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Decision

Matter of: C. Martin Company, Inc.

File: B-292662

Date: November 6, 2003

Alan Dickson, Esq., and Paul C. Burkholder, Esq., Epstein Becker & Green, for the protester.

Richard G. Welsh, Esq., and Leonard L. Anthony, Esq., Department of the Navy; Kevin R. Harber, Esq., and John W. Klein, Esq., Small Business Administration, for the agencies.

Ralph O. White, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest contentions that (1) the contracting agency transferred its requirement for housing maintenance services to the Small Business Administration's (SBA) 8(a) contracting program in a bad faith attempt to avoid continued performance under a small business set-aside contract previously awarded to the protester, or to avoid giving the protester an opportunity to compete for the work, and (2) SBA violated its regulations in accepting the work for the 8(a) program, are denied where the record shows that despite inadequacies in the contracting agency's initial offering letter to SBA, SBA ultimately obtained all of the information required by its regulations, and followed its regulatory guidelines in deciding that the offered work was a "new" requirement under the terms of the regulations.

DECISION

C. Martin Company, Inc. (CMC) protests a decision by the Department of the Navy and the Small Business Administration (SBA) to place work currently performed by CMC under SBA's 8(a) Business Development (BD) program, for award on a sole-source basis to another contractor. CMC argues that both agencies violated applicable regulations in shifting this work to SBA's 8(a) BD program, and in selecting Field Support Services, Inc. (FSSI), an Alaska Native Corporation participating in that program, for award of the contract. CMC also argues that the Navy was motivated by bad faith when it offered CMC's previous contract to SBA's 8(a) program.

We deny the protest.

BACKGROUND

In June 2000, CMC was awarded contract No. N68711-99-D-3135, for maintenance and repair of military housing at the Marine Corps Air Ground Combat Center, in Twentynine Palms, California, pursuant to a competitive small business set-aside procurement conducted by the Naval Facilities Engineering Command. The contract included a mixture of fixed-price and indefinite-quantity work, and was awarded for a base year with up to four 1-year options.

The fixed-price portion of the effort required CMC to provide change of occupancy maintenance services, various types of family housing service calls, preventative maintenance inspection and repair, grounds maintenance, and street sweeping. The indefinite-quantity work included unscheduled maintenance and repair services, painting, installation and removal of flooring, carpet, and appliances, as well as certain general labor services.

Upon completion of the base period and first option year, CMC was awarded two additional options to continue performance, but both options were for periods less than the full year anticipated in the contract. In the first instance, CMC was awarded an option for 6 months of continued performance in July 2002; in the second, an option for an additional 9 months was awarded in January 2003.

These limited extensions of CMC's contract were apparently related to Navy concerns about the adequacy of CMC's performance. In a letter dated May 21, 2002, the contracting officer (CO) advised CMC of several areas of ongoing concern about the company's performance; on April 7, 2003, the CO made a written determination not to exercise CMC's fourth option; by letter dated May 28, this decision was communicated to CMC.

Unbeknownst to CMC, the Navy was approached by another business seeking to perform these services in March 2003. Specifically, the other business, FSSI, advised the agency that: it had the capability to perform housing maintenance; it was a participant in SBA's 8(a) BD program; and, as an Alaska Native Corporation, it could be awarded the contract directly, without competition.¹ Concurrently, by letter dated March 5, SBA's Anchorage, Alaska regional office marketed FSSI's capabilities to the Navy as a possible source for the Twentynine Palms housing maintenance contract.

¹Federal Acquisition Regulation (FAR) § 19.805-1(b)(2) permits the award of sole-source contracts to Indian tribes or Alaska Native Corporations, without regard to the dollar thresholds that would otherwise require a competitive 8(a) procurement. See FAR § 19.805-1(a)(2).

By letter dated May 28—the same date as the CO’s letter to CMC advising the company there would be no exercise of its fourth contract option—the CO offered to place the Twentynine Palms housing maintenance contract under SBA’s 8(a) BD program. The Navy’s offering letter was provided to SBA’s Anchorage, Alaska regional office, and identified FSSI as its preferred recipient of the contract. By e-mail also dated May 28, an SBA representative in Fresno, California, contacted the Anchorage regional office to advise that one of its constituent small businesses, CMC, had just learned it would not be receiving an option for continued performance of its existing contract. In addition, the e-mail advised that the Navy had instead selected an 8(a) contractor sponsored by the Anchorage regional office for performance of this effort. In essence, SBA’s Fresno office asked the Anchorage office why a small business contractor was losing its contract to provide an award to an 8(a) BD contractor, despite SBA rules designed to avoid such actions.

After SBA received the May 28 offering letter from the Navy, and after additional information was exchanged between the Navy and SBA’s Anchorage office, SBA accepted the Navy’s housing maintenance contract into its 8(a) BD program. In its June 11 acceptance letter, SBA states that “[a] determination has been made that acceptance of this procurement will cause no adverse impact on another small business concern.” As of SBA’s June 11 determination, the agency had received from the Navy, and apparently reviewed, a copy of the RFP that resulted in award to CMC in June 2000; SBA had not, however, received a copy of the statement of work for the new contract. Instead, SBA relied on representations from the Navy’s CO about the differences between the previous and follow-on contracts. Approximately 6 weeks later, the Navy provided SBA with a copy of the new statement of work, and a memorandum analyzing the differences between the old and new contracts.

On July 22, the Navy provided the protester a response to a Freedom of Information Act request about the status of its contract, and about the interaction between the Navy and SBA regarding the placement of this work with the 8(a) BD program. Based on the information it received, CMC argues that the Navy and SBA violated the regulations governing placement of work under SBA’s 8(a) program. In addition, CMC alleges that the Navy’s decision to refer this effort to the 8(a) program was motivated by bad faith.

DISCUSSION

Section 8(a) of the Small Business Act authorizes SBA to contract with other government agencies, and to arrange for the performance of those contracts via subcontracts awarded without competition to socially and economically disadvantaged small businesses. 15 U.S.C. § 637(a) (2000). The Act affords 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 unless, as here, the protester alleges possible fraud or bad faith on the part of government officials, or that specific laws or regulations have been violated.

4 C.F.R. § 21.5(c)(2) (2003); Korean Maintenance Co., B-243957, Sept. 16, 1991, 91-2 CPD ¶ 246 at 5.

Under the Act's implementing regulations, 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 geographic location, or other small business programs. 13 C.F.R. § 124.504(c)(1)-(3) (2003). The purpose of the adverse impact concept is to protect incumbent small businesses who are currently performing an offered requirement outside the program. 13 C.F.R. § 124.504(c); Korean Maintenance Co., *supra*, at 2. An adverse impact is presumed to exist where a small business has been performing the requirement and the requirement represents 25 percent or more of the small business's gross sales. 13 C.F.R. § 124.504(c)(1)(i)(C).

The adverse impact concept, however, does not apply to "new" requirements, which have not been previously purchased by the procuring agency. 13 C.F.R. § 124.504(c)(1)(ii). In this regard, the regulations explain 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). In addition, even existing requirements performed by non-8(a) small businesses may nonetheless be considered "new" requirements

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.

Given the framework of the process explained above, we turn first to CMC's complaint that the Navy's letter offering this procurement to SBA lacked several pieces of information required by SBA's own regulations, and thus could not properly provide the basis for an SBA decision to accept the procurement into the 8(a) program. We agree—as do the Navy and SBA.

13 C.F.R. § 124.502(c) sets forth 12 enumerated items which must be identified in any agency's letter offering work for inclusion in SBA's 8(a) program. Here, there is no

dispute that the Navy's May 28 offering letter did not include required information about the requirement's acquisition history, the name and address of the small business contractor currently performing the requirement, the identities of other 8(a) firms that expressed an interest in the requirement, or the justification for nominating FSSI as a sole-source contractor. Nonetheless, in a filing to our Office, SBA explains--and documents--that it had actual notice of each of these missing pieces of information before it decided to accept the offered requirement into the 8(a) program.

For example, on the day the Navy offered this requirement to SBA, representatives in SBA's Fresno office contacted SBA's Anchorage regional office to advise that another small business, CMC, had been performing the Twentynine Palms housing maintenance contract, and was interested in continuing performance--or at a minimum, in competing for any new contract for these services. On the next day, SBA's Fresno office provided the Anchorage office with a copy of the RFP that resulted in award to CMC in June 2000. This information led to additional exchanges between SBA and the Navy about the nature of the requirement and whether it could properly be accepted into the 8(a) program.

In addition, SBA learned that the Navy's justification for nominating FSSI was that the company had marketed itself to the Navy as a housing maintenance contractor, and was eligible for a sole-source award as a concern owned by an Alaska Native Corporation. Thus, while we agree that the Navy's offering letter was deficient in several respects, the record shows that SBA ultimately obtained all of the information that should have been provided in the Navy's offering letter. Under these circumstances, we have no basis to conclude that the initially deficient offering letter, by itself, supports a finding that SBA violated its regulations by ultimately accepting this requirement into the 8(a) program.

We turn next to CMC's contention that SBA improperly concluded that accepting the offered procurement into the 8(a) BD program would have no adverse impact on another small business concern. On this front, CMC argues that there is no evidence SBA ever made an adverse impact determination here; that SBA did not have sufficient information to make its determination at the time it claims to have made it; and that SBA did not receive the information it would have needed to make this determination until several weeks after accepting the new requirement into the program.

With respect to CMC's argument that there is no evidence in the record that SBA ever made an adverse impact determination in this case, CMC focuses on one sentence in SBA's letter accepting this procurement into the 8(a) program. As indicated above, the acceptance letter stated that "[a] determination has been made that acceptance of this procurement will cause no adverse impact on another small business concern." CMC's claim that an adverse impact determination was required, but never made, is apparently based on the mistaken premise that a full-blown

analysis and determination must be generated each time SBA accepts work for the 8(a) program. This premise is not supported by the regulatory framework, or by the express guidance in the regulations.

The SBA regulation for determining adverse impact, at 13 C.F.R. § 124.504(c), is broken into three logical areas—determining adverse impact on individual small businesses (§ 124.504(c)(1)), determining adverse impact on groups of small businesses (§ 124.504(c)(2)), and determining adverse impact on other small business programs (§ 124.504(c)(3)). Only the guidance found in §124.504(c)(1) is applicable here.

Within § 124.504(c)(1), there are two subsections—one prescribes a presumption of adverse impact in certain situations where a small business is currently performing a requirement (§ 124.504(c)(1)(i)); the other explains that adverse impact concerns do not apply to “new” requirements, and provides guidance about when requirements may properly be considered “new” (§ 124.504(c)(1)(ii)). In the first case, if the requirements for a presumption of adverse impact are not met, additional analysis could be needed before a determination is made that there is no adverse impact. McNeil Techs., Inc., B-254909, Jan. 25, 1994, 94-1 CPD ¶ 40 at 10. In the second case, no further analysis need be made because a requirement that can properly be termed “new,” by definition, has no adverse impact on any individual small business. The Urban Group; McSwain and Assocs., Inc., B-281352, B-281353, Jan. 28, 1999, 99-1 CPD ¶ 25 at 6-7.

The situation here falls within the second of the two subsections discussed above—i.e., since the offered work is a “new” requirement, there is no adverse impact on another small business by definition. In the words of the regulatory guidance quoted earlier, “[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). In this instance, despite CMC’s contentions to the contrary, SBA can properly say—as it did here in its June 11 acceptance letter—that “[a] determination has been made that acceptance of this procurement will cause no adverse impact on another small business concern.” The absence of a stand-alone adverse impact determination does not mean that SBA failed to determine that no small business was impacted. It did, and it did so when it concluded that the requirement was “new.”

We turn next to CMC’s contentions that SBA did not have sufficient information to support its decision to accept the offered work into the 8(a) program at the time it made its decision, and that it did not receive the needed information until several weeks later. Since we have concluded that SBA was not required to make an adverse impact determination once it concluded that the offered work was “new,” these contentions, in effect, raise the issue of whether SBA followed its regulations

in concluding that the offered work was a “new” requirement. For the reasons below, we find that SBA acted in accordance with its regulations.

With respect to CMC’s claims that SBA lacked sufficient information to properly decide whether the requirement here was “new,” CMC argues that SBA had only the RFP that was used to award the previous contract to CMC in June 2000, and explanations from the CO about the ways in which the work was materially different from the previous work. In this regard, we note that the CO’s explanations fell squarely within the regulatory guidance for deciding whether existing work can properly be termed “new”—*i.e.*, he explained that the offered procurement would require “significant additional or different types of capabilities or work,” and he indicated that “the magnitude of change is significant enough to cause a price adjustment of at least 25 percent (adjusted for inflation).” 13 C.F.R. § 124.504(c)(1)(ii)(C).

As a general matter, SBA is entitled to rely on a CO’s representations regarding offered requirements for the 8(a) program. Comint Sys. Corp., B-274853, B-274853.2, Jan. 8, 1997, 97-1 CPD ¶ 14 at 3. In addition, SBA regulations do not specify that contracting agencies must provide SBA with the new statement of work for offered requirements. Instead, the regulations require that agency offering letters include “[a] description of the work to be performed.” 13 C.F.R. § 124.502(c)(1). Thus, we are aware of no requirement that an SBA finding that work can be considered “new” must be based on a detailed comparison of the previous and new statements of work.

As an overlay to the analysis above, however, we must also consider the impact of CMC’s allegations of bad faith. First, we note that CMC alleges that the Navy offered this requirement to the 8(a) program in a bad faith effort to avoid continued dealings with CMC. Given these allegations against the Navy, we generally would look behind the Navy CO’s representations to SBA with an eye towards making an independent judgment about whether the CO accurately represented the scope of the new work to SBA. *See, e.g., DGS Contracting Servs., Inc.*, B-276300, June 3, 1997, 97-1 CPD ¶ 223 at 9 (where protester alleged that a contracting agency, in bad faith, manipulated numbers in its offering letter and during the adverse impact process to convince SBA that an offered requirement was “new,” our Office reviewed the record to determine whether the agency provided erroneous or inadequate information to SBA). In this case, though, subsequent actions by SBA make this additional review unnecessary.

As indicated in the facts above (and reiterated by CMC in its arguments), although SBA accepted this requirement into the 8(a) program on June 11, it received a copy of the statement of work for the offered effort, and a memorandum analyzing the differences between the old and new efforts, approximately 6 weeks later. In its filing during the course of this protest, SBA advised our Office that

[w]hen the prior contract used by the Navy for the procurement of military family housing maintenance services at the Base is compared to the protested solicitation it becomes evident that the two requirements differ significantly. The prior contract was solely for maintenance services at the Base's military family housing units. The current solicitation, while still providing for the performance of maintenance services, also covers the overall management of the housing units and thus requires an additional range of dues and responsibilities on the part of the prospective contractor.

SBA Report, Sept. 2, 2003, at 5.

Thus, while SBA initially concluded that the offered work was "new" based, in part, on the CO's representations about the new effort, SBA has since revisited that initial determination. In fact, SBA now reiterates and expands on its initial determination based on a comparison of both statements of work. Since SBA appears to have received all of the information its regulations required it to receive, and then some; and appears to have considered all of the issues its regulations anticipated; and considering SBA's determinative role as to whether a requirement offered to the 8(a) program is "new," we have no basis to object to SBA's interpretation. The Urban Group; McSwain and Assocs., Inc., supra, at 6.

The protest is denied.

Anthony H. Gamboa
General Counsel