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Decision

Matter of: Madison Services, Inc.

File: B-400615

Date: December 11, 2008

Wayne A. Keup, Esq., for the protester.
Michelle Anderson, Esq., Federal Emergency Management Agency, and Kenneth W. Dodds, Esq., Small Business Administration, for the agencies.
Edward Goldstein, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Small Business Administration's (SBA) decision to accept requirements into its 8(a) program, notwithstanding the fact that the solicitations for the requirements previously had been issued as small business set-asides, is unobjectionable where SBA concluded that the relevant procurement history supported the view that the initial small business set-asides were issued in error and therefore justified the application of the "extraordinary circumstances" provision under SBA's regulations.
2. SBA properly accepted requirements into the 8(a) program without first determining whether doing so would have an adverse impact on existing small business concerns where the requirements qualified as new under SBA's regulations.

DECISION

Madison Services, Inc. of Madison, Mississippi protests the terms of solicitation Nos. HSFEMS-08-R-0041, for septic bladder pumping services in Mississippi, and HSFEMS-08-R-0042, for travel trailer deactivation services in Mississippi, issued by the Federal Emergency Management Agency (FEMA). Madison argues that the solicitations should not have been set aside under section 8(a) of the Small Business Act and its implementing regulations, and that the solicitations are defective because they fail to include past performance as an evaluation factor.

We deny the protest.

By way of background, in 2005, FEMA issued two multiple award, fixed-price indefinite-delivery/indefinite-quantity (ID/IQ) contracts for a wide array of services related to the maintenance and deactivation of mobile homes and travel trailers in

Mississippi, which had been supplied by FEMA in the wake of Hurricane Katrina. The requirements under the two solicitations were identical, however one was set aside for small business concerns and the other was set aside for small and disadvantaged businesses under section 8(a) of the Small Business Act. Between these two solicitations, FEMA awarded a total of 10 contracts--5 under each solicitation--with Madison receiving an award under the solicitation set aside for small business concerns. Each ID/IQ contract had a 5-year term (with five separate ordering periods), a \$50,000 minimum guaranteed value, and a \$100 million maximum value.

FEMA awarded Madison task orders under its ID/IQ contract for the first two ordering periods. FEMA, however, decided not to issue any orders under the ID/IQ contracts for the third period, finding that its needs would be better served with a different acquisition strategy, specifically, awarding separate contracts for four major, yet discrete tasks: (1) septic tank pumping services for travel trailers and mobile homes; (2) maintenance services for travel trailers and mobile homes; (3) mobile homes deactivation services; and (4) deactivation services for travel trailers.

As it relates to the protest, FEMA's acquisition plan provided for the award of these four contracts as small business set-asides. Specifically, the acquisition plan stated as follows:

These requirements can be competed on the basis of Full and Open Competition, with a small business set-aside to Mississippi vendors Further setting these requirements aside to local 8(a) contractors was considered, however determined to be unfair to those current [maintenance and deactivation contractors] who are [small businesses], and not 8(a)s.

FEMA Acquisition Plan for the Revised Mississippi Maintenance and Deactivation Contracts, July 25, 2008, § C.3.b.

In late August 2008, FEMA issued four solicitations (HSFEMS-08-R-0034, 0038, 0039, and 0040), one for each of the four major requirements noted above. Each of the four solicitations was set aside for small business concerns. As it relates to the protest, 0034 was for travel trailer deactivation services and 0040 was for septic bladder pumping services for travel trailers and mobile homes.

On August 29, the Deputy Chief Procurement Officer for the Department of Homeland Security (DHS)¹ informed the contracting officer (CO) that, based on an analysis of "the program requirements and corresponding contract history" FEMA should select at least two of the four requirements under solicitations 0034, 0038,

¹ FEMA is a component of DHS.

0039, and 0040, and set them aside under the 8(a) program. AR, Tab J, e-mail from DHS Deputy Chief Procurement Officer to CO, Aug. 29, 2008. The Deputy Chief Procurement Officer explained, “[t]his procurement strategy is consistent with the prior strategy which had two sets of contracts for like services; half of which were small business and half were 8(a)s.” Id.

Accordingly, on September 5, the CO requested that the Small Business Administration (SBA) accept the travel trailer deactivation and septic bladder pumping services requirements (solicitation Nos. 0034 and 0040) into the 8(a) program. In her request, the CO represented that “[a] public solicitation for this procurement was previously issued in error and published in FedBizOpps as a small business set-aside rather than an 8(a) set aside.” AR, Tab K, Letter from CO to SBA regarding 8(a) set aside, Sept. 5, 2008, at 2.

SBA’s regulations provide that SBA will not accept a requirement into the 8(a) program if the procuring agency previously issued a solicitation as a small business set-aside or expressed its intent to reserve the requirement for small business concerns, except “under extraordinary circumstances”; as an example of such circumstances, the regulation states that SBA may accept a requirement “where a procuring agency made a decision to offer the requirement to the 8(a) BD [business development] program before the solicitation was sent out and the procuring agency acknowledges and documents that the solicitation was in error.” 13 C.F.R. § 124.504(a) (2008).

Evidently, in an effort to justify SBA’s acceptance of the 0034 and 0040 requirements into the 8(a) program notwithstanding the prior announcement of these requirements as small business set-asides, the CO wrote SBA and explained the procurement history preceding FEMA’s decision to procure the four major tasks separately. Specifically, the CO indicated that FEMA had previously awarded an equal number of ID/IQ small business set-aside contracts and 8(a) contracts to perform the requirements, which were now divided among the four separate solicitations, and that FEMA’s announcement of all four contracts as small business set-asides “was in error” since it was not consistent with “the principal of the original requirement,” which had been divided between small business and 8(a) contractors. AR, Tab L, E-mail from CO to SBA regarding 8(a) set-aside, Sept. 12, 2008.

Thereafter, SBA accepted the 0034 and 0040 requirements into the 8(a) program. Solicitation Nos. 0034 and 0040 were withdrawn and reissued as 8(a) set-asides with new solicitation numbers (0041 and 0042, respectively). FEMA indicates that the estimated value for 0041 (travel trailer deactivation services) is \$2,830,000 and for 0042 (septic bladder pumping services), \$1,219,800. AR, Tab P, SBA Letters of Acceptance of Requirements into 8(a) Program.

In its protest, Madison argues that SBA’s acceptance of the travel trailer deactivation services and septic bladder pumping services requirements under the 8(a) program

was contrary to 13 C.F.R. § 124.504(a) since they had been initially issued as small business set-asides. In this regard, Madison argues that the “extraordinary circumstances” exception should not apply here. Madison also alleges that SBA was required by regulation, but failed, to perform a study to determine whether accepting the two requirements under the 8(a) program would have an adverse impact on Madison. As a final matter, Madison contends that the solicitations at issue are defective because they do not include past performance as an evaluation factor.

Section 8(a) of the Small Business Act, 15 U.S.C. § 637(a) (2000), authorizes SBA to enter into contracts with government agencies and to arrange for performance through subcontracts with socially and economically disadvantaged small business concerns. Federal Acquisition Regulation § 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) (2008); Rothe Computer Solutions LLC d/b/a Rohmann J.V., B-299452, May 9, 2007, 2007 CPD ¶ 92 at 3.

As noted above, 13 C.F.R. § 124.504(a) precludes SBA from accepting into the 8(a) program a procurement for which the contracting agency had previously issued, or expressed the intent to issue, the solicitation as a small business set-aside except under “extraordinary circumstances.” Madison takes the position that extraordinary circumstances did not exist here and that it therefore was improper for SBA to accept the procurements in the 8(a) program. Specifically, Madison notes that, as reflected by FEMA’s acquisition plan, which preceded the four solicitations, FEMA had expressly decided against placing the requirements with the 8(a) program. According to Madison, the solicitations were not issued “in error,” as contemplated by the examples set out in SBA’s regulations; rather, FEMA merely changed its mind regarding the 8(a) set-aside issue after it had issued the solicitations.

SBA maintains that after considering all the relevant facts, it properly concluded that FEMA’s initial small business set-asides were erroneous and did not reflect the agency’s intentions.² In this regard, SBA highlights the fact that not placing any of the work under the 8(a) program was inconsistent with FEMA’s previously awarded contracts encompassing the same services, which had been equally divided between small business set-aside awards and awards under the 8(a) program. Based on these facts, SBA concluded that the case fell within the extraordinary circumstances exception provided in its regulations.³ As a general matter, we accord SBA’s

² Our Office provided SBA with an opportunity to comment on issues raised by Madison in its protest.

³ To the extent Madison argues that the case here is not factually identical to the example of an extraordinary circumstance identified in SBA’s regulations since SBA
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interpretations of regulations which it promulgates, such as those regarding the 8(a) program, great weight. Singleton Enters.–GMT Mech., A Joint Venture, B-310552, Jan. 10, 2008, 2008 CPD ¶ 16 at 3. Here, while Madison clearly disagrees with SBA’s interpretation of its regulations as applied to the facts in this case, we see no basis to conclude that SBA’s conclusions violated the relevant SBA regulation. Id.

Madison also argues that SBA’s acceptance of the requirements for award under the 8(a) program was improper because SBA failed to consider, as required by 13 C.F.R. § 124.504(c), the “adverse impact” on small businesses presently performing the requirements under the previously awarded ID/IQ contracts. The adverse impact concept is designed to protect small business concerns that are performing government contracts awarded outside the 8(a) program.

SBA argues that an adverse impact determination was not required because the requirements at issue were considered to be new as compared to the ID/IQ contracts previously awarded by FEMA to small business concerns. In this regard, 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 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).

In determining whether there has been a price change of at least 25 percent where an agency has decided to essentially modify the requirements to unbundle previously consolidated requirements, SBA has reasonably interpreted its own regulations as providing for a comparison of the value of the requirement to be solicited (the unbundled requirement) with the overall value of the existing contract encompassing the requirement (the consolidated requirement). Rothe Computer Solutions LLC d/b/a Rohmann J.V., supra, at 10. Here, as explained above, FEMA previously awarded consolidated small business set-aside contracts for septic tank pumping, trailer and mobile home maintenance, travel trailer deactivation, and mobile home deactivation services, with values up to \$100 million. FEMA is now separately procuring those services and SBA has accepted, under the 8(a) program, the travel trailer deactivation services requirement, with an estimated value of approximately

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initially had documented a decision not to set aside the requirement under the 8(a) program, Madison’s argument is misplaced since the example cited in the regulation represents only one situation where SBA may apply the extraordinary circumstances exception and does not preclude SBA’s application of this exception under other facts.

\$2.8 million, and the septic tank pumping requirement, with an estimated value of approximately \$1.2 million. The change in value of the travel trailer deactivation services requirement and septic tank pumping services requirement, as compared to the value of the consolidated contracts, is, for each contract, greater than 25 percent.⁴ As a consequence, the argument advanced by Madison, that SBA improperly failed to perform a required adverse impact determination prior to accepting the disputed requirements into the 8(a) program, is without merit.

As a final matter, Madison argues that the solicitation was defective because it failed to incorporate past performance as an evaluation factor. Because we conclude that the requirements at issue were properly accepted by SBA under the 8(a) program, and Madison is not an 8(a) contractor, it is not an interested party to raise this issue. See 4 C.F.R. §§ 21.0(a), 21.1(a); Prospect Assocs., Ltd.–Recon., B-218602.2, Aug. 23, 1985, 85-2 CPD ¶ 218 at 2-3.

The protest is denied.

Gary L. Kepplinger
General Counsel

⁴ Madison argues that SBA has “flipped” the analysis. According to Madison, when determining whether a requirement is “new,” “it is the ratio of the value of the solicited requirements to the overall value of the existing contract that must be considered, not vice versa.” Madison’s Comments on SBA Report, at 5-6. Madison’s argument, however, is misplaced. The relevant consideration is the change in value between the existing contract and the solicited requirement (which can be either an increase or decrease), and the record reflects that the change in value is clearly greater than 25 percent.