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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: United Enterprise & Associates

File: B-295742

Date: April 4, 2005

W. Michael Duncan, Esq., Austin, Lewis & Rogers, for the protester.
Andrea S. Grill, Esq., Corporation for National & Community Service, and John W. Klein, Esq., and Kenneth Dodds, Esq., Small Business Administration, for the agencies.
John L. Formica, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

In a noncompetitive acquisition under the Small Business Administration's (SBA) section 8(a) program, although SBA, in considering the responsibility of an 8(a) vendor under the certificate of competency procedures, was not following applicable regulations, the protester was not prejudiced because SBA agreed with the procuring agency that the 8(a) vendor was not responsible for this requirement, and it is thus apparent that SBA would not have exercised its right to appeal the agency's determination not to contract with that vendor, which was the only action under applicable regulations that SBA could take to contest the procuring agency's determination here, and the protester has not shown that either agency acted in bad faith.

DECISION

United Enterprise & Associates (UEA) protests its failure to receive a noncompetitive contract under the Small Business Administration's (SBA) section 8(a) program for the Corporation for National & Community Service (CNCS), for facilities support services needed at the AmeriCorp facility in Charleston, South Carolina.[1]

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

We deny the protest.

The required facilities support services were previously performed by a section 8(a) contractor that had received a noncompetitive award. As the incumbent 8(a) contractor would be graduating from the 8(a) program, and the contract was due to expire in November 2004, CNCS, at the suggestion of the incumbent 8(a) contractor, identified UEA as an eligible 8(a) firm that could perform the services. CNCS explains that "[t]aking into consideration [the incumbent contractor's] recommendations, as well as other independent, appropriate procurement and business considerations, [CNCS] was interested in seeing whether UEA would be an appropriate vendor to be awarded the 8(a) contract and continue the work." Contracting Officer's Statement at 2. CNCS thus contacted SBA, seeking authorization to enter into negotiations with UEA. Agency Report (AR), Tab 30, Contracting Officer's Letter to SBA (Apr. 22, 2004). SBA subsequently "authorized [CNCS] to conduct negotiations with [UEA] and sign the contract documents on behalf of the Federal Government." AR, Tab 29, SBA Letter to CNCS (Apr. 28, 2004).

CNCS issued a request for proposals (RFP) to UEA on May 10 requesting UEA to respond by June 11. On June 4, UEA submitted a number of written and oral questions regarding the RFP to CNCS, and requested "an extension in submitting [its] proposal" to July 2. The agency responded to UEA's questions, and granted the extension. AR, Tab 7, UEA Letter to Contracting Officer (June 4, 2004); Contracting Officer's Statement at 2. The agency did not receive a proposal from UEA by the July 2 due date. The agency subsequently revised the RFP, and invited UEA to submit a proposal in response to the revised RFP by August 6. Contracting Officer's Statement at 2; AR, Tab 10, Revised RFP. UEA submitted its proposal to CNCS on August 9. AR, Tab 11, UEA Proposal.

The agency reviewed UEA's proposal, and "noted several serious deficiencies with it, raising substantial concern as to whether UEA would be able to satisfactorily perform the required services." Contracting Officer's Statement at 2-3. After being informally advised by SBA that it was permissible for CNCS to request that SBA replace UEA with another eligible section 8(a) vendor for the possible performance of the services, CNCS, by letter dated November 9, formally advised SBA that CNCS did "not believe that [UEA] would be able to properly fulfill the requirements or terms of the new maintenance contract." AR, Tab 21, Contracting Officer's Letter to SBA, at 1. CNCS also stated in this letter that it "would consider . . . another 8(a) firm" for the performance of the services, and identified a specific 8(a) vendor as a possibility. Id. at 3.

SBA responded by informing CNCS that SBA had been "mistaken," and it could not "just replace" UEA, but rather, that CNCS was required to refer the matter of UEA's "ability to perform" to the cognizant SBA office for "Certificate of Competency consideration." AR, Tab 20, SBA E-Mail to the Contracting Specialist. Shortly thereafter, the CNCS contracting officer performed a "pre-award survey" of UEA, as instructed by SBA, found UEA to be nonresponsible, and referred the matter to SBA

for consideration under SBA's COC procedures. Contracting Officer's Statement at 4; Tab 17, Contracting Officer's Referral of Non-Responsibility Determination to SBA; Tab 18, Contracting Officer's Letter to SBA (Nov. 23, 2004); Tab 19, Pre-Award Survey Results. On January 6, 2005, SBA issued its determination not to issue a COC to UEA. AR, Tab 14, SBA's COC letter to UEA. This protest followed.

The protester argues that SBA's denial of a COC for UEA was affected by bad faith on the part of the agencies, and that the agencies failed to follow applicable regulations in considering UEA for a COC.

The section 8(a) program has both competitive and noncompetitive components, depending on the dollar value of the requirement. See 13 C.F.R. § 124.506(a) (2004); New Tech. Mgmt., Inc., B-287714.2 et al., Dec. 4, 2001, 2001 CPD ¶ 196 at 3. Generally, where the acquisition value exceeds $3 million, a section 8(a) contract must be competed among section 8(a) firms; section 8(a) acquisitions with values less than $3 million, such as the one here, generally are awarded on a noncompetitive basis. New Tech. Mgmt., Inc., supra. Because of the broad discretion afforded a contracting officer to let a noncompetitive contract under section 8(a) of the Small Business Act upon such terms and conditions as may be agreed upon by the procuring agency and SBA, our review of actions related to noncompetitive acquisitions under the section 8(a) program is generally limited to determining whether government officials have violated regulations or engaged in fraud or bad faith. DLS Servs., Inc., B-276960, May 20, 1997, 97-1 CPD ¶ 191 at 2. As explained below, although we agree with SBA that CNCS and SBA failed to follow applicable regulations upon CNCS's determination that UEA was nonresponsible, we fail to see, and the protester has not explained, how it was harmed by the agencies' errors.

As set forth in the regulations and explained by SBA, until 1998, SBA's regulations specifically provided that the COC procedures did not apply to contracts awarded under SBA's section 8(a) program.[2] 13 C.F.R. § 124.313 (1998). SBA's regulations were amended on June 30, 1998, to provide (as they do now) that if, in the conduct of "competitive 8(a) procurements," the "procuring activity contracting officer believes that the apparent successful offeror is not responsible to perform the contract, he or she must refer the concern to the SBA for a possible Certificate of Competency." 63 Fed. Reg. 35726, 35758 (1998); 13 C.F.R. § 124.507(b)(5) (2004). In making this regulatory change, SBA explained that it wanted "to make competitive

[2] Specifically, 13 C.F.R. § 124.313(a) (1998) provided that SBA would "certify" that a firm "is competent to perform the requirement . . . based on [SBA's] determination that the 8(a) concern with which it intends to subcontract is responsible to perform the requirement," with 13 C.F.R. § 124.313(c) stating that "[a] Participant that is determined by SBA not to be responsible to perform a sole source or competitive 8(a) contract may not seek the issuance of a Certificate of Competency."

8(a) procurements as similar as possible to non-8(a) Government contracting procedures." 62 Fed. Reg. 43583, 43592 (1997); SBA Supplemental Report at 1. SBA emphasizes, however, that as provided in the regulatory history of 13 C.F.R. § 124.507(b)(5), and as indicated by SBA's current regulations, the availability of the COC process to an 8(a) participant is limited to nonresponsibility determinations made during competitive 8(a) acquisitions.

With regard to noncompetitive acquisitions, such as the one here, SBA, in amending its regulations to provide for the applicability of the COC process to nonresponsibility determinations made in the context of competitive 8(a) acquisitions, stated as follows:

> COC procedures would not, however, be available for sole source 8(a) procurements. In most cases, the procuring agency would have selected the Participant for the sole source contract by assessing the firm's capabilities prior to offering the procurement to SBA. It is unlikely that the procuring agency would select a Participant, go through negotiations with the firm, and then find the firm not to be responsible. If that does happen, or if the procuring agency determines that a firm nominated by SBA for an open requirement cannot perform the contract, SBA would review the situation to determine whether it agrees with the procuring agency. If SBA agrees, it can nominate another Participant to perform the contract, if one exists that is found to be eligible and responsible for the requirement, or it can permit the agency to withdraw the requirement from the 8(a) program if an eligible and responsible Participant is not found. If SBA does not agree, it can appeal the procuring agency's decision to the head of the procuring agency pursuant to § 124.505.

62 Fed. Reg. 43583, 43592 (1997). The procedures referenced above are implemented through 13 C.F.R. § 124.505(a)(2), which provides that the "Administrator of SBA may appeal . . . to the head of the procuring agency" the procuring agency's "decision to reject a specific [8(a)] Participant for award of an 8(a) contract."

As such, here, once CNCS determined that UEA was nonresponsible, and informed SBA of that determination, SBA, if it agreed with CNCS, should have allowed for the replacement of UEA with another 8(a) vendor, such as the vendor identified by CNCS, or should have permitted CNCS to withdraw the requirement from the 8(a) program if no qualified 8(a) vendor was available. See DLS Servs., Inc., supra, at 3. If SBA disagreed with CNCS regarding its determination that UEA was nonresponsible, the Administrator of SBA could have appealed the CNCS contracting officer's responsibility determination to the head of the procuring agency. 13 C.F.R. § 124.505(a)(2). In short, we agree with SBA that it erred in considering UEA for a COC because the COC process is not applicable to noncompetitive 8(a) acquisitions. SBA Report at 2; SBA Supplemental Report at 1-2.

Although SBA failed to follow applicable regulations once CNCS determined that UEA was not responsible and referred the matter to SBA, we fail to see, and UEA has not explained, how it was prejudiced by this error. That is, the matter of UEA's responsibility was considered by SBA as part of its COC process, with SBA determining not to issue a COC to UEA. As such, it is clear from the record that SBA ultimately agreed with CNCS's determination regarding UEA's responsibility, with the end result remaining the same--CNCS does not contract with SBA for performance of the services by UEA. In short, whether the matter of UEA's responsibility was considered by SBA through the process provided for by the regulations that contemplates a determination as to whether SBA agrees with the procuring agency's nonresponsibility determination, or whether the matter of UEA's responsibility was considered by SBA through the COC process, nothing in the record indicates that the process or result would have differed in a manner that would have favored UEA--SBA considered the matter, and concluded that it did not disagree with CNCS's nonresponsibility determination. Thus, it is apparent that SBA would not have appealed the CNCS determination not to contract with UEA under the 8(a) program, which was the only appropriate action under applicable regulations that could be taken to contest the procuring agency's determination here.

With regard to the protester's contention that the process evidenced "bad faith," we have reviewed the record and find no credible evidence of bad faith on the part of the CNCS or SBA officials. In this regard, we note that the protester argues in a number of instances that certain of the agencies' actions, such as the asserted "lack of any meaningful communications with UEA about the 'problems' with its proposal shows bad faith or incompetence to the extent that it equates to bad faith." Protester's Supplemental Comments at 3.

To establish bad faith, a protester must present convincing evidence that the officials had a specific and malicious intent to harm the firm. E.F. Felt Co., Inc., B-289295, Feb. 6, 2002, 2002 CPD ¶ 37 at 3. The burden of establishing bad faith is a heavy one. Id. Evidence establishing a possible defect in an agency's actions generally is not sufficient in itself to establish that an agency acted in bad faith. For instance, and contrary to the protester's apparent belief, neither negligence, incompetence, nor a lack of diligence on the part of agency officials establishes that such individuals acted in bad faith. D.H. Kim Enters., Inc., B-261103, July 7, 1995, 95-2 CPD ¶ 5 at 2. Rather, a protester must also present facts reasonably indicating, beyond mere inference and suspicion, that the actions complained of were motivated by a specific and malicious intent to harm the protester. E.F. Felt Co., Inc., supra, at 3-4.

Although UEA alleges bad faith, we do not agree with the protester that instances where "SBA failed to handle th[e] situation properly," where the protester believes that SBA and CNCS did not effectively communicate with each other, or the apparent suggestion by CNCS that it be able to "replace" UAE with another 8(a) vendor, equate to bad faith. See Protester's Supplemental Comments (Mar. 14, 2005), at 3-4. Additionally, because UEA has not established, and the record does not reflect, that in reviewing UEA's responsibility, either CNCS or SBA failed to consider

information bearing on UEA's responsibility with the intention of harming UEA, the protester fails to show that CNCS or SBA acted in bad faith. See E.F. Felt Co., Inc., supra, at 4.

To the contrary, the procuring agency's lack of bad faith in this regard is evidenced by the fact that the agency extended proposal due dates at UEA's request, and ultimately considered UEA's proposal for performance of the services, even though UEA submitted its proposal after the extended due dates had passed. With regard to the only instance alleged by UEA that could have been construed as suggesting bad faith, involving a statement allegedly made by an SBA representative to a UEA representative, we note that SBA has submitted the statement of that SBA representative that directly addresses and denies this allegation, while the protester, even though provided the opportunity to do so, did not submit any further statement in support of its allegation. In our view, CNCS's and SBA's actions here reflect the agencies' concerns and judgment that UEA was not capable of adequately performing the required services, as well as a lack of familiarity as to how to proceed in the context of a noncompetitive section 8(a) acquisition, rather than bad faith.

The protest is denied.

Anthony H. Gamboa
General Counsel