



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: GLR-CMC A Joint Venture

File: B-281004

Date: December 18, 1998

Brian C. Quist, Esq., Jenkins & Jenkins, for the protester.
William A. Roberts, III, Esq., Howrey & Simon, for Intersteel, Inc., an intervenor.
Larry E. Beall, Esq., U.S. Army Corps of Engineers, and Audrey H. Liebross, Esq., Small Business Administration, for the agencies.
Jennifer Westfall-McGrail, Esq., and Christine Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. While General Accounting Office will not review substantive Small Business Administration (SBA) determination regarding a section 8(a) program participant's eligibility for a particular award, GAO will consider protest against eligibility determination where it is alleged that SBA violated or misapplied regulations in making the determination.
2. Under applicable Small Business Administration regulations, section 8(a) concern must be eligible program participant on the date it submits its bid, as well as on the date of contract award.
3. Addition of Standard Industrial Classification code required by invitation for bids to section 8(a) concern's approved business plan after submission of bid does not constitute a late modification of an otherwise successful bid that the government may accept pursuant to Federal Acquisition Regulation § 52.214-7(f).

DECISION

GLR-CMC A Joint Venture protests the rejection of its bid and the selection for award of Intersteel, Inc. under invitation for bids (IFB) No. DACA01-98-B-0031, issued by the U.S. Army Corps of Engineers for construction of an Army Reserve Training Center in Knoxville, Tennessee. The IFB was issued as a competitive small

disadvantaged business set-aside under section 8(a) of the Small Business Act, 15 U.S.C. § 637(a) (1994).¹ The Army rejected GLR-CMC's bid after the Small Business Administration (SBA) notified it that the joint venture was not eligible for award under the solicitation. The protester takes issue with SBA's determination.

We deny the protest.

Competition under the IFB was restricted to firms which had been certified by SBA for participation in the 8(a) program and which had Standard Industrial Classification (SIC) Code 1542 (General Contractors--Nonresidential Buildings, Other Than Industrial Buildings and Warehouses) included in their approved business plans.² IFB, at 00100-13.

Three bids were opened on the June 11, 1998 opening date. GLR-CMC's bid of \$7,627,000 was low, and Intersteel's bid of \$8,622,000 was second low. In accordance with SBA regulations, 13 C.F.R. § 124.311(e)(4)(i), and Federal Acquisition Regulation (FAR) § 19.805-2(c)(1), the contracting officer forwarded to SBA a list of the bidders for a determination regarding their eligibility for award.³ SBA responded that GLR-CMC was not eligible for award because the joint venturer

¹Section 8(a) of the Small Business Act authorizes SBA to enter into contracts with government agencies and to arrange for performance through subcontracts with small businesses that are owned and controlled by socially and economically disadvantaged individuals.

²Under the SBA regulations in effect at the time this requirement was accepted into the 8(a) program, *i.e.*, March 2, 1998, each program participant was required to develop (and submit to SBA for approval) a comprehensive business plan setting forth its business targets, objectives, and goals, and identifying the SIC codes under which it had the capacity and capability to perform. 13 C.F.R. § 124.301(a), (b) (1998). The regulations provided that a concern would only be permitted to perform 8(a) contracts classified under the SIC codes in its approved business plan. 13 C.F.R. § 124.301(b). See also 13 C.F.R. § 124.311(g)(2) ("Only those Participants that have in their approved business plan the SIC code identified in the solicitation may submit offers for the requirement. A participant will be deemed ineligible for award by SBA if it submits an offer for a requirement for which it does not have an approved SIC code.").

³Under the procedures set out in FAR § 19.805-2(c)(1) and 13 C.F.R. § 124.311(e), SBA determines the eligibility of the firms for award of the contract. In sealed bid acquisitions, SBA is first to consider the eligibility of the low bidder. If that firm is ineligible for award, SBA is to consider the eligibility of the next low bidder, and so on, until an eligible firm is identified or the list of bidders provided by the contracting agency is exhausted.

with 8(a) certification, GLR, did not have SIC code 1542 in its approved business plan.⁴ SBA then considered the eligibility of Intersteel for award and determined that it was eligible. By letters dated August 31, the Corps of Engineers notified both the protester and Intersteel that the latter company had been selected for award. GLR filed an agency-level protest on September 4 and protested to our Office on September 9.⁵

The protester takes issue with SBA's determination of ineligibility, arguing that (1) SBA regulations no longer restrict competition under an 8(a) set-aside to those firms that have the SIC code identified in the solicitation in their approved business plans; (2) one of the joint venturers, CMC, had the correct SIC code; thus the joint venture had the correct code; (3) GLR was eligible for assignment of SIC code 1542 prior to issuance of the solicitation, but was assigned code 1541 instead by mistake, so that code 1542 should be assigned to it retroactively; (4) GLR was assigned code 1542 on June 29 and thus was an eligible Program Participant under that code on the date of contract award, which is all that is required by 13 C.F.R. § 124.307(f); and (5) the addition of code 1542 to its approved business plan after submission of its bid constituted a late modification to an otherwise successful bid that the government was required to consider pursuant to FAR § 52.214-7(f).

As a preliminary matter, SBA argues that it has exclusive authority to determine the eligibility of an 8(a) firm for award and that our Office therefore lacks the authority to review GLR-CMC's protest. In support of its argument, SBA cites 13 C.F.R. § 124.311(f), which provides:

The eligibility of a Program Participant for a competitive 8(a) award may not be challenged by another Program Participant or any other party to SBA or to any other administrative forum as part of a bid or other contract protest. Anyone with information concerning the eligibility of a Program Participant to continue participation in the 8(a) program may submit such information to SBA in accordance with § 124.111(c).

See also FAR § 19.805-2(e).

We have interpreted this section as barring our review of substantive determinations by the SBA regarding a program participant's eligibility for a

⁴At the time the IFB was issued, GLR had nine SIC codes, including 1541 (General Contractors--Industrial Buildings and Warehouses) in its approved business plan. It did not have SIC code 1542.

⁵The protester also filed an appeal with SBA's Office of Hearings and Appeals on September 10. SBA dismissed the appeal on October 7.

particular award. Premier Cleaning Sys., Inc., B-249179.3, July 27, 1992, 92-2 CPD ¶ 51 at 2-3; Little Susitna, Inc., B-244228, July 1, 1991, 91-2 CPD ¶ 6 at 2-3. We do not view it as precluding our review of allegations that regulations have been violated or misapplied in the making of such determinations, however. Gutierrez-Palmenberg, Inc., B-255797.3 et al., Aug. 11, 1994, 94-2 CPD ¶ 158 at 7-10. Since all of the protester's arguments are premised, at least in part, on allegations that SBA has misapplied its own regulations or the FAR, we will consider them.

First, the protester argues that it should not have been determined ineligible for award on the ground that it did not have SIC code 1542 in its approved business plan because SBA regulations no longer restrict competition under an 8(a) set-aside to those firms that have the SIC code identified in the solicitation in their approved business plans. In this regard, the protester notes that prior to award of the contract to Intersteel, SBA had amended its regulations to delete the requirement that the SIC code designated in the solicitation be listed in the 8(a) firm's approved business plan.

The protester is correct that on June 30, 1998, SBA amended its regulations to delete the requirement that the SIC code specified in the solicitation appear in the firm's business plan. 63 Fed. Reg. 35,726, 35,752-53, 35,758-59 (1998) (to be codified at 13 C.F.R. §§ 124.402 and 124.507). The new regulations are inapplicable to the requirement at issue here, which was accepted into the 8(a) program on March 2, 1998, however, since they apply only to 8(a) procurement requirements accepted by SBA on or after July 30, 1998. 63 Fed. Reg. 35,726.

Regarding the protester's argument that CMC--and thus the joint venture--had the correct SIC code, SBA responds that CMC is not an 8(a) program participant, and, as a consequence, has no approved business plan identifying SIC codes. In other words, CMC did not have the SIC code for the requirement in its approved business plan, as required by 13 C.F.R. § 124.311(g)(2).

GLR-CMC argues thirdly that, since it was eligible for SIC code 1542 prior to issuance of the IFB, that SIC code should be assigned to it retroactively.

The SBA regulations in effect at the time this procurement was conducted permitted participants to request changes in the SIC code designations stated in their business plans and provided that such requests were to be approved where the 8(a) firm had demonstrated the capacity and capability to perform in the requested SIC code and was otherwise eligible, or where the SBA had erred in omitting a previously requested and supported SIC code, improperly classifying a business industry, or making a typographical or other error in its letter of approval to the 8(a) concern. 13 C.F.R. § 124.302(c). Thus, if the SIC code designated in an IFB did not appear in a particular bidder's approved business plan, and the bidder believed that it was capable of performing under the code, it was the bidder's responsibility to request that the code be added to its business plan, and it had to

do so sufficiently in advance of submitting its bid to permit SBA to process the request prior to bid submission.⁶ The regulations did not provide for the retroactive assignment of codes for which a participant was eligible, but which it had failed to obtain. Here, GLR did not request that SIC code 1542 be added to its business plan until late June, more than 2 weeks after the June 11 opening date; thus, due to its own lack of diligence, it did not have the required SIC code at the time it submitted its bid and was correctly determined ineligible for award.

Next, GLR-CMC argues that it was assigned SIC code 1542 on June 29 and thus was an eligible program participant under that code prior to the date of award (i.e., August 31), as required by 13 C.F.R. § 124.307(f).

13 C.F.R. § 124.307(f) requires that an 8(a) concern be an eligible program participant on the date of contract award. This does not mean that the date of award is the only date on which the firm must be an eligible program participant, however; the concern must also be an eligible program participant on the date it submits its bid, 13 C.F.R. § 124.311(e)(4)(iii), which, as previously discussed, GLR-CMC was not.

Finally, GLR-CMC contends that the addition of SIC code 1542 to its approved business plan after submission of its bid constituted a late modification to an otherwise successful bid that the government was required to consider pursuant to FAR § 52.214-7 (Late Submissions, Modifications, and Withdrawals of Bids). This section provides, at subsection (f), that:

a late modification of an otherwise successful bid that makes its terms more favorable to the Government will be considered at any time it is received and may be accepted.

⁶13 C.F.R. § 124.311(e)(4)(iii) provides that a participant's eligibility for an award will be determined "as of the date of [the] Participant's submission of its initial offer which includes price."

An "otherwise successful bid" is a bid already in line for award prior to its modification. The W.H. Smith Hardware Co., B-219405.2, Oct. 25, 1985, 85-2 CPD ¶ 460 at 3. GLR-CMC's bid was not in line for award prior to its modification because the protester had been determined ineligible for award. Thus, the clause does not apply to it.

The protest is denied.

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