



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: BMAR & Associates, Inc.

File: B-281414

Date: February 5, 1999

Donald E. Barnhill, Esq., Joan K. Fiorino, Esq., and Valinda J. Astoria, Esq., Douglas & Barnhill, for the protester.

Maj. David Newsome, Department of the Army; and Denise Benjamin, Esq., Small Business Administration, for the agencies.

Christina Sklarew, Esq., and Paul Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Allegation by small business contractor performing under an interim contract that the Small Business Administration (SBA) failed to properly determine the adverse impact on the protester of accepting a contract requirement for the same services into the 8(a) program is denied where the protester merely disagrees with SBA's conclusion and does not show any violation of applicable regulations.

DECISION

BMAR & Associates, Inc. protests the decision by the Department of the Army and the Small Business Administration (SBA) to place request for proposals (RFP) No. DAKF19-98-R-0001 for maintenance and operations services in SBA's 8(a) business development program. BMAR, a small business contractor that has been performing these services on an interim basis since October 1997 through task orders placed under a previously awarded contract, contends that SBA did not properly analyze all relevant factors, as required by SBA regulations, in determining the adverse impact on BMAR from setting the requirement aside for the 8(a) program.

We deny the protest.

Previously, by letter dated July 29, 1996, the Directorate of Contracting at Fort Riley, Kansas offered a requirement for maintenance and operations services for all non-medical electrical and mechanical equipment at the Fort Riley MEDDAC/DENTAC facilities and related energy plant to SBA for award under the 8(a) business development program. The SBA Wichita District Office determined that, because the requirement involved a new procurement, it would not be necessary to perform an adverse impact analysis, and concluded that the offering was suitable for acceptance under the program. Accordingly, SBA's Central Office accepted the

offering as a competitive 8(a) procurement on August 15, 1996. On August 26, 1997, SBA Wichita requested that the solicitation be modified in a manner that would increase the number of 8(a) firms that would be eligible under the solicitation's experience requirements and thereby maximize competition. The Army requested release of the procurement from the 8(a) program based on the agency's concerns about whether the 8(a) firms that had attended a site visit had sufficient experience to perform the work successfully. However, after consulting further with SBA Wichita, the Army withdrew its request for release and agreed that the solicitation should be amended in the manner proposed by SBA.

Citing significant delays encountered in the process of this procurement, the Army then decided to cancel the solicitation and instead to satisfy the requirement on an interim basis by issuing task orders under an existing Medical Command (MEDCOM) preventive maintenance contract with BMAR that was being administered through the Army Corps of Engineers in Mobile, Alabama. The MEDCOM contract is an indefinite-quantity contract under which task orders are negotiated and issued as fixed-price task orders for preventive maintenance services at various locations. It had been awarded to BMAR in May 1996 for a base year with 4 option years. The initial interim task order for the requirement at issue was placed with BMAR for a period of 6 months, from October 1, 1997 to March 31, 1998.

On March 3, 1998, the Army cancelled the solicitation for this requirement, and so advised SBA on March 13.¹ On March 27, the Army issued another 6-month task order for BMAR to continue providing the services. Subsequently, the contracting officer reassessed the requirement and again determined that it should be filled through the 8(a) program.

By letter of April 1, 1998, the Army informed SBA Wichita that it intended to resolicit the requirement. Since there was now an incumbent small business contractor, SBA Wichita analyzed whether conditions were present which would require the presumption of an adverse impact on that contractor. SBA regulations provide that SBA will not accept into the 8(a) program a requirement previously met by a small business if doing so would have an adverse impact on other small business programs or on an individual small business. 13 C.F.R. § 124.309(c) (1998). In this regard, the regulations state that SBA will consider "all relevant factors" in determining the impact of an 8(a) award. 13 C.F.R. § 124.309(c)(1). The regulations further provide that SBA will presume an adverse impact on small business concerns and not accept a procurement into the program where (1) a small business which has performed the requirement for at least 24 months is currently performing the requirement or has finished performance within 30 days of

¹On March 23, another vendor, Contract Services Inc., filed a protest in our Office against the cancellation, which was dismissed for failure to state a valid basis.

the procuring agency's offer of the requirement for the 8(a) program; and (2) the estimated dollar value of the offered 8(a) award is 25 percent or more of that firm's most recent annual gross sales. 13 C.F.R. § 124.309(c)(2).

Because the incumbent, BMAR, had not been performing the contract for the minimum time period specified as necessary to give rise to the presumption, SBA concluded that no adverse impact existed and no additional impact analysis was necessary. It therefore accepted the requirement into the 8(a) program on April 8, 1998. BMAR protested this decision to the agency on May 4, and, after the agency had denied the protest, filed a protest in our Office on June 12, which we dismissed as premature.

Apparently as a result of the protest, SBA Wichita decided to perform a full adverse impact analysis, and, on August 17, it requested financial and organizational information from BMAR for that purpose; BMAR delivered the requested information on August 31. SBA analyzed the data and concluded that there was no likelihood that BMAR would be forced into bankruptcy if it could not continue to provide the services under the contract, since the percentage of BMAR's business that is dedicated to this particular contract is relatively small; that the employees dedicated to this contract represent only about 8 percent of BMAR's workforce; and that although BMAR had made capital expenditures for this project, BMAR had not shown that the value of the assets acquired would be significantly impaired by the loss of the contract or that the firm's future business capability would be significantly impaired. SBA determined on this basis on September 10 that acceptance of the requirement into the 8(a) program would not have a significant adverse impact on BMAR, and that the offering was therefore suitable for acceptance under the 8(a) program.² SBA Wichita Impact Analysis at 1-2.

On October 21, SBA published a notice in the Commerce Business Daily of its intent to solicit the requirement as a competitive 8(a) set-aside. BMAR's protest was filed in our Office on October 29, alleging that SBA had failed to perform a proper adverse impact analysis, in violation of SBA regulations.

Because the Small Business Act affords SBA and contracting agencies broad discretion in selecting procurements for the 8(a) program, our Office will not

²BMAR argues that SBA's failure to perform a full adverse impact analysis before it accepted the procurement into the 8(a) program violated 13 C.F.R. § 124.309. While we agree that SBA's initial conclusion that it did not need to perform a full analysis once it determined that no presumption of adverse impact existed was incorrect, we see no merit to this argument in these circumstances. The agency completed its full analysis on September 10, before the solicitation was reissued.

question the decision to procure under the 8(a) program absent a showing of bad faith on the part of government officials or that specific regulations have been violated. Korean Maintenance Co., B-243957, Sept. 16, 1991, 91-2 CPD ¶ 246 at 5.

BMAR primarily contends that SBA violated 13 C.F.R. § 124.309(c)(1) by failing to properly analyze "all relevant factors" prior to determining that accepting this requirement into the 8(a) program would not have an adverse impact on BMAR as the incumbent small business contractor. BMAR complains that SBA's adverse impact analysis utilized a "mechanical approach . . . which has resulted in a violation of 13 C.F.R. § 124.309(c)(1)," because SBA focused primarily on the following three factors:

1. Whether the small business incumbent would be forced into bankruptcy if it could not continue to provide the product or service called for under the procurement;
2. Whether the performance of the procurement requires a very large percentage of the incumbents' current employees and the loss of this contract would cause these dedicated employees to be terminated; and
3. Whether the incumbent has invested substantial amounts of capital and equipment solely dedicated to the procurement, and failure to continue performance on the procurement would significantly impair the value of such assets.

Protester's Comments at 5.

BMAR refers to our decision in Microform Inc., B-244881.2, July 10, 1992, 92-2 CPD ¶ 13, where SBA considered these same factors when it performed an adverse impact analysis, as a result of which we concluded that SBA's analysis and conclusions were unobjectionable. Because SBA considered the same factors here, BMAR contends that the analysis was "mechanical" and failed to consider "all relevant factors" specific to the situation at hand. Protester's Comments at 4, 5. This argument is without merit. The responsibility for determining what is and what is not a "relevant factor" under 13 C.F.R. § 124.309(c)(1) rests with SBA, not the protester. The analysis contemplated by this regulation involves an exercise of discretion on the part of SBA, which must balance various program requirements for different segments of the small business community. American Mut. Protective Bureau, B-243329.2, June 16, 1994, 94-1 CPD ¶ 371 at 6. As in Microform, here SBA examined the factors that it considered most relevant to the issue of adverse impact, as evidenced by the extent to which the loss of the contract could be expected to have an impact on BMAR's viability, based on all of the information provided by BMAR. The protester has not provided any reason why SBA's analysis was inadequate, beyond labeling the approach "mechanical" and disagreeing with SBA's conclusions. In our view, the fact that SBA's approach here was consistent

with an approach which our Office previously recognized to be unobjectionable supports, rather than calls into question, the propriety of the resulting analysis.

In addition, the "other factors that may result in an impact on an incumbent contractor" to which BMAR refers do not appear relevant to the requirements under the regulation. For example, BMAR argues that because "the issuance of the subject solicitation will cause an abrupt termination to this portion of BMAR's MEDCOM Contract" (*i.e.*, the task orders covering the Fort Riley requirement), SBA was somehow required to analyze the effect of accepting the requirement into the 8(a) program differently. Protester's Comments at 5-6. We find this argument unconvincing. Each of the task orders that was issued for this requirement referred to the temporary nature of the agreement and defined the period of performance. No task order was written for a period of longer than 12 months.³ Each task order was complete in itself, and none of them contained any promise or guarantee of a continuation of the services after the expiration of the task order. Letter from the Contracting Officer to the Protester's Attorney at 1 (June 1, 1998). There is nothing in the record to suggest that the underlying contract under which BMAR is currently performing will be terminated.⁴

BMAR also cites, as other "relevant factors," an alleged "adverse impact on the taxpayers and the inordinate cost for procuring services." Protest at 15. These are clearly not relevant to the concern with "protect[ing] small business concerns which are performing Government contracts awarded outside the 8(a) program," which the regulation sets forth as the purpose for which the "adverse impact concept is designed." 13 C.F.R. § 124.309(c).

BMAR has raised various other issues in its protest which we find without merit. For example, BMAR alleges that the Army failed to conduct a proper evaluation to

³BMAR's apparent argument that the agency's intention not to place additional task orders under options that may or may not be exercised under the MEDCOM contract in the future should be viewed as a "termination" of a "contract" with BMAR is misplaced. In addition to the fact that a contractor has no rights in connection with a task order that has not been issued, options are generally exercisable at the sole discretion of the government, and a contractor thus has no legal right to compel the government to exercise an option. Wayne D. Josephson, B-256243, May 12, 1994, 94-1 CPD ¶ 307 at 5.

⁴To the extent BMAR is anticipating the agency's failure to exercise an option under its MEDCOM contract, or to place additional task orders, 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. American Consulting Servs., Inc., B-276149.2, B-276537.2, July 31, 1997, 97-2 CPD ¶ 37 at 9.

determine the extent to which the requirement should be offered in support of the 8(a) program, as provided for under FAR § 19.804-1, or to satisfy the requirement under FAR § 19.805-1 that, in order for an agency to offer the acquisition to the SBA under the competitive 8(a) program, it must have a reasonable expectation that at least two eligible and responsible firms will submit offers and that award can be made at a fair market price. The contracting officer who evaluated the acquisition each time it was offered to SBA explains that in her analysis she took into account: that numerous 8(a) contractors were seeking to perform these services at Fort Riley; that Fort Riley had a goal of maximizing its involvement in the 8(a) program; that Fort Riley had success in the past with 8(a) contractors, including two firms that had expressed interest in this requirement and had made technical presentations; that there was no reason to expect that an 8(a) firm would cause any delay in delivery; and that market research and other sources identified 29 prospective 8(a) firms. Contracting Officer's Statement, Nov. 24, 1998, at 1-2. In our view, this analysis reasonably satisfied the regulatory requirements and BMAR's disagreement with and objection to the assessment does not show that the Army acted either in bad faith or in violation of the regulations.

The protest is denied.

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