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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Basic Concepts, Inc.

File: B-299545

Date: May 31, 2007

Russell Guffee, Basic Concepts, Inc., for the protester.
Edward R. Murray, Esq., Defense Logistics Agency, for the agency.
Linda C. Glass, Esq., and Ralph O. White, Esq., Office of the General Counsel, GAO,
participated in the preparation of the decision.

DIGEST

Contracting agency's decision to satisfy its immediate requirements for hazardous spill containment units using a contract awarded under the Small Business Administration's section 8(a) business development program, while completing an ongoing competition reserved for small businesses, is unobjectionable where acquiring the items using the 8(a) program does not violate any statute or regulation.

DECISION

Basic Concepts, Inc., a small business concern, protests the award of a contract for hazardous material spill containment units (or berms)¹, National Stock Number (NSN) 4235-01-419-4798, by the Defense Logistics Agency (DLA) under the Small Business Administration's (SBA) section 8(a) business development program. The contract was awarded on a noncompetitive basis to Bowhead Manufacturing Company, following a decision by DLA to terminate an earlier award to Bowhead because of errors pointed out by the protester in an agency-level protest.² Basic argues that the agency acted improperly in not holding a new competition for these units.

¹ These units are placed under a vehicle to prevent and contain the release of potentially hazardous materials during repairs or maintenance.

² Department of Defense (DOD) agencies have been delegated authority to enter into 8(a) contracts on behalf of the SBA. DOD Federal Acquisition Regulation Supplement § 219.80.

We deny the protest.

BACKGROUND

On October 25, 2005, the agency issued, as a small business set-aside, a solicitation seeking a long-term supplier for these berms. That solicitation is ongoing and both Basic and Bowhead are eligible to compete.

As the more significant procurement continues, DLA reports that it has backorders for these units that cannot await completion of the ongoing competition. As a result, the agency issued, on October 17, 2006, an unrestricted solicitation for 177 small hazardous spill containment berms, identified as NSN 4235-01-419-4798. Agency Report (AR), Tab B-3. In addition to listing the NSN, the solicitation set forth the salient characteristics of the item, and identified--by manufacturer's part number--four approved products, including products manufactured by Basic and Bowhead.³ Although it was not noticed until later, the manufacturer's part number listed in the solicitation for Bowhead's approved product was incorrect. Specifically, the solicitation listed Bowhead's "Snap-up" berm (Part No. B-040408-SU), rather than its "Throw N Go" berm (Part No. 4235014194798, which is the same number as the NSN). AR at 2.

On November 1, Bowhead was awarded the contract based on its lowest price. As the solicitation requested, Bowhead offered to provide its "Snap-up" berm, rather than its "Throw N Go" berm. Basic filed an agency-level protest objecting to the award, arguing that Basic had a patent that prevented Bowhead from supplying the "Snap-up" berm. Although Bowhead conceded that it could not provide the "Snap-up" berm, it explained that it recognized the mistake in the solicitation, and in fact, planned to supply its "Throw N Go" berm instead. As a result, the agency decided to terminate Bowhead's award, as well as two other contracts for larger berms awarded to Bowhead on December 15 and 18.⁴

By letter dated January 4, 2007, the agency advised both Basic and Bowhead that it was canceling the three awards, and that the agency would correct the item

³ DLA explains that, originally, the only approved hazardous material spill containment units were manufactured by Basic, but in November 2005, Bowhead's "Throw N Go" berm was approved by the agency as an acceptable product. AR, Tab B, Agency Dismissal Request at 2.

⁴ Contracts SPM4A6-07-V-1048 and SPM4A6-07-V-0998 were awarded to Bowhead on December 18 and 15 respectively and had been solicited as small business set-asides because they were anticipated for award under \$100,000. AR, Tabs E and F. These contracts were for a larger-sized spill containment berm, identified as NSN 4235-01-419-4801. AR, Tabs E and F.

description to identify the Bowhead “Throw N Go” berm as an acceptable item and resolicit the requirement. AR, Tab 4, Letter from Agency to Basic and Bowhead dated Jan. 4, 2007. This letter also advised that the needed items were in short supply and that the agency would “likely again utilize urgent and compelling procedures” to fulfill its immediate requirements. Id.

DLA explains that immediately after deciding to cancel the award, on January 9, 2007, Bowhead contacted the agency’s Small Business Office to advise that it qualifies as an 8(a) firm, and that it was approved to supply both the small and large sizes of berms. AR, Tab G, Declaration of Procurement Analyst. After verifying Bowhead’s status as an 8(a) business, and confirming that the item description had been updated, the Small Business Office decided to add the item to its 8(a) database. Id. After receipt of a purchase request for 250 berms, the Small Business Office notified the agency that the berms should be reserved for a direct award to Bowhead under the SBA’s 8(a) business development program. AR, Tab H, Small Business Coordination Record.

On January 24, the agency solicited Bowhead directly using an 8(a) set-aside, and simplified acquisition procedures. Bowhead responded on January 29, and after its offer was evaluated, Bowhead received an award for 250 berms on February 8. Basic again filed an agency-level protest on February 15, which was denied on March 3. This protest to our Office followed on March 12.

DISCUSSION

Basic argues that it was not appropriate for the agency to procure these interim quantities of berms under the SBA’s 8(a) program after the January 4 DLA corrective action letter advised that the agency would “resolicit” the item in response to Basic’s original agency-level protest. In Basic’s view it has been unfairly excluded from this procurement.

In reviewing Basic’s complaint that it has been treated unfairly here, we have looked at the January 4 letter advising Basic that the earlier award would be canceled and resolicited. As an initial matter, there was no representation in the January 4 letter that there would be a new competition for this item. In fact, the letter advised that the agency would likely take steps to expedite its reprocurement. See AR, Tab 4, Letter from Agency to Basic and Bowhead dated Jan. 4, 2007. While Basic clearly feels misled by the events here, upon review—and looking at this situation as a whole—we see nothing improper or unreasonable about the agency’s actions.

Moreover, the protester’s contention that the agency’s use of the 8(a) program was merely an attempt to exclude Basic from competing is not supported by the record here. Government officials are presumed to act in good faith, and a protester’s claim that contracting officials were motivated by bias or bad faith must be supported by convincing proof; our Office will not attribute unfair or prejudicial motives to procurement officials on the basis of inference or supposition. Shinwa Elecs.,

B-290603 et al., Sept. 3, 2002, 2002 CPD ¶ 154 at 5 n.6. Here, the protester has provided no evidence of bad faith; rather, it draws an inference from a series of facts to support its belief that someone in the Small Business Office has “targeted Bowhead as a favorite vendor.” Protest at 3. The protester’s conclusion is based on speculation, and is insufficient to support a finding of bad faith.⁵

A second theme in Basic’s protest, though not argued with specificity, is that it was somehow improper to award this requirement under the SBA’s 8(a) program. In this regard, we note that the earlier award to Bowhead, which was cancelled, was conducted on an unrestricted basis; the ongoing competition to select a long-term supplier for these products is being conducted as a small business set-aside.

Section 8(a) of the Small Business Act, 15 U.S.C. § 637(a) (2000), authorizes the 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 (FAR) § 19.800(a). 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. Bid Protest Regulations, 4 C.F.R. §21.5(c)(2); 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) (2006). 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. In response to the protester’s concerns about this procurement, our Office asked the SBA to review DLA’s actions and provide its views about whether this procurement violated the above-described restrictions.

⁵ Basic also questions whether or not Bowhead can properly be considered an 8(a) contractor under the SBA’s regulations. Challenges of a small business’s size status, or eligibility for award under the 8(a) program, are for review solely by the SBA, not our Office. 4 C.F.R. § 21.5(b) (2007). In addition, the protester’s complaints about DLA’s decision to qualify Bowhead’s “Throw N Go” berm as an equal product—an ongoing theme in these filings—are raised over a year after Basic knew the item had been approved. This matter is raised far too late for consideration in our bid protest forum. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(2).

By letter dated May 18, SBA stated that the agency here properly utilized its streamlined procedures for 8(a) awards for acquisitions valued at or below the simplified acquisition threshold. SBA Response to Protest, May 18, 2007. The SBA states that where, as here, it has delegated its contract execution function to a procuring agency, offer and acceptance of acquisitions valued at or below the simplified acquisition threshold is not required. The SBA also explained that its regulations specifically provide that the adverse impact concept does not apply to any requirement offered to the 8(a) program under simplified acquisition procedures. 13 C.F.R. § 124.504(c).⁶

Given our review of the record associated with the earlier agency-level protest, and SBA's view that DLA's approach does not violate small business regulations, we have no basis to conclude that DLA acted improperly here.

The protest is denied.

Gary L. Kepplinger
General Counsel

⁶ The SBA also concluded that the adverse impact concept does not apply to this procurement because the SBA has determined that based on the facts here, this procurement is considered a new requirement because it involves a much smaller quantity than the larger ongoing competitive set-aside procurement. See 13 C.F.R. § 124.504(c)(1)(ii), (c)(2). In addition, as noted above, the award to Bowhead that was canceled was conducted using an unrestricted solicitation, so nothing about that procurement triggers these restrictions either.