

S. Riback



Comptroller General
of the United States

329216

Washington, D.C. 20548

Decision

Matter of: Dick Enterprises, Inc.

File: B-259686.2

Date: June 21, 1995

Paul L. Waldron, Esq., and Martin Healy, Esq., Thompson & Waldron, for the protester.

Julia L. Perry, Esq., Department of Transportation, for the agency.

Scott H. Riback, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Where proposal submissions are ambiguous with respect to precisely which of numerous corporate entities is the actual offeror, offer may not be accepted since it is not clear which entity bears responsibility for performance of the contract.

DECISION

Dick Enterprises, Inc. protests the award of a contract to the Walsh Group, Ltd., d/b/a Archer-Western Contractors, Ltd., under request for proposals (RFP) No. DTFH71-94-R-00006, issued by the Department of Transportation (DOT), Federal Highway Administration for the construction of a tunnel and portal buildings at Cumberland Gap National Historic Park. Dick chiefly maintains that the awardee's bid submissions were not signed by an individual authorized to bind the bidding entity.

We sustain the protest.

The solicitation was issued as a two-step sealed bid procurement, and firms were initially required to submit technical proposals demonstrating their capabilities to perform the requirement. The agency received 10 technical proposals and, after evaluation, found all 10 acceptable. Thereafter, the agency sought step-two sealed bids from these firms. Three firms, including the protester and the awardee, submitted bids. The agency determined that all three bids were unreasonably high as to price; because of this determination, DOT converted the acquisition to negotiated procedures and engaged in discussions with the three firms. Following negotiations, DOT sought best and

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final offers (BAFO). After receiving and evaluating the BAFOs, the agency made award to The Walsh Group, Ltd., d/b/a Archer-Western Contractors, Ltd. as the firm submitting the lowest priced, technically acceptable offer.

Dick principally maintains that Walsh's offer could not properly be accepted because it was not signed by an individual authorized to bind the bidding concern, and because the bid bond was not in the name of the bidding entity, and thus was unacceptable.

We agree with Dick. We find as an initial matter, moreover, that the Walsh submissions are ambiguous with respect to precisely which firm was the bidding entity. We discuss this issue first, since the identity of the bidding entity bears directly on the question of who had authority to sign the bid/offer and the acceptability of the bid bond.

Uncertainty as to the identity of a bidding or offering entity renders a bid nonresponsive (or the offer technically unacceptable), since ambiguity as to the offeror's identity could result in there being no party that is bound to perform the obligations of the contract. Sunrise Int'l Group, Inc.; Eagle III Knoxville, Inc., B-252735; B-252735.2, July 27, 1993, 93-2 CPD ¶ 58. Although the name of the bidding entity need not be exactly the same in all of the bid documents, the bid materials or other information reasonably available must show that the differently-identified entities are in fact exactly the same concern. Mark II, Inc., B-203694, Feb. 8, 1982, 82-1 CPD ¶ 104. For example, the fact that an organization with different corporate and trade names is only a single legal entity may be established from examination of the cognizant state's records of incorporation, which often include a fictitious business name statement and show that there exists only one corporate entity using a single address. Gem Eng'g Co., B-251644, Mar. 29, 1993, 93-1 CPD ¶ 303. Similarly, the fact that a bidder has only one taxpayer identification number (TIN) or data universal numbering system (DUNS) number and only one address is often a reliable indicator of the bidding entity. Cline Enters., Inc., B-252407, June 24, 1993, 93-1 CPD ¶ 492; Mark II, Inc., supra. In any event, the evidence must reasonably establish the identity of the bidder/offeror. Ebsco Interiors, B-205526, Aug. 16, 1982, 82-2 CPD ¶ 130.

This standard is not met here. At least three existing concerns are referred to in Walsh's submissions --The Walsh Group, Ltd., Walsh Construction Company of Illinois, and Archer-Western Contractors, Ltd.--and there is no clear indication which of these three discrete entities is the actual bidding party. The materials also refer to another entity, The Walsh Group, Ltd. d/b/a Archer-Western

Contractors, Ltd., the very existence of which is not supported by any evidence.

Walsh's offer did not contain any information which can be used to establish the bidding entity or which shows the individuals having authority to bind any of the referenced entities.¹ It did not include the required affidavit of affiliation (see Federal Acquisition Regulation (FAR) § 52.214-17), which would have set forth the names and addresses of all affiliates of the bidding concern, as well as information concerning control over the listed entities. In lieu of the affidavit, Walsh's offer included a limited amount of information typed directly onto the page that included the FAR clause. This information indicates only that the Walsh Group, Ltd. is a holding company that owns two operating subsidiaries, Archer-Western Contractors, Ltd. and Walsh Construction Company of Illinois. This information does not show the identity of the bidder, the nature of the relationship between the three firms or the authority of the numerous corporate officers who could potentially act on behalf of one or more of the concerns.²

Aside from the lack of evidence of the bidding entity or authorized officials, Walsh's offer contains conflicting information regarding the identity of the bidding party. The technical proposal cover letter and standard form 1442s (solicitation, offer and award forms) identify the bidding entity as "The Walsh Group, Ltd. d/b/a Archer-Western Contractors, Ltd." Although this designation would suggest that The Walsh Group, Ltd. is the actual offeror and is merely using Archer-Western Contractors as a trade name for business reasons³, this clearly is not the case. This is

¹Walsh's offer submissions did not include a copy of the firm's corporate seal or a certified copy of the minutes of the board of directors despite the solicitation requirement that the corporate seal be used in at least one place in the firm's submissions.

²The agency was aware of the absence of the affidavit, but did not require Walsh to furnish it. In a sworn statement, the cognizant DOT official states that he brought the matter to Walsh's attention during negotiations, but that the firm apparently declined to provide the affidavit stating that it had written all pertinent information directly into the clause.

³The abbreviation d/b/a is generally used where the same legal entity is merely using another name as its trade name.
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because Walsh's offer also clearly shows that the Walsh Group and Archer-Western Contractors are existing, distinct legal entities, and there is no evidence that there exists a legal entity known as The Walsh Group, Ltd. d/b/a Archer-Western Contractors, Ltd.

There is further confusion under the solicitation requirement that firms provide information relating to the identity of the offeror with their technical proposals; bidders were required to state the name and address of "the business." In this section Walsh's offer states "The Walsh Group, Ltd.," and includes an address for The Walsh Group, Ltd. in Chicago, Illinois, as well as a telephone number and DUNS number. In the section immediately following this, bidders were to:

"provide the name under which the project will be bid, the home office address, and name of the principal who will represent the company with regard to this proposal, if different from [the name and address of 'the business' listed above]."

In this section (which was designed for use by joint venturers, but which Walsh used to identify its subsidiary), Walsh designated as 'the bidder' its wholly owned subsidiary operating company, Archer-Western Contractors, Ltd., listed an Atlanta, Georgia address, and designated Donald A. Gillis, vice president, as the Archer-Western official authorized to represent the firm in connection with the proposal. (Additional information regarding the Walsh Group's operating subsidiaries was contained elsewhere in the firm's technical proposal, including a different DUNS number for Archer-Western and a third DUNS number for Walsh Construction Company of Illinois.)⁴

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For example, in Gem Eng'g Co., supra, we found a firm's bid responsive even though the bidder was identified in the bid as "Stainless Construction Company" while the bid bond identified the principal as "Stainless Steel Construction Company, Inc., d/b/a S.G. Communications." The record showed that the two entities--Stainless Steel Construction Company and S.G. Communications--were in fact the same corporation and that Stainless Steel Construction Company was merely using the name S.G. Communications as its trade name.

⁴Walsh's technical proposal also included an unauthenticated document with information as to the ownership and corporate officers for The Walsh Group, Ltd. This document listed Matthew Walsh and his brother as owners and officers, and a
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The Walsh BAFO contains still more ambiguous information. In the section requiring firms to list their TIN, Walsh included a TIN for The Walsh Group, Ltd., and a second TIN, apparently for Archer-Western Contractors, Ltd. In the section calling for offerors to provide the contractor's establishment code (a number which currently is the same as a firm's DUNS number), Walsh provided the DUNS number for Walsh Construction Company of Illinois, the third corporate entity that is affiliated with Walsh.⁵

Based on the evidence discussed above, we find that there was no way to reliably establish which of the three corporate entities was the actual bidding party; none of the usual indicia for this determination (such as a common address or a single DUNS or TIN number) is present, and there are several factors, as discussed, that substantially confuse the issue. Since it is impossible to determine the identity of the bidding entity from the materials presented in the firm's offer or other materials that could have been furnished (such as an affidavit of affiliation), the award to Walsh was improper. See National Found. Co., B-253369, Sept. 1, 1993, 93-2 CPD ¶ 143; Sunrise Int'l Group, Inc.; Eagle III Knoxville, Inc., supra.

Further, since it is not possible to determine which of the corporate entities was the actual offeror, it obviously also is not possible to determine that Matthew Walsh had authority to bind the bidding entity, or that the required bid bond (in the name of The Walsh Group, Ltd. d/b/a Archer-Western Contractors, Ltd.) was in the name of the bidding entity, and thus was enforceable. Sweepster Jenkins Equip. Co., Inc., B-250480, Feb. 8, 1993, 93-1 CPD ¶ 111 (as a general rule, a bid or offer--as well as any material

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third individual as secretary for The Walsh Group, Ltd. There is no similar documentation for the two subsidiaries, and the only other information included in this connection are small, incomplete portions of organizational charts for Walsh which do not reveal the relationship between the three entities.

⁵Walsh's bid submissions also contain additional information such as corporate fact sheets prepared by the firm that describe the three concerns and show that they are discrete legal entities. One of these fact sheets describes Walsh Construction Company of Illinois and lists three additional d/b/a names for that concern: Walsh Northeast, Walsh Northwest, and Walsh Pacific. We cannot determine from the record whether these are three additional corporate entities; one of these, Walsh Pacific, is separately named in the affiliated bidders clause executed by Walsh.

representation such as a certificate of procurement integrity--must be signed by an individual authorized to bind the bidding entity); MKB Constructors, Inc., B-255098, Jan. 10, 1994, 94-1 CPD ¶ 10 (a bid bond which names a principal different from the bidding entity identified in the bid is deficient and the defect may not be waived as a minor informality).⁶

In view of the foregoing, we sustain Dick's protest.⁷ We are recommending by separate letter of today to the Secretary of Transportation that the awardee be requested to furnish documentation clearly establishing the bidding entity and the authority of Matthew Walsh to bind that entity. If such information is not promptly furnished, the contract awarded to Walsh should be terminated for the convenience of the government, and award made to Dick if otherwise proper.⁸ In any case, Dick is entitled to

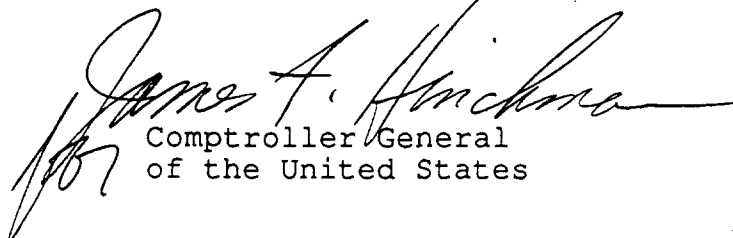
⁶Dick argues that the bid bond was inadequate for several other reasons, all of which are without merit. For example, it asserts that the bond does not identify the solicitation number. While a bid bond does have to be identifiable to the bid, a project number serves this purpose. Kirila Contractors, Inc., 67 Comp. Gen. 455 (1988), 88-1 CPD ¶ 554. The awardee's bid bond included the proper project number.

⁷Dick raises numerous additional arguments challenging the award to Walsh. These additional arguments are without merit. For example, Dick maintains that Walsh's proposed delivery schedule (which was considered only in the cost evaluation) is so short that the agency could not properly have found the firm responsible. However, our Office will not review an agency's affirmative determination of a firm's responsibility. 4 C.F.R. § 21.3(m)(1) (1995). As another example, Dick asserts that Walsh will not meet the small disadvantaged business (SDB) requirements under its SDB subcontracting plan. Whether an offeror is capable of meeting such requirements is a matter of responsibility; whether a contractor complies with subcontracting limitations in performing a contract is a matter of contract administration, which also is within the ambit of the contracting agency, not our Office. 4 C.F.R. § 21.3(m)(1).

⁸The agency was not required to suspend performance of the contract during the pendency of the protest and in fact chose not to do so. Nonetheless, we are advised by DOT that only approximately 10 percent of the required work has been performed to date; of the work performed, much of it (such as excavation work and the installation of construction equipment and temporary lighting systems) appears to be preparatory in nature. In any event, we see no impediment
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reimbursement of the costs of filing and pursuing its bid protest, including reasonable attorneys' fees. 4 C.F.R. § 21.6(d)(1). In accordance with 4 C.F.R. § 21.6(f), Dick should submit its certified claim for these costs, detailing the time expended and the costs incurred, to the agency within 60 days of its receipt of our decision.

The protest is sustained.


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⁸(...continued)

to having another firm take over operations at this point, and the agency, while urging against a recommendation of termination for convenience, has provided no information to show that the work is other than generic construction work that can be satisfactorily performed by another technically acceptable concern.