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# Decision

**Matter of:** Anika Systems, Inc.

**File:** B-422187; B-422187.2; B-422187.3

**Date:** February 1, 2024

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Jeffrey C. Walker, Esq., and Michael K. Greene, Esq., Securities and Exchange Commission, and Mark R. Hagedorn, Esq., Small Business Administration, for the agencies.

Todd C. Culliton, Esq., and Tania Calhoun, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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## DIGEST

1. Protest that the agency unreasonably divided its requirement to make a sole-source award for an interim or “bridge” contract in violation of 13 C.F.R. § 124.506(a)(5) is denied because the regulation does not apply to the award of bridge contracts.

2. Protest that the Small Business Administration unreasonably accepted a requirement into the 8(a) program without conducting an equitable distribution analysis under 13 C.F.R. § 124.503(g)(1)(iii) is denied where the record shows that the agency followed its regulations.

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## DECISION

Anika Systems, Inc., of Leesburg, Virginia, protests the Securities and Exchange Commission’s (SEC) decision to award a contract to Peregrine Advisors Benefit, Inc., of Potomac, Maryland, on a sole-source basis through the Small Business Administration’s (SBA) 8(a) Business Development (BD) Program. Anika argues that the SEC unreasonably awarded the contract without competition, and that the SBA improperly accepted the contract.

We deny the protest.

## BACKGROUND

On May 19, 2022, the SEC developed an acquisition plan to procure enterprise data management services for its Office of the Chief Development Officer (OCDO). Agency Report (AR), Tab 8, Acquisition Plan for 2022 Peregrine Contract at 5.<sup>1</sup> The agency intended to consolidate enterprise data management services received under a single contract vehicle. *Id.* To do so, the agency developed a two-phase acquisition plan. *Id.* In phase one, the agency would make a direct 8(a) award to consolidate elements of enterprise data management, architecture, governance, and strategy. *Id.* In phase two, the agency would conduct a competitive 8(a) award to obtain these services and other enterprise data management services under a single contract vehicle. *Id.*

On July 5, 2022, the SEC started phase one of its acquisition plan by notifying the SBA that it intended to award a fixed-price contract valued at \$4.5 million and nominated Peregrine for direct award. AR, Tab 2, SEC Letter to the SBA, July 5, 2022, at 1-2. Specifically, the SEC advised that Peregrine would assist its OCDO in enterprise data strategy, services, architecture, and program management. See AR, Tab 4, 2022 Peregrine Contract at 5-8. The contract was to be performed over a 12-month base period, and one 3-month option period. *Id.* at 8. On July 6, the SBA accepted the contract on behalf of Peregrine. AR, Tab 3, SBA Letter to the SEC, July 6, 2022, at 1.

On July 25, 2023, the SEC commenced phase two of its acquisition plan. COS at 2. The SEC issued request for quotations (RFQ) No. 50310223Q0101 to establish multiple blanket purchase agreements with 8(a) eligible firms for enterprise data management services. COS at 2. The estimated aggregate value of all call orders to be issued under the blanket purchase agreements (BPA) is \$43 million. Protest, exh. B., Anika BPA at 3. The ordering period for the BPAs consists of a 1-year base period and four 1-year option periods. *Id.* at 3-4.

Following the competition, the agency issued BPAs to four firms, including both Anika and Peregrine. COS at 2. On September 29, two unsuccessful vendors challenged the issuance of those BPAs and, after reviewing the allegations, the agency elected to reevaluate quotations, revise its technical and price analyses, investigate alleged organization conflict of interests, and make a new selection decision; as a result, our Office dismissed the protests as academic. *Analytica, LLC*, B-422028, B-422028.3, Oct. 24, 2023 (unpublished decision); *Enterprise e-Support, Inc.*, B-422028.2, Oct. 24, 2023 (unpublished decision).

On October 19, the SEC offered an interim or “bridge” contract at issue here to the SBA and nominated Peregrine for direct award.<sup>2</sup> Req. for Dismissal, exh. 4, SEC Letter to the SBA, Oct. 19, 2023, at 1. This letter explained that the bridge contract was needed

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<sup>1</sup> The parties refer to this contract as the “2022 Peregrine Contract,” and we use that term as well. Contracting Officer’s Statement (COS) at 1.

<sup>2</sup> The 2022 Peregrine Contract concluded on October 31, 2023. COS at 1.

to procure services while the competitive “new follow-on requirement addresses a protest.” *Id.* The letter did not identify Anika or any other vendors as interested in the requirement. *Id.* at 2.

According to the bridge contract’s terms, Peregrine will continue the services provided under the 2022 Peregrine Contract. See AR, Tab 5, Bridge Contract at 8-11. The bridge contract will be performed over a 1-month base period and five 1-month option periods and has a total value of \$4.2 million. *Id.* at 12-13; COS at 3. On October 20, the SBA accepted the bridge contract on behalf of Peregrine. Req. for Dismissal, exh. 5, SBA Letter to the SEC, Oct. 20, 2023, at 1. This letter identified the bridge contract as a new requirement. *Id.*

On November 9, Anika filed this protest challenging the award of the bridge contract. Anika raised three allegations. First, Anika argues that the agency unreasonably issued the bridge contract on a sole-source basis because 13 C.F.R. § 124.506(a)(5) prohibits the agency from dividing a requirement below the applicable dollar threshold for competition. Protest at 7-10. Second, Anika argues that the bridge contract was not authorized under applicable regulations.<sup>3</sup> *Id.* at 10-11. Third, Anika argued that the agency unreasonably took corrective action with respect to the earlier protests. *Id.* at 11-13.

On December 1, the SEC requested dismissal of the protest allegations, arguing that they were speculative, legally or factually inaccurate, or procedurally deficient. Req. for Dismissal at 3-11. On December 5, Anika responded arguing that our Office should decline to dismiss the allegations. Resp. to Req. for Dismissal at 3-6. Significantly, Anika withdrew its challenge to the agency’s decision to take corrective action, but raised a supplemental allegation asserting that the agency’s October 19 offering letter falsely represented that no other vendor was interested in performing the bridge contract. *Id.* at 6. After reviewing the request, GAO declined to dismiss the protest.

On December 7, the SEC submitted an amended offering letter to the SBA. AR, Tab 6, SEC Letter to the SBA, Dec. 7, 2023, at 1. The amended letter was largely identical to the October 19 letter, except it identified Anika as an interested vendor. *Id.* at 2. On December 18, the SBA accepted the amended offering on behalf of Peregrine. AR,

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<sup>3</sup> Initially, Anika argued that the agency unreasonably relied on Federal Acquisition Regulation (FAR) section 6.302-1 as authority to issue the contract on a sole-source basis because the contract action was incorrectly reported as relying on that authority in the Federal Procurement Data System--Next Generation. See Protest at 9-11; Req. for Dismissal at 8; Resp. to Req. for Dismissal and First Supp. Protest at 5. After learning that the agency relied on FAR section 6.302-5(b)(4), Anika revised this challenge to assert that the agency unreasonably relied on that authority because the award violated 13 C.F.R. § 124.506(a)(5). See Resp. to Req. for Dismissal and First Supp. Protest at 5.

Tab 7, SBA Letter to the SEC, Dec. 18, 2023, at 1. The SBA again noted that the bridge contract constituted a new requirement.<sup>4</sup> *Id.*

Also, on December 18, the agency submitted its report to our Office. On December 28, Anika filed its comments and raised a second supplemental allegation. Anika argues that the SBA unreasonably accepted the amended letter because the SBA did not consider how the award of the bridge contract to Peregrine would affect the equitable distribution of 8(a) contracts. Comments and Second Supp. Protest at 4.

On January 2, GAO invited the SBA to provide its views on the merits of the protest because the allegations concerned the interpretation and application of regulations promulgated by that agency. On January 4, SBA accepted GAO's invitation.<sup>5</sup>

On January 8, the SEC filed its supplemental report. On January 12, the SBA submitted its comments on the merits of the protest, and Anika submitted comments on the supplemental report.

## DISCUSSION

As noted, Anika raises multiple challenges arguing that the SEC unreasonably awarded the bridge contract. Principally, Anika argues that the SEC's decision to award the bridge contract to Peregrine on a sole-source basis was improper and that, instead, the agency must conduct the procurement as a competition among eligible 8(a) program participants. In this regard, Anika contends that the award violates the SBA's regulations, specifically 13 C.F.R. § 124.506(a). See *also* FAR 19.805-1(c). Alternatively, Anika argues that the SBA unreasonably accepted the bridge contract without considering how the award would affect the equitable distribution of federal contracts. Comments and Supp. Protest at 4.

Section 8(a) of the Small Business Act authorizes the SBA to contract with other government agencies and to arrange for the performance of those contracts through subcontracts awarded to socially and economically disadvantaged small businesses. 15 U.S.C. § 637(a). The Act affords the SBA and contracting agencies broad discretion in selecting procurements for the section 8(a) program; our Office will review 8(a) actions to determine whether government officials have violated applicable regulations or engaged in bad faith. 4 C.F.R. § 21.5(b)(3); accord *GOV Servs., Inc.*, B-414374, May 11, 2017, 2017 CPD ¶ 143 at 5.

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<sup>4</sup> We see no need to address Anika's allegation that the Oct. 19 letter unreasonably omitted identifying the firm's interest in the requirement. The agency remedied this error when it submitted the amended letter on Dec. 18. See *Champion Bus. Servs., Inc.*, B-283927, Jan. 24, 2000, 2000 CPD ¶ 18 at 2, n.1.

<sup>5</sup> As a general matter, we accord great weight to the SBA's interpretations of regulations it promulgates, such as those regarding the 8(a) program. *Allegiance Envtl. Servs.*, B-419670, June 22, 2021, 2022 CPD ¶ 196 at 5.

We have reviewed all Anika's challenges and conclude that none provide us with a basis to sustain the protest. We discuss the principal allegations in turn.

#### Alleged Violation of 13 C.F.R. § 124.506(a)

Anika argues that the agency violated 13 C.F.R. § 124.506(a) by failing to compete the bridge contract among eligible 8(a) firms. Protest at 7.

By way of background, this regulation establishes a competitive threshold amount of \$4.5 million, above which any contract action not assigned a North American Industry Classification System (NAICS) manufacturing code must be competed among eligible firms.<sup>6</sup> 13 C.F.R. § 124.506(a)(2)(ii). Further, this regulation provides, in relevant part, the following:

A proposed 8(a) requirement with an estimated value exceeding the applicable competitive threshold amount may not be divided into several separate procurement actions for lesser amounts in order to use 8(a) sole source procedures to award to a single contractor.

13 C.F.R. § 124.506(a)(5). Thus, an agency may not divide a requirement for non-manufacturing services exceeding \$4.5 million into smaller procurement actions below the threshold in order to make direct awards.

Based on this regulation, Anika asserts that the agency should have solicited competition because the total value of its requirement for enterprise data management services exceeds \$4.5 million. Comments and Supp. Protest at 8-9. To reach this conclusion, Anika argues that the SEC's requirement consists of both the 2022 Peregrine Contract and this bridge contract because both contracts contemplate provision of the same services, and the total value of the combined actions exceeds the dollar threshold. *Id.* at 9-10. As a result, Anika argues that the SEC unreasonably divided its requirement into consecutive sole-source awards. *Id.* at 11.

The SEC counters that it did not divide its requirement into smaller procurement actions to make direct awards to Peregrine; rather, the SEC explains that the bridge contract was awarded to procure essential services pending the corrective action being

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<sup>6</sup> For convenience, we use "non-manufacturing" to describe contracts that are not assigned NAICS manufacturing codes. As additional reference, manufacturing codes are assigned where the contract contemplates the mechanical, physical, or chemical transformation of materials, substances, or components into new products. See NAICS Code Description, Manufacturing, *available at* <https://www.naics.com/naics-code-description/?code=31-33> (last visited, January 31, 2024). Further, this contract was not assigned a manufacturing NAICS code; rather, it was assigned NAICS code 541611, "Administrative Management and General Management Consulting Services." AR, Tab 6, SEC Letter to the SBA, Dec. 7, 2023, at 1.

undertaken in its competitive procurement. (Memorandum of Law) MOL at 5. In this way, the SEC argues that the bridge contract constitutes a different requirement. See *id.* Further, the SEC argues that 13 C.F.R. § 124.506(a)(5) is not intended to prevent bridge contracts because such contracts are “stop-gap” measures to be implemented until a competitive procurement can be conducted. *Id.* at 6.

The SBA explains that the regulation does not apply to bridge contracts. To support this position, the SBA discusses the genesis of the regulation, and explains that the regulation was specifically implemented to address the award of indefinite-delivery, indefinite-quantity (IDIQ) contracts within the 8(a) BD program.<sup>7</sup> SBA Comments at 4. The SBA explains that, prior to implementing this regulation, it considered the guaranteed minimum value of the IDIQ contract for purposes of determining whether a contract exceeded the dollar threshold for competition. *Id.* After learning that some agencies were issuing large IDIQ contracts without competition, SBA revised the regulation to require that the dollar threshold be based on the independent government cost estimate. *Id.* Further, the SBA explains that, as an additional measure, the agency implemented this regulation to prevent an agency from dividing an IDIQ contract into separate smaller contract actions to make award to a single firm without competition. *Id.* Thus, SBA interprets the regulation as solely preventing “an agency from dividing a requirement valued above the competitive threshold into separate, concurrent sole source 8(a) contract awards to the same contractor.” *Id.*

On this record, we do not find that the agency’s action violated the regulation. First, our Office has previously considered SBA’s proffered interpretation of this regulation and concluded that such interpretation was reasonable.<sup>8</sup> In *Champion Bus. Servs.*, the protester challenged an agency’s sole-source award of a bridge contract to an eligible 8(a) firm. *Id.* at 1-2. The bridge contract contemplated month-to-month performance until the agency was able to develop specifications for a broader competitive acquisition. *Id.* The protester argued that the bridge contract should have been competed amongst eligible firms under the regulation.

In reviewing this allegation, our Office invited SBA’s analysis of the regulation. *Champion Bus. Servs.*, *supra* at 3. Like its position in the instant protest, the SBA explained that the regulation does not apply to bridge contracts because bridge contracts do not pose any threat to the aims sought to be protected by a competitive procurement. *Id.* Our Office found the SBA’s interpretation reasonable, and therefore

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<sup>7</sup> The regulation was previously located at 13 C.F.R. § 124.311(a)(2)(iii) but was moved to section 124.506(a)(4) as part of SBA’s effort to streamline its regulations. See 63 Fed. Reg. 35726, 35758 (June 30, 1998). The regulation was later redesignated to section 124.506(a)(5), see *infra* note 8.

<sup>8</sup> Our previous decisions referenced 13 C.F.R. § 124.506(a)(4) for the regulation. After those decisions, the SBA redesignated this provision as 13 C.F.R. § 124.506(a)(5). 74 Fed. Reg. 46885, 46887 (Sept. 14, 2009); see *also* MOL at 7 (explaining that the SBA redesignated this provision).

concluded that awarding the bridge contract without competition was not prohibited by the regulation. *Id.*

Similarly, in *New Tech. Mgmt., Inc.*, B-287714.2 *et al.*, Dec. 4, 2001, 2001 CPD ¶ 196, our Office concluded that the regulation only applied to the award of concurrent contracts. In this decision, the protester challenged the agency's award of a contract on a sole-source basis to an eligible 8(a) firm. *New Tech. Mgmt., supra* at 4. The protester argued that the agency awarded the contract with an artificially low number of option years in order to remain below the dollar threshold for conducting a competitive acquisition, and therefore violated the prohibition against dividing a requirement into separate smaller acquisitions because the agency sought to divide its requirement between the current contract and future contracts through shorter performance periods. *Id.*

After reviewing the allegation, our Office concluded that the regulation did not require the agency to consider potential future periods of performance when determining the value of the present award. *New Tech. Mgmt., supra* at 4. Instead, our Office relied on the SBA's interpretation, which explained that the regulation only prohibits an agency from dividing a current requirement into concurrent smaller contracts to award an entire requirement to a single firm without competition. *Id.* Since the agency's alleged improper action (*i.e.*, not adding future option years to the contract) was not within the ambit of conduct prohibited by the regulation, we did not find the agency's award to be objectionable. *Id.* Thus, we are not persuaded by the protester's argument because our jurisprudence dictates that the regulation does not apply to bridge contracts.

Finally, the protester has not provided persuasive argument that would lead us to change our position and disagree with the SBA's interpretation. To the contrary, our review of the regulation and its regulatory history confirms that this regulation was implemented specifically to prevent an agency from dividing an IDIQ contract's requirements between several smaller concurrent procurement actions in order to remain below the dollar threshold. Indeed, the notice of final rulemaking shows that the regulation was implemented as part of an effort to prevent any agency from dividing a requirement with many functions between multiple concurrent smaller contracts in order to avoid having to make a competitive award for the requirement. See 60 Fed. Reg. 29969, 29972 (June 7, 1995). Accordingly, we deny the protest allegation.<sup>9</sup>

#### Alleged SBA Failure to Conduct an Equitable Distribution Analysis

Anika also argues that the agency failed to follow applicable regulations when it failed to consider the effect that award of the bridge contract to Peregrine would have on the

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<sup>9</sup> As described earlier, Anika also argues that the agency unreasonably relied on FAR section 6.302-5(b)(4) as authority to issue this sole-source contract because 13 C.F.R. § 124.506(a)(5) prohibits issuing consecutive awards where the combined total value of the awards exceeds the dollar threshold for competition. We deny that allegation because we agree with the SBA that 13 C.F.R. § 124.506(a)(5) does not apply to bridge contracts.

equitable distribution of 8(a) contracts. Comments and Second Supp. Protest at 4. The agency and the SBA respond that the SBA did not have any obligation to consider the equitable distribution of 8(a) contracts since the bridge contract was a new requirement. Supp. MOL at 2-6; SBA's Comments at 6. In this regard, the SBA explains that the SEC's current requirement is reflected in the large competitive procurement that is the subject of corrective action. SBA's Comments at 11. Thus, according to the SBA, the relevant inquiry is whether the bridge contract is new with respect to the competitive procurement (*i.e.*, phase two of the acquisition plan), not the 2022 Peregrine Bridge Contract. *Id.* In this regard, the SBA explains that the bridge contract is, in fact, a new requirement since the bridge contract is for a shorter period of performance and has a much lower contract value. *Id.* at 11-12.

As background, 13 C.F.R. § 124.503 addresses the SBA's procedures when accepting a procurement for award through the 8(a) program. Further, section 124.503(g) addresses "Repetitive acquisitions," which provides as follows:

A procuring activity contracting officer must submit a new offering letter to SBA where he or she intends to award a follow-on repetitive contract as an 8(a) award.

13 C.F.R. § 124.503(g). This enables the SBA to consider multiple factors, including "[t]he affect that contract award would have on the equitable distribution of 8(a) contracts." 13 C.F.R. § 124.503(g)(iii). Thus, when an agency offers a follow-on contract, the SBA must conduct an equitable distribution analysis. See SBA Comments at 9.

Additionally, the SBA's regulations define a "Follow-on" contract as follows:

The determination of whether a particular requirement or contract is a follow-on includes consideration of whether the scope has changed significantly, requiring meaningful different types of work or different capabilities; whether the magnitude or value of the requirement has changed by at least 25 percent for equivalent periods of performance; and whether the end user of the requirement has changed. As a general guide, if the procurement satisfies at least one of these three conditions, it may be considered a new requirement. However, meeting any one of these conditions is not dispositive that a requirement is new. In particular, the 25 percent rule cannot be applied rigidly in all cases. Conversely, if the requirement satisfies none of these conditions, it is considered a follow-on procurement.

13 C.F.R. § 124.3 (Definition of "Follow-on requirement or contract"). Thus, if the bridge contract meets one of these conditions, then it may be considered new, and the SBA would not need to conduct the equitable distribution analysis when accepting the contract into the 8(a) program. See SBA Comments at 10.



For our purposes, the question of whether a requirement is accepted into the 8(a) program is a matter for determination by SBA and not this Office. Our review of SBA determinations under the 8(a) program are limited to determining whether the SBA has followed its own regulations. *Allegiance Envtl. Servs., supra* at 7. Because of the broad discretion afforded SBA by statute, judgmental decisions regarding section 8(a) will not be questioned by our Office, absent a showing of fraud or bad faith on the part of government officials. 4 C.F.R. § 21.5(b)(3).

Here, the SBA determined that the bridge contract constituted a “new” requirement because it was for the award of a temporary, short-term contract that would continue the performance of critical enterprise data management services. SBA Comments at 11-12. Additionally, the SBA concluded that the bridge contract was “new” because it was more than 25 percent less in total value (\$4.5 million) than the competitive procurement (\$43 million). *Id.* at 12. As a result, because the SBA considered the bridge contract a “new” requirement, we agree that the regulations did not require the SBA to conduct an equitable distribution analysis. Accordingly, we deny the protest allegation because the SBA followed its regulations. Further, we note that the protester did not allege that SBA officials engaged in fraud or bad faith.<sup>10</sup>

The protest is denied.

Edda Emmanuelli Perez  
General Counsel

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<sup>10</sup> To the extent the protester contends that the SEC failed to identify the bridge contract as a follow-on requirement in accordance with 13 C.F.R. § 124.502(c)(9), we do not find that allegation persuasive because the SBA explains that bridge contracts are not “follow-on” requirements. See Comments and Second Supp. Protest at 6, n.3.