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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Margni, Inc.

File: B-299037

Date: January 26, 2007

Thomas J. Kelleher, Jr., Esq., Smith, Currie & Hancock, for the protester.
Phillipa L. Anderson, Esq., and Dennis J. Foley, Esq., Department of Veterans Affairs,
and John W. Klein, Esq., and Laura Mann Eyester, Esq., U.S. Small Business
Administration, for the agencies.
Charles W. Morrow, Esq., and James A. Spangenberg, Esq., Office of the General
Counsel, GAO, participated in the preparation of the decision.

DIGEST

Small Business Administration's (SBA) determination that placing a cemetery maintenance requirement into SBA's section 8(a) program would not have an adverse impact on an individual small business, a group of small businesses located in a specific geographical location, or other small business programs was reasonable, where the record shows that the SBA made requisite findings concerning the lack of adverse impact.

DECISION

Margni, Inc. protests the award of a sole-source contract to Native Contractors, Inc. under request for proposals (RFP) No. VA-786-06-RP-0148 under the Small Business Administration's (SBA) section 8(a) program, for cemetery maintenance services for the Department of Veterans Affairs (VA) at the Georgian National Cemetery, Canton, Georgia.

We deny the protest.

On March 29, 2006, under request for proposals (RFP) No. VA-786-06-RP-0050, the VA solicited the predecessor to this requirement as a service disabled veteran owned (SDVO) small business set-aside. Five SDVO small businesses, including Margni, submitted acceptable proposals by the April 28 closing date. On May 25, the VA awarded the contract to Benchmark Headstones LLC based on its low \$2,437,704.57 price. The requirements contract awarded was for a base period from date of contract award through September 30, 2006, with four 1-year option periods.

During performance of the base period, the VA encountered several problems with Benchmark's performance, which caused the VA not to exercise the first option year under the contract. The VA then decided to obtain these cemetery maintenance services under a sole-source contract under the SBA's 8(a) program from Native Contractors, an 8(a) SDVO small business, which was successfully performing similar services at a nearby cemetery. The VA determined that because of the non-exercise of the option, this course of action was in the agency's best interests due to "the urgent nature of the Government's needs." See VA Report, Tab G.1, Justification for Use of SDVOSB 8(a) Contractor.

On September 14, the VA notified the SBA of its desire to negotiate an 8(a) contract with Native Contractors. Included in the letter was the estimated cost of the contract (\$2,400,000), the period of performance, which was for 1 year longer than the prior contract, the acquisition history, and other pertinent information. The only acquisition history provided the SBA by the VA was information relating to the Benchmark contract. See VA Report, Tab G.3, at 1-2. On September 19, the SBA, accepted the offering on behalf of Native Landscaping and stated that "[a] determination has been made that acceptance of this procurement will cause no adverse impact on another small business concern." VA Report, Tab G.3, at 1. A sole-source contract was awarded to Native Contractors under the 8(a) program on September 29.

Under section 8(a) of the Small Business Act, the SBA is authorized to enter into contracts with government agencies and to arrange for performance of such contracts by awarding subcontracts to socially and economically disadvantaged small businesses. 15 U.S.C. § 637(a) (2000). The Act affords the 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 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) (2006); Designer Assocs., Inc., B-293226, Feb. 12, 2004, 2004 CPD ¶ 114 at 4.

Under the Act's implementing regulations, the 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 located within a specific geographical location, or other small business programs. 13 C.F.R. § 124.504(c) (2006). The purpose of the adverse impact concept is to protect incumbent small businesses which are currently performing an offered requirement outside the 8(a) program. Id.; Korean Maint. Co., B-243957, Sept. 16, 1991, 91-2 CPD ¶ 246 at 2. As part of the process, the agency has the obligation to submit all relevant information, including the acquisition history of the offered requirement, which the SBA may rely upon in making its decision. 13 C.F.R. §§ 124.502, 124.504(c); Korean Maint. Co., Inc., supra, at 5.

Here, the SBA's adverse impact analysis at the time the requirement was accepted into the 8(a) program was admittedly not "detailed," but only determined "that as result of Benchmark's poor performance, it would have no chance of being awarded another contract." See SBA Report at 3; Declaration Business Development Specialist (Jan. 11, 2007) at 1. This analysis only addressed the issue of whether this 8(a) award would have an adverse impact on an individual small business, that is, Benchmark. See 13 C.F.R. § 124.504(c)(1).¹

As a result of this protest and because it had not been apprised by the VA that five SDVO small business concerns had submitted proposals for the predecessor requirement, the SBA performed a documented detailed impact analysis that determined that accepting the requirement into the 8(a) program has no adverse impact to a group of small businesses located within a specific geographical location.² See 13 C.F.R. § 124.504(c)(2), which provides:

In determining whether the acceptance of a requirement would have an adverse impact on a group of small businesses, SBA will consider the effects of combining or consolidating various requirements being performed by two or more small business concerns into a single contract which would be considered a "new" requirement as compared to any of the previous smaller requirements. SBA may find adverse impact to exist if one of the existing small business contractors meets the presumption set forth in paragraph (c)(1)(i) of this section.³

¹ Under 13 C.F.R. § 124.504(c)(1)(i), the SBA is required to presume that adverse impact exists where the individual small business has performed the specific requirement for at least 24 months, the small business is performing the requirement at the time it is offered to the 8(a) program, or its performance of the requirement ended within 30 days of the procuring activity's offer of the requirement to the 8(a) program; and the dollar value of the requirement that the small business is or was performing is 25 percent or more of its most recent annual gross sales. In its report, the SBA stated that this contract did not represent 25 percent of Benchmark's most recent annual revenue, so that no adverse impact on Benchmark could be presumed. SBA Report at 4; see 13 C.F.R. § 124.504(c)(1)(i)(C). Margni does not argue that this aspect of the determination was improper.

² The SBA also determined that accepting this procurement into the 8(a) program would not have an adverse impact on other small business programs because this requirement is only a very small percentage of VA's SDVO small business set-aside program and that the VA has significantly exceeded its SDVO small business goals. SBA Report at 4-5. The protester does not dispute this aspect of the determination.

³ Paragraph (c)(1)(i) is summarized in note 1, infra.

The SBA advises that it found that “there was no combining or consolidating of various requirements being performed by two or more small businesses into a single contract,” and that the acquisition history, including the five SDVO small business concerns that competed under the prior procurement, was not a basis to find an adverse impact to a group of small businesses located within a specific geographical location because this circumstance only reflected the level of interest of small businesses from various locations in the requirement.⁴ See SBA Supplemental Report (Jan. 4, 2007) at 5, n.2.

Margni nevertheless argues that the SBA’s analyses should not be accepted because it relied solely upon the dated information involving the prior solicitation, instead of performing its own broad based independent research of databases, such as the Central Contractor Registration (CCR), to determine this question.⁵ The kind of research suggested by Margni with regard to whether accepting a requirement into the 8(a) program will have an adverse impact on a group of small businesses located in a specific geographical location is not required by the SBA regulations. As previously noted, the purpose of the adverse impact concept is to protect incumbent small businesses currently performing an offered requirement outside the program, and 13 C.F.R. § 124.504(c)(2) addresses the potential adverse impact of the loss of business by two or more small businesses when the agency is combining or consolidating requirements currently being performed by them.⁶ As pointed out by the SBA, the agency was not combining or consolidating this requirement. Based on our review, Margni has not shown that the SBA’s determination in this regard was

⁴ While the SBA’s more detailed documented impact analysis was not undertaken until after the protest, we have given weight to SBA’s post-protest statements and analyses concerning the adverse impact of accepting an agency requirement into the SBA’s 8(a) program. See Catapult Tech., Ltd., B-294936, B-294936.2, Jan. 13, 2005, 2005 CPD ¶ 14 at 5-7; Designer Assocs., Inc., *supra*, at 5; C. Martin Co., Inc., B-292662, Nov. 6, 2003, 2003 CPD ¶ 207 at 5-8.

⁵ CCR is the common source of vendor data for the government. Federal Acquisition Regulation (FAR) § 4.1100(b).

⁶ This regulation was added to the SBA adverse impact regulations to broaden the adverse impact concept to allow for such impact to be found where several requirements currently being performed by different small business concerns are consolidated into one large requirement, which could be considered “new” under SBA’s regulations due to the magnitude of the consolidated requirement. This rule permits SBA to find adverse impact whenever at least one of the small business concerns losing work that is to be consolidated meets the presumption of adverse impact. 62 Fed. Reg. 43584, 43591 (Aug. 14, 1997).

improper, or that small businesses were having work taken from them that they currently were performing prior to the VA's and SBA's action.⁷

In sum, Margni has not shown that the SBA's determination that there was no adverse impact in placing this requirement under the 8(a) program was not reasonably based. See Catapult Tech., Ltd., supra, at 5.

The protest is denied.

Gary L. Kepplinger
General Counsel

⁷ The SBA has previously taken, and we have given deference to, the position that in the context of a consolidated requirement, 13 C.F.R. § 124.504(c)(2) only provides that the SBA "may," rather than "shall," find adverse impact if the circumstances under this regulation exist, so that it has the discretion to accept a requirement into the 8(a) program in appropriate circumstances, even where one or more contractors met the presumption of adverse impact. Catapult Tech., Ltd., supra, at 6.