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GAO confirms that 8(a) joint venture agreements need not be approved at the time of proposal submission

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More than one government agency has struggled recently with the connection between two regulatory provisions.

The provisions pertain to firms in the Small Business Administration's (SBA) 8(a) Business Development Program.

One provision is in the Federal Acquisition Regulation (FAR 52.219-18), requiring that the offeror on an 8(a) contract be "certified" by the SBA prior to submission of an offer.

The other is in the Code of Federal Regulations (13 CFR 124.513(e)), requiring that 8(a) joint ventures need only be "approved" by SBA prior to the award of an 8(a) contract.

The FAR requires that the 8(a) contractor already be certified by SBA to be eligible to submit an offer on an 8(a) contract.

At the same time, for 8(a) joint ventures, SBA's regulation only requires that the joint venture agreement be approved by SBA prior to award, not prior to the submission of proposals.

Confusion has arisen

Confusion has arisen because when a joint venture bids on a contract, the joint venture itself is the offeror, not the individual companies making up the joint venture.

Thus, under FAR 52.219-18, one could believe that the joint venture, as the offeror, needs to be the actual entity "certified" by SBA prior to the submission of a joint venture proposal.

If that were indeed the case, however, then 13 CFR 124.513(e) would essentially be rendered moot any time an agency included the FAR provision in a solicitation.

GAO clears up confusion

Fortunately, for both government procurement officials and 8(a) concerns looking to bid with joint ventures, the Government Accountability Office (GAO) has cleared up this issue.

"Fortunately, for both government procurement officials and 8(a) concerns looking to bid with joint ventures, the Government Accountability Office (GAO) has cleared up this issue."

The GAO recently ruled that joint venture agreements need not be approved by the SBA prior to submission of a proposal for an 8(a) set-aside contract. *(See BGI-Fiore JV, LLC, B-409520, May 29, 2014.)*

NASA's position

BGI-Fiore, JV, LLC supra was a preaward protest of NASA's decision to eliminate the BGI-Fiore Joint Venture (JV) LLC's proposal from competition for an 8(a) set-aside contract.

NASA rejected the proposal of BGI-Fiore JV LLC, a joint venture between an 8(a) firm and another partner, because the joint venture was not "certified" by the SBA prior to submission of the joint venture's proposal for the contract.

According to NASA, the BGI-Fiore joint venture was not an eligible offeror because the solicitation contained FAR 52.219-18(a), which NASA believed required all companies who are responding to an 8(a) set aside solicitation, including joint ventures, to be "certified" 8(a) participants prior to submitting a proposal.

BGI-Fiore's argument

In its protest, BGI-Fiore argued that:

--(1) NASA erroneously relied on FAR 52.219-18(a), because this provision applied only to 8(a) firms, themselves, not joint ventures who are not required to be "certified" 8(a) participants; and

--(2) that SBA's regulations and Standard Operating Procedures for the 8(a) Program, unambiguously allow joint ventures to bid on contracts before a joint venture agreement is formally approved by the SBA.

The SBA weighed in on the case and essentially corroborated each of BGI-Fiore's arguments.

GAO makes ruling

The GAO agreed, holding that a correct and harmonious reading of FAR 52.219-18(a) with the SBA's regulations only requires the 8(a) participant members of an 8(a) joint venture to be certified prior to the submission of a proposal, while 8(a) joint venture agreements need not be approved until the time of award.

Conclusion

This should clear up that confusion and allow 8(a) companies to bid with joint ventures without fear of being eliminated from the competition, or having to file lengthy protests in order to get a fair shot at an award. Further, GAO confirmed that in the case of a conflict between the FAR and SBA's regulations, the GAO will look to SBA in determining which provision best implements SBA's policies.

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