



U.S. SMALL BUSINESS ADMINISTRATION  
WASHINGTON, DC 20416

September 14, 2016

**Via email to protests@gao.gov**

Louis A. Chiarella  
Office of General Counsel  
U.S. Government Accountability Office  
Washington, D.C. 20548

Re: Protest of InfoReliance Corporation, B-413298

Dear Mr. Chiarella:

As you requested on September 7, the U.S. Small Business Administration (SBA) hereby submits these comments on the protest filed by InfoReliance Corporation against the Department of Justice, Bureau of Prisons (BOP). InfoReliance argues that BOP improperly set aside for small business a request for quotations (RFQ) to establish a blanket purchase agreement (BPA) under the General Services Administration (GSA) Federal Supply Schedule (FSS), IT Schedule 70. In particular, InfoReliance claims that the BOP did not satisfy the “Rule of Two” requirements set forth in section 19.502-2(b) of the Federal Acquisition Regulation (FAR), 48 C.F.R. § 19.502-2(b), because a small business awardee would not be able to comply with the Limitations on Subcontracting FAR clause 52.219-14.

We submit that the FAR—in particular FAR part 8.4—does not require an agency find that the Rule of Two is satisfied before setting aside an FSS BPA for small business. Nevertheless, in response to your specific inquiry on the subject, we believe that the solicitation here does not facilitate compliance by the small business awardee with the Limitations on Subcontracting because it does allow for sufficient prime contractor performance.

### **BACKGROUND**

On May 31, 2016, BOP issued an RFQ through GSA e-Buy, seeking IT Schedule 70 vendors to provide Amazon Web Services (AWS) cloud services. BOP designated the RFQ as a small business set-aside and assigned North American Industry Classification System (NAICS) code 518210 to the RFQ. Offers were due June 21, 2016. The protestor, a large business, submitted its protest to GAO on June 21.

## DISCUSSION

### I. The FAR does not require that the Rule of Two be satisfied before setting aside an FSS BPA.

InfoReliance bases its protest on the Rule of Two set forth in FAR section 19.502-2(b), but that regulation is not applicable to this set-aside. Instead, the FAR regulation that applies to this set-aside is section 8.405-5(a), which states:

Although the preference programs of part 19 are not mandatory in this subpart, in accordance with section 1331 of Public Law 111-240 (15 U.S.C. 644(r))--

(1) Ordering activity contracting officers *may, at their discretion*--

(i) Set aside orders for any of the small business concerns identified in 19.000(a)(3); and

(ii) Set aside BPAs for any of the small business concerns identified in 19.000(a)(3).

(2) When setting aside orders and BPAs--

(i) Follow the ordering procedures for Federal Supply Schedules at 8.405-1, 8.405-2, and 8.405-3; and

(ii) The specific small business program eligibility requirements identified in part 19 apply.

48 C.F.R. § 8.405-5(a) (emphasis added).

Section 8.405-2(a) provides that contracting officers “may, at their discretion” set aside a BPA off the FSS. Interpreting this discretionary authorization in section 8.405-2(a), GAO concluded that its “plain language” does not require application of the Rule of Two. *Edmond Scientific Company*, B-410179, B-410179.2, Nov 12, 2014, at 7. GAO noted in *Edmond Scientific Company* that a solicitation *may* mandate the use of the Rule of Two or preserve the right of an agency to apply the Rule of Two, but the solicitation in that case did neither. Similarly, the FSS Schedule 70 contract does not express an intent to apply the Rule of Two to set-asides of BPAs or of Orders. Tab 5 at 49.

SBA’s additional regulatory guidance on the parameters of the discretion in section 8.405-5(a) does not mandate use of the Rule of Two. SBA’s rule states, “The ultimate decision of whether to use [a set-aside off of a multiple-award contract] in any given procurement action is a decision of the contracting agency.” 13 C.F.R. § 125.2(e)(ii). SBA’s regulation also provides that, where an agency chooses not to issue a set-aside, the agency “must document the contracting file,” but that guidance does not apply here because BOP has issued the RFQ as a set-aside.

We note that section 15(j) of the Small Business Act, 15 U.S.C. § 644(j), mandates setting aside of contracts between \$3,500 and \$150,000 for small businesses. The U.S. Supreme Court’s decision in *Kingdomware Technologies, Inc. v. United States*, 579 U.S. \_\_\_\_ (2016) (slip op.), concluded that an FSS order is a contract for the purposes of federal contracting. Post-*Kingdomware*, SBA’s view is that an order is a contract for all federal procurement purposes, and the 15(j) mandatory set-aside therefore applies to FSS orders between \$3,500 and \$150,000. Provided this RFQ is valued at more than \$150,000—as we presume it is—the section 15(j) mandate would not apply because the RFQ is not within section 15(j)’s dollar thresholds.

**II. If BOP were to perform a Rule of Two analysis, the Rule of Two would not be satisfied because the solicitation does not allow for the small business awardee to comply with the Limitations on Subcontracting.**

Your September 7 request for our comments specifically asked us to address whether the contracting officer must determine compliance with the limitations on subcontracting, assuming that the BOP were to perform a Rule of Two analysis. As discussed above, the FAR does not require a Rule of Two analysis in this case. Were BOP to perform an analysis, however, the Rule of Two would not be satisfied because the solicitation requires that the contract be subcontracted almost entirely to AWS and therefore does not allow a small business awardee to comply with the Limitations on Subcontracting.

SBA’s regulations provide that the compliance with the limitations on subcontracting “will be considered an element of responsibility and not a component of size eligibility.” 13 C.F.R. § 125.6(e). As the protestor has noted, the cloud services here are considered by SBA to be services and subject to the 50 percent limitations on subcontracting applicable to services. 13 C.F.R. § 121.1203(d)(3). Nothing in the FAR or in SBA’s regulations require an agency to make an affirmative determination prior to issuing a solicitation that potential small business offerors will satisfy the limitations on subcontracting. Nevertheless, where the solicitation is structured such that it would be impossible for a small business awardee to satisfy the limitations, that solicitation should not be issued as a small business set-aside because no potential offeror could possibly comply with the limitations on subcontracting.

GAO recently sustained a protest against an agency’s set-aside decision where the agency did not “assess small business eligibility in accordance with the agency’s actual requirements....” *Triad Isotopes*, B-411360, July 16, 2015, at 10. In *Triad Isotopes*, the agency conducted small business market research without regard to whether the potential offerors could satisfy the nonmanufacturer rule. The agency did not consider that the solicitation called for radiopharmaceutical and non-radiopharmaceutical items for which it was unclear whether small business manufacturers existed. The nonmanufacturer rule requires that the awardee of a set-aside contract supply a product that it manufactured in compliance with the limitations on subcontracting, or otherwise supply the product of another small business. 13 C.F.R. § 121.406. GAO concluded in *Triad Isotopes* that the agency should account for the nonmanufacturer rule during its market research.

Similarly, a BOP Rule of Two analysis here should consider the agency's actual requirements in determining whether there would be adequate small business competition. The RFQ's Schedule of Services consists entirely of Amazon services, leaving little room for performance by the small business awardee. Tab 3 at 16. Though it might be possible for the awardee to contribute some services through Task 4, Miscellaneous Support, prime-provided services do not appear on the Schedule of Services and, even if they did, likely would not amount to 50 percent of the contract. Thus, as it is currently constructed, this RFQ does not facilitate an awardee's compliance with the Limitations on Subcontracting.

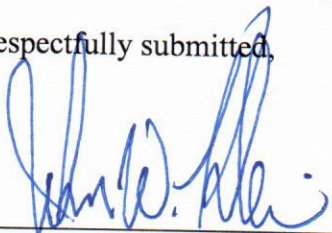
We also question whether a small business awardee of the BPA as currently constructed would qualify as a small business under SBA's ostensible subcontractor rule, 13 C.F.R. § 121.103(h)(3). The ostensible subcontractor rule provides that an offeror is affiliated with its subcontractor if the subcontractor would perform the primary and vital requirements of a contract, or is a subcontractor upon which the prime contractor is unusually reliant. SBA's Office of Hearings and Appeals has found that, in reseller agreements such as the one contemplated here, SBA may include government-directed subcontracts for the purposes of determining whether the subcontractor would perform the primary and vital requirements. *Size Appeal of Red River Computer Co.*, SBA No. SIZ-5512 (2013). If found affiliated with Amazon Web Services, the awardee of this BPA would undoubtedly be unable to qualify as a small business for the award.

We therefore would advise the agency to restructure the solicitation to enable compliance with the Limitations on Subcontracting. Alternatively, BOP could consider awarding the BPA outside of a small business set-aside program, and instead use the process in FAR section 8.405-5(c) to target small businesses and participants in small business programs. The limitations on subcontracting do not apply outside of set-aside procurements.

We note that, on May 31, 2016, SBA issued its final rule implementing the National Defense Authorization Act (NDAA) of 2013. 81 Fed. Reg. 34243. Among other things, the final rule changes the basis for limitations on subcontracting for services from the cost of performance expended by the prime contractor's employees, to the amount paid by the prime contractor to a subcontractor that is similarly situated. 13 C.F.R. § 125.6(a)(1). The rule now provides that in the case of a contract for services (except construction), the set-aside awardee will not pay more than 50% of the amount paid by the government to it to firms that are not similarly situated. The NDAA 2013 statutory change and SBA rule have not yet been implemented into this FSS contract.

Thank you for the opportunity to respond to this protest.

Respectfully submitted,



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