WHERE DOES IT END?

(New Tactics to Dilute Contracts from the SBA 8(a) Program)

C.W., an executive of a woman-owned 8(a) company, sat at his desk shaking his head as he looked at a notification of yet another 8(a) contract being converted to an unrestricted FSS procurement. This one was being done by the same large civilian agency that had taken the same action with other contracts from the Small Business Administration's (SBA) 8(a) Business Development Program. This one, however, happened to be a contract that C.W.'s company planned to compete for as an 8(a) company.

He doubted if the SBA even knew what was being done. These 8(a) contracts were being converted to Federal Supply Service (FSS) competitions. And what hardly anyone knew is that some agencies felt that when they used what was known as the "FSS exemption", they did not need the consent or concurrence of the SBA to remove the contract from the 8(a) Program. In fact the agencies did not believe that it was required to even notify the SBA or the 8(a) contractor of its plans.

Even if the SBA somehow found out about it and tried to put up a fight, the agency could merely assert that the contract was a "new requirement" and that under the Federal regulations, there was nothing the SBA, or anyone else, could do about it. The "new requirement" process is when is when an agency takes one or more of its existing 8(a) contracts and adds new tasks which supposedly are beyond that of which an 8(a), or any other small business can perform. All that the agency has to do in notify the SBA at any point in time up to the time an award is made, making the notification of no real effect. Of course, the SBA can appeal the agency's decision with five days of being notified, but the appeal is made to the head of the very agency that is making the contract a new requirement. Good luck with that.

If somehow the 8(a) company is still hanging in there, the agency can merely convince the SBA to concur that the contract is a "new requirement." Game over. As a recent article about this case indicated, "the requirements for a procurement to be 'new' are pretty low, all things considered." Sadly, the 8(a) company does not have many options after that. And, the thing is, such dilemma was never intended when the 8(a) Program was established. It should not be tolerated now.

Purpose of the 8(a) Program

In 1978 Congress empowered the Small Business Administration (SBA) to "provide small business concerns owned and controlled by socially and economically disadvantaged individuals such management, technical, financial and contract assistance as may be necessary to promote competitive viability within a reasonable amount of time." (Act of October 24, 1978, Pub. L. No. 95-507, 92 Stat. 1757-73 (1978)).

In this law Congress left no doubt as to its intent. The legislation sets forth both congressional findings and purposes. The statute in effect contains a congressional finding that there exists in this country a correlation between ethnicity and social and economic disadvantage.

The Congress also found that it was in the national interest to expeditiously deal with this situation in order to both obtain social and economic equality and to improve the functioning of the national economy. The promotion of minority business ownership through the use of Federal resources, i.e., contract awards, was one of the means chosen by Congress to effect these goals.

"Once an 8(a) contract, always an 8(a) contract"

C.W. was faced with a situation where a longstanding SBA policy, and the applicable Federal regulations set forth at 13 C.F.R. § 124.504(d), were not being followed with regard to the contract his company wanted to compete for, as well as others. That policy states that where a procurement is awarded as an 8(a) contract, its follow-on or renewable acquisition *must remain in the 8(a) BD program* unless the AA/BD agrees to release it for non-8(a) competition. Often referred to as the "once 8(a), always 8(a)" rule, this requirement exists to further the statutory goals of the 8(a) BD program by ensuring that prime federal contract support is available to SBA and 8(a) Program Participants as a form of business development assistance.

Where a Federal agency seeks to fulfill an 8(a) requirement outside of the 8(a) BD program, it must make a written request to and receive the concurrence of the SBA's Associate Administrator of Business Development (AA/BD) to do so. § 124.504(d)(1). The Contracting Officer must include the reason(s) for the request, the procurement history of the requirement, the incumbent name, the assigned NAICS Code and the Statement of Work. The final decision rests with the AA/BD. SBA has repeatedly taken the position that release rules apply in any instance where a procuring agency or activity seeks to remove a requirement from the 8(a) BD program and reprocure it through a contract that was not itself offered to and accepted into the 8(a) BD program.

Doing his due diligence, C.W. found that the agency had not sought the SBA's permission remove the contract that he was competing prior to issuing its initial solicitation. In addition, the 8(a) contract statement of work and the "new" solicitation looked pretty much like the 8(a) solicitation. Thus, C.W. authorized his attorneys to file a bid protest with the GAO.

The FSS exemption

After the bid protest was filed, the first thing the agency did was to file a motion to dismiss the protest. The agency claimed that FAR 8.404(a) exempts an agency from complying with SBA regulations requiring its concurrence to take a contract out of the 8(a) program if it is re-soliciting the 8(a) contract as a Federal Supply Schedule (FSS) procurement. Many 8(a) contractors and even some government procurement officials do not even realize that such a FAR exists.

As C.W.'s lawyers argued, the FSS exemption flies in the face of the SBA's obligation to administer the 8(a) Program pursuant to the authority given it under the Small Business Act. To allow the FSS exemption to apply to 8(a) program requirements would stand the SBA's statutory responsibilities on its head. As stated previously, the purpose of the 8(a) BD program is to assist eligible small disadvantaged business concerns to compete in the American economy through business development. See 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. See 13 C.F.R. § 508(a)(1).

If the FSS exemption were applied en masse, agencies would have the ability to thwart the business development of 8(a) contractors at any time and evade commitments it made to the SBA and the 8(a) contractor under the tripartite agreement by simply availing itself of an FSS exemption in which no rationale has been set forth in a statute or a regulation as to why an FSS procurement should be able to cancel out an 8(a) contract with no explanation whatsoever.

In addition, there is no exception in any SBA regulation which recognizes an FSS exemption. Furthermore, the SBA itself has never recognized an FSS exemption in any legal proceeding, and the SBA stated as much in C.W.'s protest as well. SBA asserted that it has not accepted the FSS exemption as an agency waiver to following the dictates of SBA regulatory requirements for removing a contract from the 8(a) Program.

In what Team C.W. saw as positive sign at the time, GAO made no ruling as to this aspect of the case.

Making the 8(a) contract(s) a "New Requirement"

Under SBA regulations, where a requirement is procured using an 8(a) contract, follow-on acquisitions of the requirement must remain in the 8(a) program, unless SBA agrees to release the requirement for non-8(a) competition. *See* 13 C.F.R. § 124.504(d)(1). However, the mandate for a contract to remain in the SBA's 8(a) program does not apply where a follow-on contract is a "new requirement." *See* 13 C.F.R. § 124.504(d);

So, in this regard, the SBA's regulations provide that the determination of whether a particular requirement or contract is "new" includes consideration of the following factors: (1) whether the scope has changed significantly, requiring meaningfully different types of work or different capabilities; (2) whether the magnitude or value of the requirement has changed by at least 25 percent for equivalent periods of performance; and (3) whether the end user of the requirement has changed. 13 C.F.R. § 124.3. As a general guide, if the procurement satisfies at least one of these three conditions, it may be considered a "new" requirement.

C.W.'s argument was that the requirement was not "new" because the contract was basically about doing the same thing - the operation and maintenance of Government facility. The agency essentially added more tasks to the requirement and argued that an 8(a) could not perform the basic tasks plus the different and expanded managerial tasks that would be required in the "new requirement."

The mere premise of the new requirement regulation is unfair and only serves to give Federal agencies one more reason to take a contract out of the 8(a) program. The three factors to determine whether a requirement is "new" are misplaced. It presumes that just because an 8(a) contract requires more managerial tasks and the contract increases in value that an 8(a) contractor cannot be up to the task. However, in agencies like NASA, possibly

the most technological agency in the Government, 8(a) contractors perform 8(a) contracts over $200 million, the first of which was awarded in 1993. There are such examples today in other agencies where 8(a) contractors are performing sophisticated and complex tasks.

In addition, the GAO's decision even makes the notification requirement related to a "new requirement" of no effect. The regulation states the following:

> Where a procurement will contain work currently performed under one or more 8(a) contracts, and the procuring agency determines that the procurement should not be considered a follow-on requirement to the 8(a) contract(s), the procuring agency *must notify* SBA that it *intends* to procure such specified work outside the 8(a) BD program through a requirement that it considers to be new.
> 13 C.F.R. 504(d)(1). (Emphasis added).

However, the agency in C.W.'s case did not notify the agency until well *after* it issued its initial solicitation as a "new requirement." To this fact, the GAO found that, " . . . even so, there is nothing in the regulations that require an agency receive approval prior to proceeding with a procurement that it has concluded is a "new" requirement. However, the question was not about "prior approval." Rather, it was about the agency's failure to notify the SBA that it intended to solicit the 8(a) contract as a "new requirement." This means that an agency can declare an 8(a) contract to be a "new requirement" without the SBA's knowledge and solicit the former 8(a) contract as a "new requirement" and "notify" the SBA of its "intentions" at any time.

The "new requirement" issue turned out to be germane issue in the whole case. At first the SBA supported C.W.'s company and its protest, both as to the FSS exemption and the "new requirement" exception. However, near the end of the case, the SBA changed its position and supported the agency. C.W.'s team challenged the SBA's questionable last minute switch of positions, but it did not make much of a difference. The GAO based it decision on SBA's changed position and suggested that the agency's late notification to the SBA did not matter, since the SBA stated that the contract was a "new requirement" after all.

So, the "new requirement" regulation puts the SBA in the position of essentially helping agencies pull requirements from the 8(a) Program, by giving the actions its blessings. The SBA's job is supposed to be the champion of 8(a) contractors, and advocate for the adding of contract requirements to the 8(a) Program and to stand as the vanguard against entities trying to take contracts out of the 8(a) Program.

WHAT NEEDS TO BE DONE NOW

Despite the disappointment related to the case, C.W. knew when he filed the case that he was taking a risk. However, his goal from the beginning was to expose the questionable taking of contracts from the SBA's 8(a) community in broad daylight. The automatic taking of 8(a) contracts without the 8(a) companies or even the SBA even knowing about it is a travesty, legal or not. The FSS exemption and the "new requirement" regulations need to go. The SBA 8(a) Business Development Program was not intended for little-known regulations act as legalized ambushes on existing 8(a) contracts.

All in the small business community must unite with C.W. to re-capture the real purpose of the SBA 8(a Program. The fight begins now. C.W. is gathering supporters from 8(a) companies and other supportive businesses, Members of Congress, business trade associations and all other entities, large or small, that want to lend a hand in helping 8(a) companies, along with other small businesses, to contribute to the national economy by increasing its participation in the performance of government contracts.

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The Case: *Matter of TeamGov, Inc., B-419865.2 (November 10, 2021)*
Article: Patterson, **GOVCON Brief,** *" 'New' Procurement Pulls Work Out of 8(a) Program"* (Dec. 17, 2021)