



August 11, 2021

BY EPDS

Ms. Young Cho, Esq.
U.S. Government Accountability Office
ATTN: Office of the General Counsel
441 G Street, NW
Washington, D.C. 20548

***Re: Protest of TeamGOV, Inc.
B-419865.2
Response to Motion to Dismiss***

Dear Ms. Cho:

On behalf of TeamGOV, Inc. (“TeamGOV” or “Protester”), we hereby submit the following response to Agency Counsel, Mr. Robert Notigan’s, Motion to Dismiss dated August 9, 2021 in connection with the above-referenced protest. TeamGOV hereby requests that GAO’s Motion to Dismiss be denied, that GAO request comments from the SBA, and that our Protest be considered on its merits.

Respectfully,

/s/ Ralph C. Thomas

/s/ Sean C. Trice

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cc: via EPDS to all Parties

ANSWER TO MOTION TO DISMISS

Protester has filed a protest alleging that GSA's recent issuance of a Request for Quotations (RFQ) solicitation is defective because GSA is attempting to remove an 8(a) contract from the Small Business Administration (SBA) Business Development Program without complying with the applicable Federal regulations, namely FAR 19.815 and 13 C.F.R. 124.504(d)(1), which establish the proper procedures for removing a contract from the 8(a) Program.

GSA has filed a Motion to Dismiss ("Motion") asserting that the Federal Acquisition Regulation (FAR) 8.404(a) exempts Agency from complying with FAR 19 and 13 C.F.R. 124.504 because it is re-soliciting the 8(a) contract as a Federal Supply Schedule (FSS) procurement. However, GSA has cited no cases indicating that the SBA has ever accepted the notion that FAR 8.404(a) can contravene its regulations on this matter, which were written pursuant to statute. The SBA has no "exemption" clause in its regulation that would allow an agency an "exemption" from complying with its regulation establishing the procedures for releasing a contract from the 8(a) Program.

SBA just revised the relevant regulations regarding release of contracts from the 8(a) Program in November 2020 and did not mention, recognize or accept any FAR "exemption" to 13 C.F.R. 124.504. None of the cases cited by Agency in its Motion supports the notion that the SBA recognizes or supports any FAR exemption from the dictates of 13 C.F.R. 124.504. In fact there are court cases and cases by even the GAO itself which indicate that FAR does not take precedence over SBA regulations in the Code of Federal Regulations (C.F.R.). Therefore, GSA's solicitation is defective because it does not comply with the requirements of 124.504 and the

FAR which grants an exemption from compliance with 124.504 if it re-solicits an 8(a) contract as an FSS acquisition is not relevant in this case. Protester requests that GAO request comments from SBA before ruling on this matter.

1. Agency's Cited Cases Do Not Support its Assertion that SBA has accepted the applicable FAR's exemption from Compliance with 13 C.F.R. 124.504.

None of the cases cited by GSA in its Motion support the position that the SBA has accepted the FAR's exemption from compliance with 13 C.F.R. 124.504. In fact, almost all of the cases cited by Agency have nothing to do with the removing of a contract from the 8(a) Program to any degree.

For example, GSA has cited *Alpa Techs. & Servs., Inc.*, B-408762.2, 2014 CPD ¶ 66 (Feb. 12, 2014) ("*Alpa* ") as support for its position that "... the FAR exempts task orders issued under FSS contracts from application of the set-aside withdrawal requirements found in FAR §19.506". See Motion at 2. However, that statement is taken out of context. Indeed, the *Alpa* case had little, if anything, to do with whether the FAR exempts the Agency from complying with FAR 19 or 13 C.F.R. 124.504.

The case was about an 8(a) contractor who insisted that the relevant contract was removed from the 8(a) Program without the SBA conducting the required "adverse impact analysis" as required by 124.504. It turns out that the agency went to the wrong entity to get approval for removing the contract from the 8(a) Program. However, the SBA's position was that the removal of the 8(a) contract represented a "new requirement" under 124.504 and, thus, an "adverse impact analysis" was not required.

The only relevant part of that case to the one at bar dealt with the issue of whether the agency, in carving out a portion of the 8(a) contract and awarding it to the incumbent in the form of a task order under an FSS after the incumbent had graduated from the 8(a) Program,

represented an improper removal of that portion of the contract from the 8(a) Program. However, the SBA disagreed that the agency's procurement under the FSS removed the requirement from the 8(a) program, arguing that the "once 8(a), always 8(a)" rule applied.

The GAO found that although GAO "has recognized that the FAR exempts task orders issued under FSS contracts from application of the set-aside withdrawal requirements found in FAR § 19.506. [Cases omitted] . . . [n]onetheless, in light of the SBA's position here that the requirement is new, as discussed above, the SBA would not be required to conduct an adverse impact analysis even if the SBA agreed that the requirement had been legally removed from the 8(a) program."

Thus, the important point here is that despite GAO's recognition of the FAR FSS exemption, it nevertheless gave deference and precedence to the SBA's position that the dictates of 124.504 still applied, and the GAO ruled on that basis.

In *Global Analytic Info. Tech. Servs., Inc.*, B-297200.3, 2006 CPD ¶ 53 (Mar. 21, 2006) ("Global"), another case cited in Agency's Motion, the issue of an agency's improper removal of a contract from the 8(a) Program is nowhere in the case. Rather, the case is about a protest of a requirement that was initially solicited and performed as a small business set-aside and then re-solicited as an FSS acquisition. GAO found that the FAR exempts task orders issued under FSS contracts from application of the set-aside withdrawal requirements found in FAR sect. 19.506. However, the facts of the case were absent any consideration of the removal of a contract from the SBA's 8(a) Program.

Similarly, GSA's cited case of *Millennium Data Sys., Inc.*, B-292357.2, 2004 CPD ¶ 48 (Mar. 12, 2004) is not relevant because it is not about the removal of a contract from the 8(a) program and/or the applicability of 124.504. The case concerned several issues but mainly came

down to the fact that the agency did not have to re-solicit as small business set-aside due to the FSS exemption. That, however, is not what the instant case is about.

In addition, GSA cites *Capital Brand Group, LLC—Reconsideration*, B-418656.2 (July 9, 2020), as a case which “reaffirms” the GAO’s position that FAR 19 does not apply to FSS task orders. Although the case was one which actually did involve the protest of an agency removing a contract from the 8(a) Program, it is actually a timeliness case where the protester failed to file its protest before the time that proposals were due. After its case was dismissed, the protester asked for reconsideration on the grounds that the GAO in its discretion can rule on the merits of an untimely filed case if the protest raises issues significant to the procurement system.

The GAO declined to issue a ruling on the merits, stating that the case did not meet all of the requirements for reconsideration of the protest on the merits. Rather, GAO stated that there were enough cases in which it had already ruled on the issues the protester was raising in its request for reconsideration. GAO stated that, “[l]astly, as the agency points out, we have considered protests concerning whether an agency improperly removed work from the 8(a) program, and we have concluded that the FAR exempts task orders issued under FSS contracts from application of the setaside withdrawal requirements found in FAR 19.506, specifically not mentioning 124.504. The cases GAO cited in its decision were the same cases cited by GSA in its Motion and in response, analyzed by Protester here.

The opinion is *Capital Brand* does not illustrate what the point of contention was that the protester wanted GAO to rule upon with regard to the removal of a contract from the 8(a) Program. However, the SBA felt that it was important enough to write a letter to GAO requesting a ruling on the merits. Nevertheless, the protester in that case did not timely file its protest before the bid opening, and, as a result, got no ruling on the merits. Here, Protester did

make a timely protest and its case should be considered on the merits.

As can be seen above, in the cases where the issue of an agency's removal from the program was relevant, the GAO either deferred to the SBA (*Alpa*), despite the presence of the issue of the FSS exemption, or GAO declined to consider the position of SBA on the merits due to the timeliness factor on the main issue (*Capital Brand*). The fact of the matter is that no case cited by GSA supports the notion that the SBA has ever accepted the FAR's FSS exemption to an agency's compliance to the requirements of 13 C.F.R. 124.504(a), "Release for non-8(a) or limited 8(a) competition."

The only case cited by Agency that is directly on point is that of *K-LAK Corp. v. United States*, 98 Fed. Cl. 1, 1 (2011), which was a case in which the agency re-solicited a procurement as an FSS acquisition that it had previously solicited as an 8(a) contract. The court found that the agency (contracting officer) did not abuse his discretion by removing the contract from the 8(a) Program utilizing the FAR FSS exemption. However, in that case, the court did not deal, and plaintiff did not make, any of the arguments being made here. In addition, the court did not have the benefit of considering the views of SBA, which is a vehicle that GAO has.

2. THE FAR FSS DOES NOT RELIEVE GSA FROM ITS OBLIGATIONS WITH REGARD TO THE 8(a) PROGRAM OR 124.504

The purpose of the 8(a) BD program is to assist eligible small disadvantaged business concerns compete in the American economy through business development. 13 C.F.R. § 124.501. The procuring agency participates in that endeavor by offering a particular contract for acquisition through SBA's 8(a) Program. Thus, the execution of an 8(a) contract is a tripartite agreement in which the procuring activity, SBA and the Participant all sign the appropriate contract documents. 13 C.F.R. § 508(a)(1). When a procuring agency decides to change course and acquire services, previously acquired through the 8(a) program, through a procurement

mechanism outside the 8(a) program, that agency must notify the SBA. 13 C.F.R. 504(d). There are no exceptions or exemptions to that requirement within the regulation.

The reason for that requirement is so the SBA can review such issues as whether the agency has achieved its Small Disadvantaged Business goal; whether the agency is achieving other socioeconomic goals it has negotiated with the SBA or whether the agency is even meeting the small business goal itself; and most importantly, whether the requirement is critical to the business development of the 8(a) Participant that is currently performing it. 13 C.F.R. 504(d)(i)(ii)(iii). Those concerns do not disappear just because an agency desires to offer the procurement as an FSS acquisition.

Most importantly, the agency has an obligation to notify SBA of its intentions to remove the requirement from the 8(a) Program so that SBA can decide whether to appeal the agency's decision to do so. Under its regulations, SBA may choose to appeal the terms or conditions of a particular 8(a) contract or a procuring activity decision not to use the 8(a) BD program. 13 C.F.R. 124.505. Specifically, the Administrator of SBA may appeal to the head of the procuring agency a contracting officer's decision not to make a particular procurement available for award as an 8(a) contract. 13 C.F.R. 124.505(a)(1). There are no exceptions in the regulation allowing for FSS exemptions.

In summary, GSA contravened the authority of the SBA by statute, as well as making of no effect SBA's potential exercise of its regulatory rights by not informing SBA of its intentions to remove the subject contract from the 8(a) Program. Thus, GSA's solicitation is defective.

3. IN THIS CASE THE FAR FSS EXEMPTION DOES NOT HAVE PRECEDENCE OVER THE SBA REGULATIONS REGARDING REMOVAL OF A CONTRACT FROM THE 8(A) PROGRAM

The FAR FSS exemption cited by GSA in this case does not have precedent over 13 C.F.R. § 124.504. The conflict between the regulations falls in favor of the SBA's regulations.

In *C & G Excavating, Inc. v. U.S.*, 32 Fed. Cl. 231 (Fed. Cl. 1994), the Court of Federal Claims resolved a conflict between SBA regulations and the FAR concerning certificates of competency in favor of the SBA regulations, holding:

In general, the SBA regulations conflict with FAR 19.602-2(a)(2) because they do not contain any restrictions as to the meaning of the term responsibility. For example, the SBA regulations define a COC as a written instrument ... certifying that a small concern ... possesses a responsibility.? 13 C.F.R. 125.5. Section 125.5(d) further provides that once the contracting officer notifies the SBA as to the basis of the referral, the SBA must investigate and certify as to the bidder's responsibility. Finally, section 125.5(j) provides that the COC is conclusive as to responsibility. In contrast, FAR 19.602-2(a)(2), restricts the definition of responsibility by limiting the scope of site investigations to the elements cited by the contracting officer as deficient. According to plaintiff's theory, this restriction translates into a restriction on the SBA's overall review authority. In addition to this general conflict, a direct conflict exists between FAR 19.602-2(a)(2) and 13 C.F.R. 125.5(e), in that the former limits the scope of the site investigation to the elements cited by the contracting officer as lacking, and the latter contains no such restriction. 13 C.F.R. 125.5(e) (stating SBA personnel may be sent to the firm to review the responsibility of the applicant.).

Although plaintiff contends that the FAR restriction controls the extent of the SBA's review authority, plaintiff fails to recognize that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer.... [especially when the decision as to the meaning or reach of a statute has involved reconciling conflicting policies....*Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844, 104 S.Ct. 2778, 2782, 81 L.Ed.2d 694 (1984) (footnote omitted) (quoting *United States v. Shimer*, 367 U.S. 374, 382, 81 S.Ct. 1554, 1560, 6 L.Ed.2d 908 (1961) (citations omitted))]. Because Congress entrusted the SBA with administering the COC program as provided in section 8(a) of the Act, 15 U.S.C. 637((7), the court must accord the SBA's interpretation of the program appropriate deference. The FAR, promulgated by DOD, GAO, and NASA, are designed to provide uniform acquisition procedures for federal government agencies. Once the contracting officer refers a matter to the SBA, as required by

the FAR, the SBA's procedures generally should control, especially considering that the SBA is the agency charged with issuing COCs, not DOD, GAO, or NASA.

The above analysis applies to the instant case. The FSS exemption flies in the face of SBA's obligation to administer the 8(a) Program pursuant to the Small Business Act, 15 U.S.C. § 637(a). To allow the FSS exemption to apply to the SBA forces the agency to stand its responsibilities under its enabling statute on its head. Agencies would have the ability to thwart the business development of an 8(a) contractor at any time and evade its responsibilities under the tripartite agreement with the SBA and the 8(a) contractor simply by availing itself of FAR exemption which the SBA has not accepted as an agency waiver to following the dictates of its regulatory requirements for removing a contract from the 8(a) Program.

The *C&E Excavating* case is supported by *CSE Const. Co., Inc. v. U.S.*, 58 Fed. Cl. 230 (Fed. Cl. 2003), which speaks of the "well-established principle that 'considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer....'" Id. at 239 (quoting *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984))."

And, finally, the GAO has weighed in on a similar conflict between the FAR and the SBA regulations in the case of *Adams Industrial Services, Inc.*, B-280186, August 28, 1998. That case involved the conflict between the FAR and the SBA regulations regarding the treatment of size protests after award. There, GAO stated that:

While FAR sec. 19.302(j) treats size status protests received after award of a contract as having no applicability to that contract, ***SBA's regulations, which we view as controlling in this area***, provide that "[a] timely filed protest applies to the procurement in question even though a contracting officer awarded the contract prior to receipt of the protest." 13 C.F.R. sec. 121.1004(c). Moreover, in the absence of countervailing reasons, we view it as inconsistent with the integrity

of the competitive procurement system and the intent of the Small Business Act, 15 U.S.C. sec. 631-657a (1994), for an agency to permit a large business, which was ineligible under the terms of the RFQ, to continue to perform. *Diagnostic Imaging Tech. Educ. Ctr., Inc.*, supra. (emphasis added).”

The same situation applies here. It is inconsistent with the integrity of the Small Business Act for to allow an agency to abruptly walk away from its obligations and responsibilities to the SBA and the 8(a) Program just because a FAR regulation allows it to do so if the re-solicitation is an FSS acquisition without the input of SBA.

CONCLUSION

Simply put, GSA’s solicitation is defective because in this case Agency did not contact the SBA pursuant to the applicable SBA regulations regarding the removal of a contract from the SBA 8(a) Program, FAR exemption notwithstanding. GSA has obligations and responsibilities as a result of having a procurement in the 8(a) Program that transcends any FAR FSS exemption. GSA’s failure to contact the SBA about this matter prevented the SBA from doing its regulatory job of analyzing the effect of the removal of the contract from the 8(a) Program to its 8(a) Participants who can perform the contract as a whole and GSA’s action also prevented the SBA of deciding whether or not it wanted to appeal the Contracting Officer’s decision to remove the 8(a) contract to an FSS acquisition.

Nothing in the 13 C.F.R. 124.504 recognizes any FAR-mandated FSS exemption. At the very least SBA’s position should be heard in this matter.