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**Comptroller General
of the United States**

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

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Decision

Matter of: Rothe Computer Solutions, LLC d/b/a Rohmann Joint Venture

File: B-299452

Date: May 9, 2007

David F. Barton, Esq., The Gardner Law Firm, for the protester.
Christopher S. Cole, Esq., Department of the Air Force, and John W. Klein, Esq., and Kenneth Dodds, Esq., Small Business Administration, for the agencies.
Jennifer D. Westfall-McGrail, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Small Business Administration properly accepted requirement for visual information services for the Air Force Academy into the 8(a) business development program for award on a competitive basis without determining whether acceptance of the requirement into the 8(a) program would have an adverse impact on an existing small business after reasonably determining that the services qualified as a new requirement.

DECISION

Rothe Computer Solutions, LLC d/b/a Rohmann Joint Venture (RJV) protests the decision by the Department of the Air Force and the Small Business Administration (SBA) to place a requirement for visual information services for the Air Force Academy under the SBA's section 8(a) business development program for award on a competitive basis.

We deny the protest.

BACKGROUND

RJV has been performing a contract for various information management and communications services, including the visual information services at issue in this protest, for the Air Force Academy since 2002. Because this contract is due to expire in July 2007, the Air Force has initiated the process of reprocurring the services. In June 2006, the Air Force shifted responsibility for the visual information services from the Communications Squadron, which had awarded the contract to RJV, to the Air Force Public Affairs Office; as a consequence of this reorganization, the Air

Force determined that the visual information services should be procured separately from the other services.

After determining that the visual information services should be procured separately, the Air Force conducted market research to determine the size status and assess the capabilities of potential sources. Based on the results of its research, the agency concluded that there were multiple 8(a) firms capable of performing the requirement and that the services should be offered to the 8(a) program for award on a competitive basis.

By letter of November 16, 2006, the Air Force offered the requirement to the SBA. Of significance to this protest, the letter furnished the following summary of the acquisition history of the requirement:

These services were outsourced as part of an A-76 study and are currently included in a larger scale contract that was awarded to a small business, Rohmann Joint Venture, San Antonio, TX. Mandated reorganization of Media Services under Public Affairs requires a new contract action to be put into place for those services. . . . To be noted is the fact that the value for the Media Services piece is approximately [deleted] of the current contract value for Communication Support, which includes the Media Services.¹ This is considered to be a new requirement.

Letter from AF Director of Small Business to SBA at 1.² By letter of the following day, SBA accepted the requirement for competition in the 8(a) program.

The Air Force posted a presolicitation notice describing the requirement on the Federal Business Opportunities website on November 28. The notice informed

¹ The Air Force previously referred to the services that it now calls “visual information services” as “media services.” Agency Request for Summary Dismissal at 2.

² The letter also furnished the following information regarding interested 8(a) firms:

Of the [deleted] companies that provided capability information, there were [deleted] 8(a) companies from across the United States and Alaska that submitted capability information. After reviewing the information provided, and following up with telephone calls for clarification, it was determined that [deleted] of the 8(a) companies that responded have the background, capability and skills to provide the required services

Id. at 1-2.

prospective sources that the requirement would be set aside as a competitive 8(a) acquisition. RJV contacted the contracting officer later the same day to object to the setting aside of the requirement for 8(a) competition, arguing that such a course of action would have an adverse impact on it “in that the proposed set-aside is more than 25% of [its] only contract and therefore its annual gross sales.” E-mail from RJV to the Contracting Officer, Nov. 28, 2006, Agency Report, Tab 23. The Air Force sought guidance from the SBA regarding the protester’s complaint. By letter dated December 15, the SBA advised the Air Force that an adverse impact determination had not been required because the procurement in question was considered a new requirement. The Air Force notified the protester of the SBA’s response. On December 22, RJV filed an agency-level protest objecting to placement of the requirement in the 8(a) program. The agency denied the protest, whereupon RJV protested to our Office.

The protester argues that the SBA erred in finding that the requirement for visual information services was a new requirement and that an adverse impact determination thus was not required.

DISCUSSION

Section 8(a) of the Small Business Act authorizes the 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) (2000). 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) (2006); Designer Assocs., Inc., B-293226, Feb. 12, 2004, 2004 CPD ¶ 114 at 4.

Under the Act’s implementing regulations, the SBA may not accept any procurement for award as an 8(a) contract 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) (2006). The adverse impact concept is designed to protect small business concerns that are performing government contracts awarded outside the 8(a) program. Id. The SBA presumes adverse impact to exist where the 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 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).

Except where a new requirement—which SBA’s regulations define as a requirement that has not previously been procured by the relevant procuring activity—is created through a consolidation of existing requirements, the concept of adverse impact does not apply to new requirements.³ 13 C.F.R. § 124.504(c)(1)(ii) and (2). In this connection, the regulations explicitly provide that the “SBA need not perform an impact determination where a new requirement is offered to the 8(a) BD [business development] program.” 13 C.F.R. § 124.504(c)(1)(ii)(D). The rationale for exempting new requirements from adverse impact analysis, the regulations explain, is that “[w]here a requirement is new, no small business could have previously performed the requirement and, thus, SBA’s acceptance of the requirement for the 8(a) BD program will not adversely impact any small business.” 13 C.F.R. § 124.504(c)(1)(ii)(A). The regulations further explain 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).

To avoid adverse impacts, and to obtain other information necessary for SBA to determine that an offered requirement is eligible and appropriate for award under the 8(a) program, SBA’s regulations require that contracting agencies furnish detailed information about a procurement when offering it for inclusion in the program. 13 C.F.R. § 124.502; see also Federal Acquisition Regulation (FAR) § 19.804-2. Among the items of information required to be included in the offering letter are the acquisition history, if any, of the requirement; the names and addresses of any small business contractors that have performed on the requirement within the previous 24 months; and the identities of all 8(a) program participants that have expressed an interest in being considered for the acquisition. 13 C.F.R. § 124.502(c)(9), (10), and (14); FAR § 19.804-2(a)(8) and (12).

In its report to our Office, the Air Force explained that the visual information services offered to the 8(a) program qualified as a new requirement because the services represented “approximately [deleted] of the current contract value, or, a

³ With regard to a requirement that is created through a consolidation of existing requirements, the regulations provide as follows:

In determining whether the acceptance of a requirement would have an adverse impact on a group of small businesses, the 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.

13 C.F.R. § 124.504(c)(2).

[deleted] reduction in total services from the current contract,” a change “that satisfie[d] the 25% requirement established by the SBA.” Agency Memorandum of Law at 4. In commenting on the agency report, the SBA agreed with the Air Force that the requirement should be considered new, although basing its analysis on the Air Force’s representation in its offering letter that the visual information services represented approximately [deleted] of the current contract value, rather than the above figure.⁴ The SBA explained as follows:

In its offering letter, the Air Force informed SBA that the value of the visual information services requirement being offered to the 8(a) BD program was approximately [deleted] lower than the total value of the acquisition currently being performed by RJV. If that is correct, the change in value between the two procurements is greater than 25 percent, and the visual services acquisition is a new requirement under SBA’s regulations and no adverse impact determination is required. 13 C.F.R. § 124.504(c)(1)(ii)(D). A change in value alone is enough to render a procurement new for adverse impact determination purposes, even if the goods or services are exactly the same as a prior procurement. See NANA Services, LLC, B-297177.3, B-297177.4, Jan. 3, 2006, 2006 CPD ¶ 4. . . . Under the adverse impact regulation, SBA compares the total estimated value of RJV’s contract, including all options, to the total estimated value of the offered requirement, including all options, to determine whether it is new.

SBA Comments, Mar. 23, 2007, at 3.

RJV argues that the SBA’s interpretation of its own regulation is unreasonable. According to the protester, it is not the change in overall procurement value, but rather the change in the value of the visual information services component that the agency should consider. RJV maintains that the value of the visual information services under the contract that it is performing and the value of the visual information services under the new solicitation are virtually the same; thus, the protester argues, the requirement for a price adjustment of 25 percent is not met.

⁴ While we are perplexed by the unexplained discrepancy between the information furnished to the SBA and the information furnished to our Office regarding the percentage of existing contract value that the visual services represent—and by the fact that attachment 1 to the Contracting Officer’s Statement of Facts furnishes yet a third percentage [deleted]—we nonetheless do not regard the inconsistency as significant for purposes of our decision given that the percentage change in value now reported by the Air Force (i.e., approximately [deleted]) is greater than the percentage change in value (i.e., approximately [deleted]) on which the SBA based its determination.

As the agency responsible for promulgating the applicable regulations, the SBA's interpretation of the regulations, that is, what constitutes a "new" requirement, deserves great weight, and we defer to the SBA's interpretation so long as that interpretation is reasonable. NANA Servs., LLC, *supra*, at 10; The Urban Group, Inc.; McSwain and Assocs., Inc., B-281352, B-281353, Jan. 28, 1999, 99-1 CPD ¶ 25 at 6.

As explained above, 13 C.F.R. § 124.504(c)(1)(ii)(C) provides that a "modification" of an existing requirement will be considered "new" (and therefore exempt from the requirement to do an adverse impact analysis) where the "magnitude of change" between the original and modified requirements is at least 25 percent. The protester argues that the magnitude of change here must be based on the change in value of the work that is the subject of the new procurement relative to the value of only that component of the work under the existing contract, rather than the contract value as a whole. We think that, in determining whether there has been a price change of at least 25 percent, the SBA has reasonably interpreted its own regulation as providing for comparison of the value of the requirement to be solicited with the overall value of the existing contract encompassing that requirement. NANA Servs., LLC, *supra*, at 10; see also OMNI Gov't Servs., LP, B-297240.2 *et al.*, Mar. 22, 2006, 2006 CPD ¶ 56 at 2 n.2. Although RJV disagrees and offers an alternate approach, we see no basis to conclude that the interpretation by the SBA—the agency that is charged by statute with administering the 8(a) program and that wrote and issued the regulation at issue—is unreasonable. Since it is undisputed that, applying this interpretation of the regulation, the value of the work called for under the new requirement represents a reduction of more than 25 percent from the value of the existing contract held by RJV, the agencies properly concluded that no adverse impact analysis was required.⁵

Finally, the protester argues that in deciding to make the requirement an 8(a) set-aside, SBA violated 13 C.F.R. § 124.504(c)(3) by failing to consider the number and value of contracts in the subject industry reserved for the 8(a) program as compared with other small business programs. 13 C.F.R. § 124.504(c)(3) provides as follows:

⁵ RJV further argues that since 13 C.F.R. § 124.504(c)(2) provides for the performance of an adverse impact determination where a new requirement is formed by combining requirements currently being performed by two or more small businesses into a single contract, an adverse impact determination logically should be required in the converse situation, *i.e.*, where a new requirement is formed by extracting work from an existing requirement. Whether or not it would be logically consistent with 13 C.F.R. § 124.504(c)(2) for the SBA to require the performance of an adverse impact determination where a new requirement arises through the division of an existing requirement, the fact is that the provision does not provide for performance of an adverse impact determination under those circumstances.

In determining whether the acceptance of a requirement would have an adverse impact on other small business programs, SBA will consider all relevant factors, including but not limited to, the number and value of contracts in the subject industry reserved for the 8(a) BD program as compared with other small business programs.

By its terms, this provision calls on the SBA to perform the review set forth therein only where an adverse impact determination is required. Since, as explained above, an adverse impact determination was not required here, 13 C.F.R. § 125.504(c)(3) does not apply.

The protest is denied.

Gary L. Kepplinger
General Counsel