

When is Awarding a Sole Source Contract Promoting Social Policy?



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The Small Business Administration's 8(a) Business Development Program aims to "assist eligible small disadvantaged business concerns *compete in the American economy* (remember those words) through business development." See 13 C.F.R. § 124.1 (emphasis added).

But like in *Animal Farm*, all 8(a) firms may be equal, but some are more equal than others. Such was the case in *Agency Management Concepts, Inc.*, B-411206, *et al.*, April 21, 2015, 2015 CPD ¶ 133.

In that case, the Department of State ("State") was procuring lock and lock services. According to the protester, State historically had procured that work on a competitive basis among 8(a) participants. The incumbent contractor had graduated from the 8(a) program, and 8(a) contractor Agency Management Concepts

("AMC") was interested in competing for the follow on requirement. For the follow on work, however, State changed strides, and decided to award the work to a tribally-owned 8(a) program participant on a sole source basis. And, that is where AMC cried foul.

AMC argued that because the requirement historically had been competed among eligible 8(a) program participants, State could not now "remove" the requirement from competition for sole source award to a tribally-owned 8(a) participant. This argument was based on the following language in 13 C.F.R. § 124.506(b):

1. A Participant concern owned and controlled by an Indian Tribe or an ANC may be awarded a sole source 8(a) contract where the anticipated value of the procurement exceeds the applicable competitive threshold if SBA has not accepted the requirement into the 8(a) BD program as a competitive procurement.

3. There is no requirement that a procurement must be competed whenever possible before it can be accepted on a sole source basis for a Tribally-owned or ANC-owned concern, or a concern owned by an NHO for DoD contracts, *but a procurement may not be removed from competition to award it to a Tribally-owned, ANC-owned or NHO-owned concern on a sole source basis.*

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Id. (emphasis added).

AMC reasoned that because the requirements historically had been competed among 8(a) participants, the regulations prohibited State from making a sole source award for the follow on requirement to a tribally-owned concern. The flaw in AMC's reasoning, however, was that the follow on competition was a "new" procurement.

GAO sought input from the SBA before rendering its decision. And, the SBA explained "that 'the question of whether the [agency] previously awarded a contract for this requirement on a competitive or sole source basis is immaterial to the analysis of whether the instant procurement may properly be sole sourced to a tribally-owned concern.'" See *Agency Management Concepts, Inc.*, *supra* (quoting from SBA Comments). For both GAO and the SBA, the answer hinged on whether the "new" solicitation for the follow on requirement had been first initiated as a competition among 8(a) participants – not whether the requirement had been competed historically under different solicitations. Because the "new" solicitation was issued as a sole source 8(a) award to a tribally-owned concern, State's sole source award of the follow on requirement was proper.

The case provides a couple of takeaways: First, as a general rule, just because an agency conducted a procurement a specific way in the past is not a guarantee that the agency will follow the same methods for the follow on procurement – nor does it create a requirement that the agency do so. Second, the 8(a) Program is designed to assist disadvantaged businesses, but some businesses are entitled to more help than other businesses. In 2012, GAO issued a report about oversight of Tribal 8(a) Firms. See *Federal Contracting, Monitoring and Oversight of Tribal 8(a) Firms Need Attention*, GAO-12-84 (Jan. 2012). That report said that while tribally-owned concerns make up a relatively small per-

centage of 8(a) program participants, they accounted for approximately 30% of the 8(a) Program awards in 2010. See *id.* at 13. Of that 30%, approximately 75% were made on a sole source basis. *Id.* at 14. GAO reported that "contracting officers viewed sole source contract awards to tribal 8(a) firms as a way to expedite the federal acquisition process, avoid some potential bid protests, and help the meet their agencies' small business goals." *Id.* at 17. So with agencies having the green light to use awards to tribally-owned concerns to completely avoid competition, it is surprising that awards to such firms only are 30% of all 8(a) awards.

What to Do? What then can a small business contractor that is similarly situated to the *Agency Management* protester do when faced with the same facts?

Agency Management and the governing regulations both say that a bid protest will not lead to any effective relief. That means that non-tribally owned small business contractors can:

- encourage agencies to compete the requirement (even though the requirement could be awarded on a sole source basis);
- seek out possible teaming opportunities with the tribally-owned concerns that are eligible for the sole source requirement; and/or
- lobby for changes to the 8(a) program.

Setting those options aside, the resources of such small business concerns are likely better spent on identifying the 8(a) set aside procurements that will be competitively awarded than trying to force an agency to conduct a competitive procurement under the facts of *Agency Management*.

Now for extra credit: Explain how winning contracts in a make-believe world where there is no competition will develop a business to successfully "compete in the American economy"?

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