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**Comptroller General
of the United States**

**United States Government Accountability Office
Washington, DC 20548**

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Decision

Matter of: Operational Support & Services

File: B-299660.2

Date: September 24, 2007

Joan K. F. Fiorino, Esq., and John C. Dulske, Esq., Dulske & Fiorino, for the protester.

Bruce N. Edwards, Esq., and Michael R. Sorensen, Esq., Sorensen & Edwards, for Shee Atika Languages, the intervenor.

John W. Klein, Esq., and Kenneth Dodds, Esq., Small Business Administration.

Maj. David Abdalla, and Capt. Robert B. Nelson, Department of the Army, for the agency.

David A. Ashen, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Noncompetitive award under Small Business Administration's section 8(a) program was unobjectionable where meeting requirement under 8(a) program did not violate statute or regulation.

DECISION

Operational Support & Services (OSS) protests the award of Department of the Army, United States Special Operations Command (USSOCOM), contract No. H92222-07-D-0021, to Shee Atika Languages (SAL), for comprehensive foreign language interpretation, transcription, reporting and translation services. OSS asserts that the USSOCOM acted in bad faith and in violation of applicable regulations in making the award to SAL on a sole-source basis under the Small Business Administration's (SBA) section 8(a) program.

We deny the protest.

On December 28, 2006, USSOCOM issued a presolicitation notice on the Federal Business Opportunities (FedBizOps) website announcing its intention to issue, within 30 days, a solicitation for comprehensive foreign language interpretation, transcription, reporting and translation services in support of Special Operations Forces (SOF) operational requirements worldwide. At the time of the notice, Worldwide Language Resources, Inc. was providing the services to be procured

under the contemplated solicitation. The FedBizOps notice advised that the solicitation would provide for multiple awards of indefinite-delivery/indefinite-quantity contracts, with one award to be reserved for a small business concern and one to be made on an unrestricted basis.

On December 29, SAL, which is certified as an Alaskan Native Corporation (ANC) under the SBA 8(a) program, responded to the FedBizOps notice with an e-mail to the agency advising of its interest in the procurement, its status as a section 8(a) ANC, and the fact that it had assembled a “team” whose partners have “extensive experience with Special Operations,” including current support of SOF in Afghanistan. SAL E-mail to USSOCOM Contract Specialist, Dec. 29, 2006. The USSOCOM contracting officer at the time, aware that SAL had a business relationship with Worldwide, the incumbent contractor, decided to further investigate the possibility of an award to SAL. E-mail from USSOCOM Contracting Officer to USSOCOM Contract Specialist, Dec. 29, 2007; Declaration of USSOCOM Contracting Officer, July 20, 2007. On January 9, 2007, SAL e-mailed the agency a statement of the capabilities and intended approach of “Team Shee Atika” in performing the requirement. On January 12, in response to an inquiry from USSOCOM, SAL e-mailed the contracting officer a more detailed statement of capabilities and approach; this statement listed Worldwide as one of SAL’s team members. On January 31, SAL provided a capabilities briefing to USSOCOM, in which it listed the four members of Team Shee Atika, including Worldwide. At the conclusion of the briefing, USSOCOM determined that SAL was capable of satisfying its foreign language services requirement. USSOCOM Contracting Officer Memorandum, Jan. 31, 2007. Accordingly, on February 2, USSOCOM synopsisized in FedBizOps its intention to award a contract to SAL under SBA’s 8(a) program.

On February 9, two other companies filed agency-level protests questioning SAL’s qualifications to perform the contemplated work, asserting that the determination to abandon a competitive procurement was the result of a conflict of interest, and that SAL was affiliated with Worldwide--whose owner held a 49 percent ownership interest in SAL--so as to render SAL other than a small business concern. On February 15, USSOCOM requested that SBA make a formal size determination with respect to SAL. However, SBA dismissed the matter on the bases that (1) it was premature because there had been no formal solicitation and no response to a solicitation from the protesters, and (2) the protesters were not interested parties because they were not 8(a) concerns. SBA Decision, Case 1-SD-2007-30, Feb. 22, 2007. In addition, USSOCOM’s investigation of the alleged conflict of interest, which concerned a reserve officer’s alleged involvement in the procurement while being employed by Worldwide, concluded that the allegation was unfounded; the reserve officer in fact had no involvement in the procurement. Letters from USSOCOM to Counsel for Torres Advanced Enterprise Solutions, LLC, and Allworld Language Consultants, Inc., Mar. 16, 2007.

As a result of the above delays in its effort to award a successor contract, when the incumbent contract with Worldwide expired on March 29, USSOCOM awarded Worldwide a bridge contract. On April 5, OSS filed a protest with our Office challenging SAL's status as a section 8(a) ANC and citing the fact that the owner of Worldwide had a 49 percent ownership interest in SAL. We dismissed this protest on the basis that a firm's status as an ANC is a matter for determination by SBA. (B-299625, Apr. 6, 2007). On April 9, OSS filed a second protest with our Office, asserting that the bridge contract award was improper. Thereafter, USSOCOM advised us that it intended to award a contract for the requirement to SAL under the 8(a) program, would begin transition of its language services requirements to SAL immediately upon award, and would terminate Worldwide's bridge contract on or about June 1. Based on this proposed action, we dismissed the protest as academic. (B-299660, May 11, 2007).

In the interim, on April 18, in response to a further request from USSOCOM regarding the alleged affiliation of SAL and Worldwide, SBA informed the agency that it found no evidence of affiliation. Thereafter, on April 23, USSOCOM offered the foreign language services requirement to SBA for award to SAL under the 8(a) program on a sole-source basis. SBA Comments, Aug. 6, 2007, at 2. On May 17, SBA, having determined that SAL was a small business for the procurement and that SAL has the requisite capabilities to satisfactorily perform the contract, accepted USSOCOM's offer. SBA Letter of Acceptance, May 17, 2007; SBA Comments, Aug. 6, 2007, at 2-3; see SBA E-mail to USSOCOM Contracting Officer, Apr. 18, 2007. Thereafter, on May 31, the agency made award to SAL. OSS then filed this protest with our Office.

Section 8(a) of the Small Business Act, 15 U.S.C. § 637(a) (2000), authorizes 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. The Act affords SBA and contracting agencies broad discretion in selecting procurements for the 8(a) program; accordingly, 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) (2007); Rothe Computer Solutions, LLC d/b/a Rohmann J.V., B-299452, May 9, 2007, 2007 CPD ¶ 92 at 3; Designer Assocs., Inc., B-293226, Feb. 12, 2004, 2004 CPD ¶ 114 at 4. In this regard, 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. Basic Concepts, Inc., B-299545, May 31, 2007, 2007 CPD ¶ 98 at 3-4; Shinwa Elecs., B-290603 et al., Sept. 3, 2002, 2002 CPD ¶ 154 at 5 n.6.

We have considered all of OSS's arguments, and find that none furnishes a basis to question the award to SAL. We discuss the most significant arguments below.

BAD FAITH

OSS asserts that USSOCOM acted in bad faith in making award to SAL; according to the protester, USSOCOM “wanted to make a sole source award to SAL because the Agency knew [Worldwide] would perform the linguist work.” OSS Comments, Aug. 20, 2007, at 13.

The record does show that the agency was aware that SAL had a prior business relationship with Worldwide, and that Worldwide’s participation as a subcontractor was a significant factor in its decision to make award to SAL. E-mail from USSOCOM Contracting Officer to USSOCOM Contract Specialist, Dec. 29, 2007; Declaration of USSOCOM Contracting Officer, July 20, 2007. In fact, the contracting officer indicated to SAL’s CEO that “working with WorldWide was a ‘plus’ based on some of our units.” Declaration of USSOCOM Contracting Officer, July 20, 2007.

However, the agency’s consideration of Worldwide’s participation in performance of the contract was not improper. In this regard, there is no applicable statute or regulation that prohibits section 8(a) firms from entering into subcontracting arrangements for purposes of competing for an 8(a) award. In fact, SBA’s regulations actually contemplate that 8(a) participants will subcontract (but specifically provide that an 8(a) firm must comply with the limitation on subcontracting requirements). See 13 C.F.R. §§ 124.510(a) and 125.6; Myers Investigative and Sec. Servs., Inc., B-286971.2, B-286971.3, Apr. 2, 2001, 2001 CPD ¶ 59 at 4. Likewise, OSS has not cited any statute or regulation—and we are aware of none—that precludes the contracting agency from considering—in deciding whether to offer a requirement to SBA under the 8(a) program—whether the proposed 8(a) contractor will subcontract with a particular firm in performing the requirement. SBA has advised us of its view (in response to our request for its position) that USSOCOM’s consideration of SAL’s contemplated subcontractors was reasonable and consistent with law and regulation. SBA Comments, Aug. 6, 2007, at 4; FAR §§ 9.104-1(e), 9.104-3 and 19.804-1(f). We conclude that there is no basis for finding bad faith on the part of USSOCOM.

LIMITATION ON SUBCONTRACTING

OSS asserts that SAL’s proposal evidenced an intention to violate the requirement that a concern awarded an 8(a) contract agree to perform at least 50 percent of the personnel cost under the contract with its own employees, reflecting its plan to have Worldwide continue performing the work. 13 C.F.R. § 125.6(a); FAR § 19.811(3)(e); see FAR § 52.219-14, Limitations on Subcontracting, incorporated into SAL Contract at 52.

We have recognized that, where a proposal indicates that an offeror could not and would not comply with the subcontracting limitation, the proposal is unacceptable

and may not form the basis for an award under the section 8(a) program. See generally Ecompex, Inc., B-292865.4 et al., June 18, 2004, 2004 CPD ¶ 149 at 5.

Here, it is clear from the record that SAL expressly committed to complying with the limitation on subcontracting requirements in performing the contemplated contract. In this regard, SAL stated in its proposal to USSOCOM that:

[SAL] will provide the program management staff and all leadership roles for this contract. As positions are tasked, SAL will fill linguist slots as required in order to insure that at all times 51% of the labor cost will be performed by SAL direct (ie., W-2) employees.

To the greatest extent possible consistent with the requirement that SAL perform 51% of the labor cost, SAL intends to use Worldwide Language Resources as a subcontractor to provide linguists in those arenas where Worldwide has previously been USSOCOM's contractor. Obviously, if USSOCOM provides SAL sufficient total positions throughout the world, then SAL will use Worldwide Language Resources as its subcontractor for all the positions where Worldwide Language Resources was the incumbent.

SAL Management Proposal, Apr. 16, 2007, at 15-16. Further, SAL's correspondence with USSOCOM was consistent with the position expressed in SAL's proposal, that is, that Worldwide would continue furnishing the linguists performing under its current contract, but only to the extent consistent with SAL's performing 51 percent of the overall effort. In this regard, SAL's chief executive officer (CEO) advised USSOCOM, prior to award, as follows:

I have talked to [Worldwide] and, if the worst case scenario occurs and the only task order we get is for their customer, SAL will simply impose our management and "hire away" enough [Worldwide] linguists to insure that we have at least 51% of the work. [Worldwide] has reluctantly agreed to this.

E-mail from SAL CEO to USSOCOM Contracting Officer, Apr. 17, 2007.

Likewise, the record indicates that USSOCOM emphasized the necessity for complying with the limitation on subcontracting requirements, with SAL's stated approach to complying being a response to USSOCOM's request that SAL: "readdress [its] plan on how [it] will achieve the 51% of labor dollars with Shee Atika employees--this plan needs to address timeliness in obtaining the proper skill sets, etc." Id.; Agency Supplemental Report, Aug 15, 2007, at 4. As a result, SAL's contract included not only the standard limitation on subcontracting clause at FAR § 52.219-14, but also a special limitation on subcontracting clause, which read as follows:

H.2. PRIME CONTRACTOR PREDOMINANCE OF SUPPORT NOTICE. [SAL] as the prime Contractor, is required to perform 51% of ALL labor as measured by total labor dollars under this contract. This requirement does not apply to each task order. However, it is required that the balance be maintained at any point in time and must be in compliance at the end of the contract. Actual compliance shall be monitored through the monthly manning report submitted by the Contractor to the USSOCOM Contracting Officer.

SAL Contract, § H.2.¹ We conclude that there was, and is, no indication that SAL did not intend to comply with the limitation on subcontracting; in fact, the record shows that the agency took steps to ensure that SAL understood its obligation and would not violate the limitation during contract performance.

FAIR MARKET PRICE

OSS challenges USSOCOM's determination that SAL's contract price represented a fair market price. In this regard, the FAR provides that "[a]n 8(a) contract, sole source or competitive, may not be awarded if the price of the contract results in a cost to the contracting agency which exceeds a fair market price." FAR § 19.806(b). A "fair market price" with regard to the small business programs is defined as "a price based on reasonable costs under normal competitive conditions and not on lowest possible cost." FAR § 19.001. In order to ensure that awards made to 8(a) participants do not exceed the fair market price, the FAR requires that contracting officers "estimate the fair market price of the work to be performed by the 8(a) contractor," and that in estimating the fair market price, the contracting officer (as appropriate) use cost or price analysis, and consider recent award prices for the same or similar work, commercial prices for similar products and services, available in-house cost estimates, data (including cost or pricing data) submitted by the SBA or the 8(a) contractor, and data obtained from any other Government agency. FAR § 19.807. We will review an agency's fair market price determination only to determine whether it was reasonable, or where there is a showing of possible fraud or bad faith. NANA Servs., LLC, B-297177.3, B-297177.4, Jan. 3, 2006, 2006 CPD ¶ 4 at 8; Techno-Sciences, Inc., B-277260, Sept. 22, 1997, 97-2 CPD ¶ 115 at 5.

The fair market price determination here was unobjectionable. The record indicates that the agency considered extensive data regarding current pricing for linguist services similar, or generally similar, to those required here. Specifically, the

¹ The record indicates that, in its July 9 report to the agency, SAL stated that it was performing the contract in compliance with the limitation on subcontracting clause; [DELETED] SAL employees and [DELETED] Worldwide employees were working under the contract. SAL E-mail to USSOCOM Contract Specialist, July 9, 2007.

contracting officer considered: (1) pricing data from 22 separate General Services Administration schedule contracts, with an emphasis on the pricing of linguists used in support of Operation Enduring Freedom and Operation Iraqi Freedom (because such services are similar to the linguist services in support of special operations forces required here); (2) cost and pricing data furnished by SAL; (3) the Defense Contract Audit Agency's (DCAA) review of SAL's direct and indirect rates; and (4) market research into linguist salaries, as listed on employment websites. USSOCOM Business Clearance Memorandum, Aug. 15, 2007; Contracting Officer's Supplemental Statement of Facts, Aug. 27, 2007, at 1-37, and attachments 51-105.

The protester questions various aspects of the agency's approach, but we find its methodology reasonable. For example, OSS questions the contract daily rate of \$[DELETED] for host nation nationals in Category I, Group B (which includes Arabic languages in Afghanistan, Iraq, and other Middle Eastern countries). However, as explained in the agency's business clearance memorandum, and subsequently by the contracting officer, this daily rate was derived from the daily pay offered by three contractors to Category 1 host nation nationals in Afghanistan and Iraq, to which the agency applied overhead and general and administrative rates approved by DCAA, and a profit falling within Department of Defense guidelines. USSOCOM Business Clearance Memorandum, Aug. 15, 2007, at 15-17; Contracting Officer's Supplemental Statement of Facts, Aug. 27, 2007, at 33-35. There is no basis for us to find this rate excessive.

OSS asserts that the fair market price determination was improper because some of the items on the contract schedule were unpriced, with the items marked "TBN," that is, prices to be negotiated at a later date. The agency takes the position, however, and we agree, that, since the TBN items were for services for which there was a possible future need, but no current need, and for which pricing information was limited or unavailable, these items reasonably were excluded from the fair market price analysis. Agency Supplemental Report, Aug. 28, 2007, at 12-13; Contracting Officer's Supplemental Statement of Facts, Aug. 27, 2007, at 3. This view is consistent with SBA's regulations, which recognize the possibility that a contract awarded under the 8(a) program may include unpriced options, and provide that exercise of an unpriced option is considered to be a new contracting action. 13 C.F.R. § 124.514(a). As a result, according to SBA, the contracting agency would be required to make a fair market price determination regarding the option exercise price at the time of the exercise of the option. SBA Comments, Sept. 7, 2007, at 2. We are aware of--and OSS has cited--no statutory or regulatory authority that provides otherwise with respect to the 8(a) program. Accordingly, we conclude that this argument does not warrant questioning the fair market price analysis.

The protest is denied.

Gary L. Kepplinger
General Counsel