



United States Government Accountability Office  
Washington, DC 20548

## Decision

**Matter of:** MCB Lighting & Electrical

**File:** B-406703

**Date:** July 13, 2012

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Charles M. Baker for the protester.  
Christopher S. Cole, Esq., Department of the Air Force, and Sam Q. Le, Esq., Small Business Administration, for the agencies.  
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### DIGEST

Protest is denied where protester fails to demonstrate that contracting agency failed to comply with Small Business Administration (SBA) regulations in offering a requirement to the SBA as a sole-source award under the 8(a) program and requesting that the award be made to an 8(a) firm other than the protester.

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### DECISION

MCB Lighting & Electrical (MCB), of Owings, Maryland, protests the decision by the Department of the Air Force to nominate Utility Systems Solutions (US2), of Dallas, Texas, rather than itself, to the Small Business Administration (SBA) for award of a sole-source contract under the 8(a) program. The protester argues that the Air Force improperly failed to advise SBA of its interest in the requirement.

We deny the protest.

### BACKGROUND

The acquisition at issue here is for Light Emitting Diode (LED) street and parking lot lights for 15 Air Force installations across the United States and abroad. The Air Force reports that it has been investigating the requirement and working to establish technical specifications since about 2009, and that, in March 2011, it issued a sources sought notice seeking to identify potential vendors, collect information regarding their products and company capabilities, and give industry the opportunity to comment on the proposed specification. Both MCB and US2 expressed interest in the acquisition. MCB's interest was conveyed in a letter from SBA's Baltimore

District Office (BDO), dated February 2, 2012, which indicated that MCB had identified and requested the contract in support of its approved business plan under the 8(a) program.

At approximately the same time that the BDO sent its letter on behalf of the protester to the Air Force, responsibility for the requirement was transferred to a different contracting office, which issued a second sources sought notice that excluded installation of the lights from the products/services sought. The second sources sought notice, dated February 10, 2012, asked interested vendors to respond to a series of questions about their products, including whether the vendor's exterior lighting fixtures came with integral glass lenses with ultra violet (UV) coating. The notice also asked vendors to describe their standard warranties, including the validity of the warranty if the items were installed by a third party. Before the new contracting office had received responses to the second sources sought notice, it received both the letter from the BDO on behalf of MCB mentioned above and a letter from SBA's Dallas/Fort Worth District Office (DFWDO) seeking to have the requirement reserved for negotiation with US2. By letter of March 1, the Air Force advised the BDO that it was unable to accept its request to enter into a contract for the requirement on behalf of MCB, and by letter of March 7, the Air Force similarly advised the DFWDO that it was unable to accept its request on behalf of US2. Both letters advised that the NAICS [North American Industry Classification System] code assigned to the acquisition had been changed, and that, as a result, the agency would be conducting further market research "to determine the best acquisition strategy for purchasing these items." Agency Report (AR), Tab 9.

By letter of March 12, the BDO notified the Air Force that it intended to appeal the agency's decision not to make the procurement available for award as an 8(a) contract. The BDO letter asserted that the Air Force had selected an inappropriate NAICS code for the acquisition.

On March 9, the agency received responses to the second sources sought notice from MCS and US2. In response to the question as to whether its exterior lighting fixtures came with integral glass lenses with UV coating, MCB replied "Integral glass lenses yes, UV coating no." AR, Tab 10. In addition, when the contracting officer followed up with the protester regarding the terms of its standard warranty, including the validity of the warranty if the items were installed by a third party, MCB responded that MCB technicians would have to perform the installation for the warranty to be valid. US2, in contrast, responded that it could provide integral glass lenses with UV coating and that its warranty would still be in effect if the lights were installed by a third party.

After reviewing the vendors' responses to the sources sought notice and considering the BDO's notice of intent to appeal, the contracting officer decided to change the NAICS code and set the acquisition aside for the 8(a) program. The

contracting officer further determined that the offer letter should go to the DFWDO to negotiate with US2 directly because US2 “gave positive indication that their company could meet all of the requirements in the Sources Sought Notice, while MCB failed to meet 2 of the 9 questions that were asked.” Contracting Officer’s Statement of Facts at 4. On March 26, the Air Force sent a letter to the DFWDO offering the requirement to the SBA as a sole-source award under the 8(a) program and requesting that the award be made to US2. By letter of March 28, the DFWDO accepted the offer.

By letter of April 3, the Air Force responded to the BDO’s notice of intent to appeal, stating that the procurement would be made available for award under the 8(a) program and that the NAICS code would be changed. On April 23, the Air Force notified the BDO that it had selected US2 for award of the acquisition. SBA forwarded the Air Force’s notification to the protester on April 30, and MCB protested to our Office on May 3.

## DISCUSSION

Section 8(a) of the Small Business Act authorizes SBA to contract with government agencies and to arrange for performance of such contracts by awarding subcontracts to socially and economically disadvantaged small businesses.<sup>1</sup> 15 U.S.C. § 637(a) (2006). The Act affords SBA and contracting agencies broad discretion in selecting procurements for the 8(a) program. We will not consider a protest challenging a decision to procure under the 8(a) program absent a showing of possible bad faith on the part of government officials or that regulations may have been violated. Bid Protest Regulations, 4 C.F.R. § 21.5(b)(3) (2012).

The section 8(a) program has both competitive and noncompetitive components, depending on the dollar value of the requirement. See 13 C.F.R. § 124.506(a) (2012); Donnelly & Moore Corp., B-404480, Feb. 16, 2011, 2011 CPD ¶ 46 at 3. In order to obtain the information necessary for the SBA to determine that an offered requirement is eligible and appropriate for award under the 8(a) program (whether on a competitive or noncompetitive basis), the SBA’s regulations require that contracting agencies furnish information about a procurement when offering it for inclusion in the program. 13 C.F.R. § 124.502 (2012). As a general matter, the SBA is entitled to rely on a contracting agency’s representations in making decisions regarding 8(a) acquisitions, and SBA’s regulations place primary

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<sup>1</sup> SBA and the Department of Defense (DOD) have entered into a partnership agreement pursuant to which SBA delegates to DOD its contract execution functions, that is, its authority to enter into 8(a) prime contracts and to arrange for the performance of such procurement contracts by eligible 8(a) participants. SBA remains the prime contractor on all 8(a) contracts and the 8(a) participant remains the SBA’s subcontractor.

responsibility on the procuring agency to submit all relevant information necessary to SBA's decision-making process. Security Consultants Group, Inc., B-276405, B-276405.2, June 9, 1997, 97-1 CPD ¶ 207 at 2.

In its initial protest, MCB argued that the Air Force had violated SBA regulations by failing to notify SBA of the protester's interest in the acquisition in its March 26 offering letter to the DFWDO. Among the items that the SBA regulations specifically require are "[i]dentification of all Participants [that] have expressed an interest in being considered for the acquisition" and "[i]dentification of all SBA field offices [that] have requested that the requirement be awarded through the 8(a) BD program." 4 C.F.R. §§ 124.502(c)(14) and (15).

Prior to submitting its agency report to our Office, the Air Force took corrective action with regard to this issue. That is, on June 1, it sent an amended offering letter to the SBA in which it identified MCB as an 8(a) concern that had expressed an interest in being considered for the requirement and the BDO as a field office that had requested that the requirement be awarded through the 8(a) BD program. The agency's corrective action renders this ground of protest academic; accordingly, we dismiss the argument.

In a related vein, the protester argues that the Air Force should have explained in its amended offering letter to the SBA that it was nominating US2 rather than MCB based on an informal assessment of the technical capabilities of the vendors, which led the agency to question MCB's ability to comply with certain agency requirements.

SBA regulations simply provide that the nominating agency should include a brief justification for its nomination in its offering letter. 13 C.F.R. § 124.503(c)(12). The Air Force complied with this requirement by noting in the offering letter that it was nominating US2 "based on their positive response to all requirements in the source sought notice . . . and their capabilities history." AR, Tab 17. We do not agree with the protester that the Air Force was required to further justify its nomination or furnish an explanation as why other firms, such as MCB, were not nominated.<sup>2</sup>

MCB further argues that the Air Force violated 4 C.F.R. § 124.505(b)(2) by offering the requirement to the DFWDO on behalf of US2 before the head of the agency had issued a written decision on MCB's appeal. In this regard, section 124.505(b)(2) provides that upon receipt of a notice of intent to appeal from the SBA, the procuring activity must suspend further action regarding the procurement until the head of the procuring agency issues a decision on the appeal (or makes an urgency

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<sup>2</sup> We solicited and obtained the SBA's views regarding MCB's protest. The SBA indicated that the agency had acted in accordance with all applicable regulations and that the agency had properly nominated US2 for the sole-source award.

determination). This allegation, like the protester's first protest argument, was rendered academic by the Air Forces' issuance of an amended offering letter on June 1. Moreover, there is no evidence that the protester suffered any prejudice as a result of the agency's failure to issue a written decision before proceeding with the 8(a) procurement given that the Air Force acceded to the SBA's position on both issues raised in the appeal--that is, it changed the NAICS code consistent with the SBA's recommendation and agreed to make the requirement available under the 8(a) program.

MCB also argues that once the Air Force decided to change the NAICS code and set the acquisition aside for the 8(a) program, it should have offered the requirement to the BDO on behalf of MCB because the BDO appealed the Air Force's NAICS code designation and decision not to set the requirement aside for the 8(a) program. In essence, MCB is arguing that because it, through the BDO, played a significant role in persuading the Air Force to change the NAICS code assigned to the acquisition, which, in turn, led the Air Force to decide that the requirement was appropriate for the 8(a) program, it should have had priority for nomination to the SBA.

The protester has furnished no legal authority for its argument, and we are aware of none. Both US2 and MCB had identified and requested that the requirement here be awarded to them in support of their approved business plans under the 8(a) program. Accordingly, it was within the Air Force's discretion to decide which of the two 8(a) firms to nominate, and the Air Force made its decision based on the results of its informal assessment of the two vendors' capabilities.

Finally, the protester objects to the Air Force's assessment of its capability to perform the requirement. MCB argues that it can, in fact, provide glass lenses with UV coating and an acceptable warranty.

Based on the information furnished in the protester's response to the sources sought notice and follow-up telephone conversation, indicating that the protester's product would not include the UV coating desired by the agency and that its manufacturer's warranty would not apply if installation was done by a third party, the contracting officer reasonably concluded that MCB did not offer a product that met the agency's requirements. While it is possible that the contracting officer would have reached a different conclusion had he considered the additional information furnished by MCB in connection with its protest, this does not establish that the conclusion he reached based on the information available to him at the time was unreasonable or otherwise improper.

The protest is denied.

Lynn H. Gibson  
General Counsel