($28 million)." SBA Report at 3 (Dec. 6, 2004). Indeed, in a letter to the SBA, Catapult accepts DOT's statement that Catapult "has lost only 17 percent of its revenues, not the 25 percent required for an adverse impact." Catapult's Letter to SBA at 2 (Dec. 3, 2004). While the protester argues that the SBA's analysis ignores DOT's "immediate plans to consolidate more work into [the protested contract]" and that Catapult will have "a total loss of 42 percent of Catapult's revenues," id. at 2-3, the fact remains that the record shows that, at the time the matter was before the SBA, Catapult did not meet the 25-percent threshold. More importantly, in the view of the SBA, the additional work that may be consolidated into the contract is being performed under a section 8(a) contract and, according to the SBA, consolidation of such requirements is not to be counted toward the 25-percent share relevant to the adverse impact analysis. For this reason, the SBA contends that Catapult did not meet the 25-percent threshold for the presumption of adverse impact.

Second, the SBA points out that the language of the regulation provides that, in the context of consolidated requirements, even if the presumption of adverse impact is met as to an affected small business, the SBA "may"--rather than "shall"--find adverse impact to exist. 13 C.F.R. § 124.504(c)(2). In other words, according to the SBA, the above-quoted exception to the usual provision exempting new requirements from the adverse impact rule gives the SBA "the discretion to accept a requirement into the 8(a) [business development] program in appropriate circumstances even where one or more contractors met the presumption of adverse impact." SBA Supplemental Report at 2 (Dec. 14, 2004). The SBA points out that the adverse impact regulation was amended to provide that the SBA "may" find adverse impact to exist if the adverse impact presumption is met for a "new" consolidated requirement. 62 Fed. Reg. 43583, 43591 (1997). The regulation thus does not preclude the SBA from

deciding to accept a consolidated requirement into the section 8(a) business development program, even if the adverse impact presumption is met. The SBA argues that under the circumstances here, the SBA's decision to accept the offered IT requirement into the section 8(a) business development program was in accordance with its regulations.

Catapult disagrees with the SBA's analysis. In Catapult's view, its 8(a) contract work should be included in the analysis of whether the 25-percent threshold is met. Catapult also rejects the SBA's conclusion that the adverse impact determination is discretionary even where the presumption of adverse impact is met.[6] Moreover, Catapult argues, since the SBA admitted that it never performed an adverse impact analysis and never "exercised discretion of any sort," the SBA cannot now rely on discretion as a defense to its failure to conduct an adverse impact analysis. Protester's Final Comments at 3-4 (Dec. 17, 2004).

We are required to give deference to an agency's reasonable interpretation of its regulations, and because the SBA is the agency responsible for promulgating the adverse impact regulation, we give its interpretation great weight. See Red River Serv. Corp., B-279250, May 26, 1998, 98-1 CPD ¶ 142 at 5-6; see also Udall v. Tallman, 380 U.S. 1, 16 (1965). Because Catapult would appear not to have met the 25-percent threshold, particularly in light of the SBA's view that section 8(a) contracts should not be the basis of an adverse impact determination, it appears that the record supports the conclusion that, had the SBA performed the required analysis at the time, it would have concluded that Catapult would not suffer adverse impact. In addition, the SBA's interpretation of its regulations indicates that the requirement could properly have been accepted, even if adverse impact had been found as to Catapult. Under these circumstances, it does not appear that Catapult has suffered

[6] As support for its position, Catapult relies on the decision by the U.S. District Court for the District of Columbia in Barrett Refining Corp. v. Defense Fuel Supply Ctr., 1992 U.S. Dist. 1271. Protester's Supplemental Comments, at 4 (Dec. 8, 2004). However, as noted by the SBA and DOT, the Barrett decision is not controlling because, among other things, the discretionary language ("may") was introduced into the regulations after the Barrett decision was issued. SBA Supplemental Report at 2 (Dec. 14, 2004).

any prejudice by the SBA's admitted failure to perform an adverse impact analysis. Designer Assocs., Inc., B-293226, Feb. 12, 2004, 2004 CPD ¶ 114 at 5.

The protest is denied.[7]

Anthony H. Gamboa
General Counsel

[7] In a supplemental protest, filed after receipt of the agency report, Catapult challenges Bowhead's failure to obtain the required facilities security clearance prior to award. We agree with the agency that the issue of whether Bowhead ultimately obtains security clearances is a matter of contract administration, which our Office does not review. 4 C.F.R. § 21.5(a); Mark Dunning Indus., Inc., B-258373, Dec. 7, 1994, 94-2 CPD ¶ 226 at 5-6.