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**Comptroller General
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**United States Government Accountability Office
Washington, DC 20548**

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Decision

Matter of: W.B. Construction and Sons, Inc.

File: B-405874; B-405874.2

Date: December 16, 2011

Lynn Patton Thompson, Esq., Biggs, Ingram, Solop & Carlson, PLLC, for the protester.

Maj. John C. Dohn, Department of the Army, and Sam Q. Le, Esq., Small Business Administration, for the agencies.

Tania Calhoun, Esq., and Edward Goldstein, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that contracting agency improperly awarded contract is sustained where the record reflects that the legal entity awarded the contract did not participate in the procurement and appears to be a different legal entity from the offering entity.

DECISION

W.B. Construction and Sons, Inc., of Pierre Part, Louisiana, protests the award of a contract to DQSI, Corporation, of Covington, Louisiana, under request for proposals (RFP) No. W9124E-11-R-0011, issued by the Department of the Army for various types of construction work at Fort Polk, Louisiana. W.B. Construction contends that the award was improper because the awardee was not the offering entity and does not exist, and because the offering entity is not an eligible 8(a) firm.

We sustain the protest.

BACKGROUND

The solicitation, issued July 29, 2011, contemplated the award of a fixed-price, indefinite-delivery/indefinite-quantity contract to an eligible 8(a) firm to provide, over multiple years, road repair, improvement, and infrastructure construction at

Fort Polk, and other areas.¹ RFP at 1-5. Award was to be made to the offeror submitting the lowest-priced, technically acceptable proposal. RFP § M.a. The Army received proposals from five firms, including W.B. Construction and DQSI, LLC, by the September 26 closing date. The Army evaluated all five proposals as technically acceptable. DQSI, LLC proposed the lowest price of \$38,555,017, followed by W.B. Construction's price of \$39,135,920.96. Army Motion to Dismiss, Oct. 19, 2011, Exhibit B; Army E-Mail, Nov. 28, 2011.

Since this was a competitive 8(a) set-aside, the Army was required to ask the SBA district servicing the apparent successful offeror, DQSI, LLC, to determine that firm's eligibility for award. 13 C.F.R. § 124.507(b). The contracting officer states that the Army sent SBA's district office the commercial and government entity (CAGE) code and the data universal numbering system (DUNS) number listed in DQSI, LLC's proposal, but not the name of the firm. Supplemental Contracting Officer's (CO) Declaration ¶ 2. She states that the Army checked this same identifying information in the following databases: the Small Business Administration Dynamic Small Business Search, the Central Contractor Registry (CCR), and the Online Representations and Certifications Application (ORCA). *Id.* All of these database searches showed that the name of the firm was DQSI, Corporation and, where the information was present, that the firm's legal structure was as a corporation, not a limited liability corporation. *Id.*; Agency Report (AR), Tabs 14, 15, 17, Database Search Results. SBA's district office, which was only given the CAGE code and DUNS number listed in DQSI, LLC's offer, confirmed that the numbers belonged to DQSI, Corporation and sent the Army a checklist showing that DQSI, Corporation was an eligible 8(a) firm. Supplemental CO's Declaration ¶ 3; AR, Tab 16, SBA 8(a) Competition Award Eligibility Checklist.

The discrepancy between the name of the offering entity, DQSI, LLC, as compared to DQSI, Corporation, the name of the entity listed in SBA's 8(a) award eligibility checklist, and in every database the Army reviewed, does not appear to have concerned the Army.² The contracting officer states that DQSI, LLC's offer was signed by the same person identified as the president and chief executive officer of

¹ Section 8(a) of the Small Business Act authorizes the Small Business Administration (SBA) to enter into contracts with government agencies and to provide for performance through subcontracts designed to assist developing small business concerns which are owned and controlled by designated disadvantaged individuals. See 13 C.F.R. Part 124. Department of Defense agencies have been delegated authority to enter into 8(a) contracts on behalf of SBA. Defense Federal Acquisition Regulation Supplement Subpart 219.8.

² The CCR lists the firm's legal business name as DQSI, Corporation and its mailing name as DQSI, LLC. This difference reinforces, and does not resolve, the discrepancy.

DQSI, Corporation. She also states that because she had no reason to doubt the veracity of the signature, and given the results of the database searches and SBA's representations, she determined that the offeror was DQSI, Corporation, an eligible 8(a) firm. Id.

On September 27, the agency e-mailed a notice of award to the person listed in DQSI, LLC's offer as the firm's senior vice-president. The attached award document for signature listed the name of the offeror not as DQSI, LLC, but as DQSI, Corporation. Supplemental AR, Tab 2, DQSI Award Notice. That same day, the Army sent W.B. Construction a notice stating that the firm had not been selected for award; the notice listed the awardee as DQSI, LLC. Initial Protest, Exhibit A. This protest followed.

W.B. Construction argues that the awardee, DQSI, Corporation, is not the same legal entity as the entity submitting the initial proposal, DQSI, LLC.³ The protester asserts that the award to DQSI, Corporation was an improper circumvention of the 8(a) program's regulations that resulted from the Army's failure to ascertain whether the offering entity and the awardee were the same concern. In this regard, W.B. Construction asserts that DQSI, Corporation no longer exists because it converted to a limited liability corporation, DQSI, LLC, in 2009. The protester further alleges that DQSI, LLC did not request SBA's approval of its change in business form and thus is not an eligible 8(a) firm.

ANALYSIS

We will review competitive section 8(a) procurements for compliance with certain applicable procurement regulations, Premier Cleaning Sys., Inc., B-249179.3, July 27, 1992, 92-2 CPD ¶ 51 at 2, but our review generally does not extend to matters that are solely within the purview of SBA. Id.; Little Susitna, Inc., B-244228, July 1, 1991, 91-2 CPD ¶ 6 at 2. Challenges to a small business's eligibility for award under the 8(a) program are generally for review by SBA, not our Office.⁴ 4 C.F.R. § 21.5(b); Basic Concepts, Inc., B-299545, May 31, 2007, 2007 CPD ¶ 98 at 4 n.5; see also FAR

³ W.B. Construction also challenged aspects of the evaluation of DQSI's proposal; we dismissed all but one challenge as lacking a sufficient basis. 4 C.F.R. §§ 21.1(c)(4) and (f) (2011). The Army responded to the remaining issue in its agency report and the protester did not address the issue in its comments. We consider the issue to have been abandoned and will not consider it further. CM Mfg., Inc., B-293370, Mar. 2, 2004, 2004 CPD ¶ 69 at 3. In its supplemental protest, W.B. Construction argued that the Army's issuance of amendments after initial proposals were submitted was a pretext to permit DQSI to lower its price. We dismissed this allegation as an untimely challenge to alleged solicitation improprieties. 4 C.F.R. § 21.2(a)(1).

⁴ An 8(a) firm may change its ownership or business structure so long as one or more disadvantaged individuals own and control it after the change and SBA approves the
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§ 19.805-2(d).⁵ Thus, the questions for our review here are whether there was uncertainty as to the identity of the offering entity and whether the entity awarded the contract was the entity that submitted the initial proposal.

Interested Party

As an initial matter, the Army argues that W.B. Construction is not an interested party to maintain this protest because it graduated from the 8(a) program on September 26, 2011. However, the Small Business Act provides that an 8(a) contract may be awarded to a firm that has completed its period of program participation if the prospective contract awardee was a program participant eligible for award on the date specified for receipt of offers contained in the solicitation. 15 U.S.C. § 637(a)(1)(C)(ii) (2006 & Supp. IV 2010); see also 13 C.F.R. § 124.507(d). The initial date specified for receipt of offers was September 1, CO's Initial Declaration at 1, and there is no evidence that W.B. Construction is ineligible for award. If DQSI, LLC is determined to be ineligible for award, W.B. Construction, as the next lowest-priced, technically acceptable offeror, is in line to become the prospective contract awardee and is, therefore, an interested party to maintain this protest.

Propriety of Award

Uncertainty as to the identity of an offering entity renders an offer technically unacceptable, since ambiguity as to an offeror's identity could result in there being no party bound to perform the obligations of the contract. See Dick Enterprises, Inc., B-259686.2, June 21, 1995, 95-1 CPD ¶ 286 at 2. The information readily available, such as records for incorporation and DUNS numbers, must reasonably establish that the differently-identified entities are in fact the same concern. Id.; see also Trandes Corp., B-271662, Aug. 2, 1996, 96-2 CPD ¶ 57 at 2. Moreover, as a

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transaction in writing prior to the change. 13 C.F.R. § 124.105(i). SBA states that its records reflect that DQSI, Corporation is an 8(a) program participant and that, prior to this protest, DQSI, Corporation had not requested a change in business structure approval from SBA. Accordingly, SBA had never approved a change in the firm's business structure. SBA states that, as a result, only DQSI, Corporation is an eligible 8(a) participant. SBA Statement for the Record at 2. Shortly before this decision was issued, counsel for DQSI, LLC, submitted a letter contending that his client had informed SBA of its change in business structure and was an eligible 8(a) participant. While the matter is in dispute, as noted above, determinations of a small business's eligibility for an 8(a) award are matters for SBA, not this Office.

⁵ We will consider a protest against an 8(a) eligibility determination where it is alleged that SBA violated or misapplied regulations in making the determination. GLR-CMC A Joint Venture, B-281004, Dec. 18, 1998, 98-2 CPD ¶ 152 at 4. The protester has made no such allegation.

general matter, the entity awarded the contract should be the entity that submitted the initial proposal. Townsend & Co., B-211762, Mar. 27, 1984, 84-1 CPD ¶ 352 at 4; Pedestrian Bus Stop Shelters, Ltd., B-212570, Mar. 20, 1984, 84-1 CPD ¶ 331 at 3.

It is undisputed that DQSI, LLC was the offering entity. Its name is the only name that appears anywhere in the proposal. It is also undisputed that the contracting officer made award to DQSI, Corporation, the name that appears on the award document.

The contracting officer reasonably turned to the CAGE code and DUNS number in DQSI, LLC's proposal to ascertain the firm's eligibility for award. CAGE codes are assigned to discrete business entities by the Defense Logistics Agency and are used to dispositively establish the identity of a legal entity for contractual purposes. URS Group, Inc., B-402820, July 30, 2010, 2010 CPD ¶ 175 at 4. Similarly, the DUNS numbering system is established by Dunn & Bradstreet Information Services, which assigns discrete 9-digit numbers for purposes of establishing the precise identification of an offeror or contractor. Id.; FAR §§ 2.101, 4.605(b). These numbers are used to identify the entity that is the offeror for a given procurement.

However, the Army's searches of various databases using this identifying information, as well as the information it received from SBA, revealed a discrepancy between the identity of the offering entity and the identity of the entity to whom those numbers were assigned. Although this discrepancy introduced uncertainty as to the identity of the offering entity, the contracting officer appears to have made no effort to ensure that the two entities were the same concern. She did not seek clarification from SBA, and there is no evidence that she sought additional information from DQSI. Instead, she appears to have simply assumed that the two entities were the same because the same person was the vice president and chief executive officer of both entities. While this fact may show that there is a relationship between the two concerns, it does not show that they are the same legal entity, particularly given the differing legal structures denoted by their respective names.

W.B. Construction has provided copies of documents, certified by the Secretary of State of Louisiana, concerning DQSI, LLC. Comments, Exhibit D. These documents show that DQSI, Corporation converted from the organizational form of a corporation to the organizational form of a limited liability company, DQSI, LLC, in 2009. As a result, it appears that the entity called DQSI, Corporation no longer exists. According to the protester, under Louisiana law, a limited liability company and a corporation are different and distinct legal entities formed under different statutes—the distinction between the two legal structures is not a mere formality or name change.

The record demonstrates that the Army failed to resolve the uncertainty as to the identity of the offering entity and its eligibility for award of this 8(a) contract, and awarded the contract to an entity that was not an original participant in this

procurement, and does not appear to be a successor in interest to the offering entity. We therefore find that the Army improperly found the firm's proposal technically acceptable and sustain the protest.

RECOMMENDATION

We recommend that the Army review the available information, including that from SBA, in order to determine whether DQSI, LLC is eligible for award of this 8(a) contract. If the firm is not eligible for award, the Army should terminate its contract for convenience and award the contract to the lowest-priced, technically acceptable offeror that is eligible for award. We further recommend that the agency reimburse the protester the costs of filing and pursuing its protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d)(1). The protester's certified claim for costs, detailing the time spent and the cost incurred, must be submitted to the agency within 60 days after receiving this decision.

Lynn H. Gibson
General Counsel