



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: T3 Corporation

File: B-276535

Date: June 27, 1997

Edward J. Tolchin, Esq., Fettmann, Tolchin & Majors, for the protester.
Alexander J. Brittin, Esq., and Diane E. Flyer, Esq., McKenna & Cuneo, for KBM Group, an intervenor.
Anthony N. Torres, Esq., Bureau of Alcohol, Tobacco and Firearms, for the agency.
Jacqueline Maeder, Esq., and Paul Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that contracting agency's offering of requirement to Small Business Administration for acceptance into 8(a) program on sole source basis was improper because agency failed to identify protester as interested firm is denied where contracting agency took reasonable steps to identify and solicit 8(a) vendors with appropriate expertise and was not made aware of protester's alleged interest in the procurement, and nothing in the record suggests that protester took any affirmative steps to make its interest known to agency.

DECISION

T3 Corporation protests the award of a sole source subcontract to KBM Group under request for proposals (RFP) No. BATF-97-1, issued by the Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms (ATF) under section 8(a) of the Small Business Act, 15 U.S.C. § 637(a) (1994).¹ The protester asserts that ATF did not report T3's interest in the procurement to the SBA and did not properly estimate the value of the subcontract. T3 also complains that the agency failed to report changed requirements and a revised estimate of the subcontract's value to the SBA.

We deny the protest.

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

The work required under this solicitation was broadly described as providing services to convert ATF's documents to microfilm and prepare an automated index. The primary document types were defined in the statement of work (SOW) as "(1) records of the acquisition and disposition of firearms by dealers no longer in business and (2) other documents for which microfilming would either save space or make the information more readily available for use." Several examples of "other documents" were listed, including firearm transaction records, suspect guns reports, interstate theft forms, federally licensed firearms theft forms and other ATF firearms or nonfirearms related documents.

Prior to this procurement, Digicon Corporation, another 8(a) firm, had performed the microfilming and information retrieval services on the serial numbers of firearms from licensees who had discontinued business and on firearms used in violent crimes. In September 1996, ATF determined that only \$300,000 remained for the final option period under Digicon's subcontract. Because these funds were insufficient to complete the anticipated work and would be depleted by November 15 and because the agency could not permit disruption of performance, it sought to increase the subcontract ceiling by \$2.3 million.² ATF was informed by the SBA that further increases or extensions would be outside the scope of the subcontract and that Digicon had graduated from the 8(a) program. To provide it sufficient time to develop an updated solicitation for a multi-year 8(a) subcontract and to prevent a lapse in performance, ATF decided to award an interim 1-year contract and began the process of obtaining another subcontractor under the SBA's 8(a) program.

ATF's Small Business Specialist (SBS) provided contracting personnel with the names of three 8(a) vendors with expertise in data retrieval services. The SBS had used her library and SBA's Procurement Automated Source System (PASS) to obtain the names of qualified vendors. T3 was not included on the PASS list, however, and its name was not one of the three provided to the contracting personnel. The SBS also provided the data retrieval/microfilming requirement information to vendors attending monthly Treasury Department outreach sessions and suggested they contact ATF if they were interested in the procurement; none of those vendors, however, contacted the agency to express interest in the procurement. Contracting officials then invited the three firms identified by the SBS to attend a National Gun Tracing Center site visit, but KBM Group was the only vendor to accept that invitation and attend the site visit. Because of KBM's favorable past performance providing similar services and because of severe time constraints, ATF decided to nominate KBM to the SBA for award.

²Disruption needed to be avoided because the work performed under this subcontract enables the agency to provide tracing information to federal, state, local and foreign law enforcement agencies on firearms used in criminal activity.

By letter dated October 7, 1996, ATF nominated KBM to the SBA for a 1-year subcontract whose value was estimated at \$2.8 million. This estimate included the remaining \$300,000 in contract funds, the \$2.3 million increase ATF had previously requested and an additional \$200,000 because KBM, which is not a West Virginia firm, would have to maintain an on-site administrator and other on-site personnel. On October 23, ATF received SBA's acceptance letter of KBM.³ SBA advised ATF that if the SOW were changed, "SBA will have to re-determine the appropriateness of the SIC [Standard Industrial Classification] Code, and the acceptability of this offer" for KBM.

Due to congressional concern that some ATF records may be inaccurate, on November 4, ATF determined to redo the optical imaging and microfilming of its records for machine guns and other nonfirearm destructive devices and to include the redoing of the microfilming in KBM's proposed subcontract. The redoing of the microfilming was not specifically included in the agency's original requirements or in its original estimate of the value of the contract. Contracting personnel requested a revised estimate to include this work. Although it initially appeared that the additional work would cause the estimated contract value to rise to \$3.2 million, that figure was revised downward to \$2.76 million after it was determined that the agency would be prepared to award a multi-year contract for these services within 10 months (rather than the 12 months which has formed the basis of the \$3.2 million estimate). ATF issued its sole source solicitation to KBM on January 17, 1997, on an indefinite delivery/indefinite quantity basis with a not-to-exceed price of \$2.9 million (for reasons not clear from the record, the subcontract awarded identified the period of performance as 1 year). On that basis, an 8(a) subcontract was awarded to KBM on March 6. Upon learning of the award, T3 protested to our Office.

The protester argues that ATF failed to notify SBA of T3's interest in the procurement and violated the requirements of Federal Acquisition Regulation (FAR) § 19.805-1 and 13 C.F.R. § 124.311(a) (1997) by awarding the contract to KBM on a sole source basis. T3 also argues that the estimated value of the 1-year subcontract that was awarded exceeds the \$3 million competitive threshold for a sole source 8(a) acquisition and that ATF's use of a 10-month estimate for a 1-year award indicates that the agency was trying to circumvent the competitive threshold. Finally, T3 argues that ATF changed the requirements under the SOW without reporting the change to the SBA.

³To ensure a smooth, gradual transition and continued service, ATF entered into an interagency agreement with the General Services Administration and the Federal Systems Integration and Management Center to award a 5-month contract to Digicon on November 5 for \$1,238,937. The contract period ran from October 29, 1996, through April 15, 1997.

When planning to place an 8(a) contract with the SBA, FAR § 19.804-2(a)(12) requires the agency to identify all known 8(a) concerns that have expressed an interest in this specific requirement as a result of self-marketing, response to sources sought, or publication of advanced acquisition requirements. Additionally, FAR § 19.805-1(a) and 13 C.F.R. § 124.311(a) provide that an acquisition offered to the SBA under the 8(a) program shall be awarded on the basis of competition limited to eligible 8(a) firms where the agency expects offers from at least two eligible and responsible 8(a) firms and the anticipated award price of the contract including options will exceed \$3 million.⁴

The agency reports that it was not aware of T3's existence or of the firm's interest in the procurement at the time it nominated KBM to SBA for award. ATF states that it first became aware of T3's interest on or about December 18 (after SBA had approved award to KBM), upon receipt of a letter from a U.S. Senator from West Virginia. That letter was sent to ATF in response to a letter from Digicon in which Digicon indicated that it was mentoring T3 and supported T3 for contract consideration. Subsequently, in late February 1997, ATF was contacted by SBA representatives on behalf of T3. The contracting officer informed the SBA representatives that the agency had been unaware of T3 at the time it requested SBA approval to award to KBM on a sole source basis. The contracting officer indicated that SBA had approved ATF's request and that a sole source award was pending with KBM. The contracting officer also explained that ATF was preparing a solicitation for a multi-year follow-on contract and that T3 could participate in the competition for that contract.

Based on this record, there is no basis to object to the sole source award. Although the letter from Digicon to the Senator on behalf of T3 suggests that Digicon and T3 were following contracting opportunities at ATF, the record shows that T3 took no steps to make its interest known to the agency. Moreover, T3 does not rebut the agency's explanation or timeline and did not submit to our Office any documentation suggesting that T3 had contacted ATF earlier and that ATF therefore should have been aware of the firm's status as an 8(a) contractor and its interest in the procurement. In fact, upon receipt of T3's protest, ATF's SBS again searched SBA's PASS database by SIC code, state, and company name and found that T3 is not listed in the database.⁵ Thus, the record provides no basis to conclude that ATF should have been aware of T3's interest in the procurement or that ATF failed to inform SBA of T3's interest.

⁴The competitive threshold is \$5 million for acquisitions assigned manufacturing SIC codes and \$3 million for all other acquisitions, such as the one at issue here.

⁵In response to our request that T3 provide evidence of its status, the only confirmation it submitted relevant to SBA certification under the relevant SIC code was dated May 30, 1997.

We also find without merit T3's allegations that ATF improperly modified the solicitation requirements without notifying SBA of the changes and that the estimate is improper. As noted above, in November, ATF determined to include the microfilming of certain machine gun and other nonfirearm records in its proposed contract to KBM. T3 argues that this additional work constitutes a change in the solicitation's SOW and, under the terms of SBA's acceptance of KBM, should have been resubmitted to SBA.⁶ The protester argues that to include this additional work, the agency's estimate increased from \$2.3 million to \$3.2 million, an increase of 40 percent. T3 argues that such an increase is clearly substantial and material.

To determine if there has been a meaningful change or modification in the SOW, we look to whether there is a material difference between the modified SOW and the original SOW and consider such factors as the extent of any changes in the type of work to be performed or changes in the performance period and the costs anticipated. See Data Transformation Corp., B-274629, Dec. 19, 1996, 97-1 CPD ¶ 10 at 6; Neil R. Gross & Co., Inc., 69 Comp. Gen. 292, 294 (1990), 90-1 CPD ¶ 212 at 2-3. We also consider whether the original SOW adequately advised offerors of the potential for the type of modifications that in fact occurred and whether the modification is of a nature which offerors would reasonably have anticipated under the SOW. See Neil R. Gross & Co., Inc., *supra*, at 2-3.

Here, there are no significant differences in the nature or character of the services to be performed, in the performance time frame, or in the costs.⁷ While the microfilming of nonfirearm related documents was not originally specifically anticipated by the agency, but is now required, it is not a modification of the type of work that was always to be performed. KBM will still be required to microfilm and index ATF documents. Indeed, as noted above, the SOW identifies two

⁶Although we address the materiality of modifications to the SOW in our discussion, we note that the terms of SBA's acceptance letter suggested that ATF was required to resubmit its offer letter only if it changed the SOW so that SBA would have to redetermine if the SIC code remained appropriate and if KBM was still qualified to perform the required work. Thus, SBA requested resubmittal only where the work requirements of the SOW were revised in a way that could affect the assigned SIC code or KBM's eligibility. Clearly, no such revision occurred here, and the protester does not assert that one did.

⁷The agency reports that it added a transition clause and a requirement for an on-site administrator to the SOW. ATF also revised the language in the SOW related to document control procedures to allow the offeror to propose these procedures anytime before implementation. However, these changes do not relate to the type of work to be performed, and thus to the SIC code, or to KBM's ability to do the work. Thus, there is no basis to conclude that these changes should have been resubmitted to SBA.

categories of documents to be microfilmed and indexed. While T3 argues that the SOW's "other documents" category is impermissibly broad, the SOW provides numerous examples of the additional types of documents that an offeror could be required to microfilm and index and, specifically cites "non-firearms related documents" as an example. Thus, an offeror could reasonably expect that additional microfilming of other documents could be requested which could include, as here, nonfirearms related documents.

Moreover, the estimate of the value of the contract increased only slightly from the original \$2.8 million estimate to the \$2.9 million not-to-exceed price. T3's assertion that costs increased 40 percent, from \$2.3 million to \$3.2 million, is simply incorrect. ATF originally submitted an estimate of \$2.8 million to SBA. This estimate was revised to \$2.76 million based on the combined effect of the additional microfilming requirement (which caused the estimate to increase) and the 10-month performance period (which caused it to decrease). The difference of \$100,000 between the original estimate and the not-to-exceed price of the subcontract actually awarded does not evidence a significant modification. Thus, there is no basis to conclude that the SOW was expanded or modified in a manner resulting in the ensuing requirement being other than substantially similar to the original one, and there was thus no reason for resubmission to SBA.

Finally, the protester alleges that the actual estimated value of the subcontract exceeds the \$3 million competitive threshold but was revised downward only to avoid competition. T3 complains that ATF has violated FAR § 19.805-1(c), which prohibits an agency from dividing a requirement into lesser amounts in order to use 8(a) sole source procedures for award to a single firm.

As noted above, ATF contacted three interested firms concerning this procurement and discussed the acquisition in its vendor outreach sessions. These actions do not suggest that ATF was attempting to avoid a competitive procurement. Moreover, by the time the estimate was being finalized, ATF had concluded that it could issue that solicitation for a multi-year contract, which was to be competed, in 10 months. As a result, the \$3.2 million estimate, which assumed that awarding the multi-year contract would require a full year, was inappropriate and ATF reasonably based its final estimate on the 10-month period. In making the change, the actual work to be performed was neither divided into lesser amounts nor into shorter periods; hence, there is no basis for objection.

The protest is denied.

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