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Decision

Matter of: The Building People, LLC

File: B-423896

Date: November 20, 2025

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Michael Willems, Esq., and Evan D. Wesser, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest alleging that the agency erred by excluding the protester from the competition for an 8(a) small business set aside because the Small Business Administration (SBA) concluded the protester was not an eligible 8(a) small business is dismissed because GAO does not consider as part of our bid protest function challenges to SBA's determinations with respect to a firm's small business or socio-economic status.

2. Protest alleging that the agency applied an unstated evaluation criterion by deferring to SBA's conclusion that the protester was not an eligible 8(a) small business is dismissed where the protester fails to demonstrate any legal prohibition on the agency's consultation with the SBA and SBA's acceptance of the procurement was predicated on the agency submitting the putative awardee to SBA for an eligibility determination.

DECISION

The Building People, LLC, a small business of Leesburg, Virginia, protests its exclusion from the competition and the issuance of an order to Transpacific Technologies Inc., a small business of Pasadena, California, under request for quotations (RFQ) No. 89503125QWA000337, issued by the Department of Energy (DOE) under the General Services Administration's (GSA) Multiple Award Schedule (MAS) contract for technical support services. The protester contends that the agency erred in excluding it from the competition for several reasons related to its size status.

We dismiss the protest because it, in effect, challenges the Small Business Administration's (SBA) determination of the protester's size status, which is outside of our bid protest jurisdiction.

BACKGROUND

The agency issued the RFQ on April 30, 2025, and the RFQ was set aside for 8(a) small businesses.¹ Agency Report (AR), Tab A.1, RFQ at 2.² In response to questions and answers concerning 8(a) eligibility, the agency clarified that contractors were not required to certify their 8(a) status at the time of proposal submission, but were only required to verify their 8(a) status on their GSA MAS contracts. AR, Tab A.11, Questions and Answers, Q&A No. 24. Relevant to this protest, the agency submitted an 8(a) offering letter to the SBA for this procurement on June 11, 2024, and SBA accepted the procurement as an 8(a) procurement on June 27. RFQ at 2; Decl. of Contracting Officer at 2. The SBA's acceptance letter expressly required DOE to notify the SBA of the apparent successful offeror in order for the SBA to conduct an eligibility determination prior to making award. Specifically, the SBA's acceptance letter stated:

You are authorized to announce the acquisition as 8(a) Competitive utilized the GSA MAS 8(a) pool and issue a solicitation. Upon conclusion of your evaluation, please notify the servicing District Office of the apparent successful offeror (or offerors). This notice should include the initial date specified for receipt of offers contained in the solicitation so that SBA may assess the eligibility of an apparent successful offeror whose 8(a) [business development] program has expired, 13 C.F.R. § 124.507(d). Within five (5) business days of this notification, SBA will determine the apparent successful offeror's eligibility to receive the contract award and inform your office, in writing, of its determination. If the offeror is deemed ineligible, SBA will request that you provide the identity of the next highest evaluated offeror for an eligibility determination.

AR, Tab B.2, SBA Acceptance Letter at 1-2 (emphasis added).

¹ Section 8(a) of the Small Business Act, 15 U.S.C. § 637(a), authorizes the SBA to enter into contracts with government agencies and to arrange for performance through subcontracts with socially and economically disadvantaged small business concerns. Federal Acquisition Regulation (FAR) 19.800. This program is commonly referred to as the 8(a) program.

² Although we resolve this protest based on the agency's request for dismissal, as opposed to on the merits following the submission of a full agency report, DOE made an early production of relevant documents prior to the filing of its request for dismissal. For the purposes of this decision, references herein to the agency report or AR are to DOE's early document production.

On July 30, 2025, the agency completed its evaluation concluding that the protester was the apparent successful vendor and notified the SBA consistent with the instructions provided in the SBA's acceptance letter. Decl. of Contracting Officer at 2. On August 13, the SBA responded and informed the agency that the protester was ineligible for award as an 8(a) small business. *Id.* at 2-3. The contracting officer sought clarification through multiple rounds of follow up with the SBA, specifically asking SBA whether the fact that the protester held an existing 8(a) contract under the GSA MAS rendered them eligible for award. *Id.* In response, the agency received two additional notices from the SBA that the protester was ineligible for award. *Id.* Ultimately, the agency concluded that it could not make an award under the 8(a) program without SBA's approval and accordingly made award to the next highest rated offeror.

DISCUSSION

The protester raises numerous challenges to its exclusion. Protest at 3-11. The majority of those challenges, are, in effect, challenges to the propriety of the SBA's determination that the protester was not an eligible 8(a) small business and are therefore outside of our jurisdiction. Our regulations provide that we will not generally consider a protest challenging a firm's small business or socio-economic status because those judgments are subject to the SBA's conclusive authority.³ 4 C.F.R. § 21.5(b)(1); *DynaLantic Corp.*, B-402326, Mar. 15, 2010, 2010 CPD ¶ 103 at 5 (“[T]he SBA, not [GAO], has conclusive authority to determine the size status of an offeror for federal procurement purposes.”).

However, the protester also raises a handful of ancillary challenges that appear to be focused on DOE's conduct, as opposed to the SBA's ineligibility determination. First, the protester argues that the FAR and SBA's regulations did not require the agency to submit this specific order to the SBA. Protest at 8-11 *citing* 13 C.F.R. § 124.503(i)(1)(ii) (explaining that an agency is not required to seek SBA's acceptance of individual orders when a multiple award contract was set-aside exclusively for 8(a) small businesses, partially set aside for 8(a) small businesses or reserved solely for 8(a) small businesses, and the individual order is to be competed among all 8(a) contract holders), and FAR 19.804-6(d) (providing that when a multiple award contract is set aside exclusively for

³ Because we conclude that our Office lacks jurisdiction over the protester's challenge to the SBA District Office's ineligibility determination, we need not resolve the question of whether such a determination is otherwise appealable. *See, e.g.*, 13 C.F.R. § 124.517(c) (“A participant cannot appeal SBA's determination not to award it a specific 8(a) contract because the concern lacks an element of responsibility or is ineligible for the contract, other than the right set forth in § 124.501(h) to request a formal size determination where SBA cannot verify it to be small.”); *Appeal of Aurora Tech. Solutions, LLC*, SBA No. BDP-6111, 2021 SBA LEXIS 54 (SBA Office of Hearings & Appeals Aug. 2, 2021) (dismissing for lack of jurisdiction appeal challenging an SBA District Office's determination that a firm was ineligible for an 8(a) order).

8(a) small businesses, an 8(a) contractor may continue to accept new orders under the contract, even if it exits the 8(a) program). In the alternative, the protester argues that the solicitation provided that offerors need not certify their 8(a) status at time of award, and that the agency applied an unstated evaluation criterion by requesting that the SBA recertify the protester's 8(a) status or conditioning award on SBA's determination of eligibility. Protest at 8-11.

With respect to the first argument, the agency argues that the protester identifies no legal authority that would preclude coordination with the SBA. In this regard, while 13 C.F.R. § 124.503 provides that an agency is not required to seek SBA's acceptance of individual orders when a multiple award contract was set-aside exclusively for 8(a) small businesses, partially set aside for 8(a) small businesses or reserved solely for 8(a) small businesses, and the individual order is to be competed among all 8(a) contract holders, nothing in that provision--or any other authority identified by the protester--prohibits the agency from seeking the SBA's acceptance. Additionally, the agency argues that, regardless of the general provisions in SBA's regulations, the specific terms of the SBA's acceptance of this procurement into the 8(a) program expressly required DOE to obtain an eligibility determination from the SBA prior to making award. See AR, Tab B.2, SBA Acceptance Letter at 1-2.

In this case, the agency submitted the procurement to the SBA, and the SBA issued a determination that the protester is not an eligible 8(a) small business for this procurement. As a result, we need not resolve the question of whether the agency was, in the first instance, required to submit this procurement to the SBA or whether the FAR might have permitted the agency to make award without seeking a determination of eligibility. Rather, we need only assess two questions: whether it was improper for the agency to submit the order to the SBA; and whether our jurisdiction extends to reviewing the substance of the SBA's determination.

On the first point, the protester has failed to make a legally sufficient argument. By its terms, 13 C.F.R. § 124.503 only addresses when an agency must submit an 8(a) procurement to SBA but does not prohibit an agency from choosing to do so when submission is not required. The protester does not identify any authority that would prohibit the agency from submitting this procurement to the SBA for review. The protester merely argues that the agency was not required to do so and could have made award without doing so. Accordingly, the protester has not facially alleged any regulatory obstacle to the agency submitting this 8(a) procurement to the SBA. Furthermore, it bears noting that regardless of the general provisions of SBA's regulations, SBA in this case expressly required DOE to submit the prospective awardee to SBA for an eligibility determination.

Related, the protester argues that the SBA's determination was based on an erroneous understanding of the circumstances and of the applicable rules and urges us to conclude the agency was not required to abide by the SBA's decision. The protester explains that we should resolve this protest ground because our Office routinely considers issues related to determinations of small business eligibility to participate in a

procurement, and that our decisions have concluded that we will sustain protests where SBA's interpretation of its own regulations is unreasonable.

However, none of the decisions cited by the protester involve a case in which the SBA had conclusively determined a specific offeror's eligibility prior to award. Rather, the cited decisions involved our Office considering *agency* determinations that an offeror was eligible or ineligible, or decisions in which we subsequently invited the SBA to comment as part of the protest process. See, e.g., *Odyssey Sys. Consulting Grp., Ltd.*, B-419731 *et al.*, July 15, 2021, 2021 CPD ¶ 260 at 3 (noting that “[n]either the task order contracting officer, nor others within GSA, sought guidance from the SBA prior to making award.”); *ASRC Fed. Data Network Techs., LLC*, B-418028, Dec. 26, 2019, 2019 CPD ¶ 432 at 7 (noting that we solicited SBA's views “because the protest raised legal questions regarding the [small business innovation research] program”). The fact that the SBA conclusively determined the protester was ineligible for award in this specific procurement distinguishes those decisions from the present case, and renders these arguments, in effect, a protest of SBA's conclusive determination of the protester's size or socio-economic status, which we will not review. 4 C.F.R. § 21.5(b)(1).

Reinforcing this view, we note that following the SBA's negative determination the agency requested clarification from the SBA, citing the same regulatory provisions the protester now cites in this protest, and twice more the SBA rejected the agency's arguments and confirmed the protester was ineligible for award. The fact that the protester now seeks to litigate in our forum substantially similar arguments concerning its eligibility to those that were presented to the SBA, and which the SBA conclusively rejected also weighs in favor of dismissing this protest. In short, we decline to consider arguments which would be more properly addressed in an appeal of the SBA's determination of the protester's size status.

Concerning the protester's second argument that the agency's actions were inconsistent with the terms of the solicitation, we do not agree that the protester has facially alleged such an inconsistency. The solicitation and questions and answers explained that the *offeror* would only be required to certify their 8(a) status on the GSA MAS contract; the solicitation did not limit SBA's involvement in the procurement. See AR, Tab A.11, Questions and Answers, Q&A No. 24. To the contrary, the RFQ expressly noted that this procurement had been submitted to the SBA as an 8(a) procurement and that the SBA had accepted it. RFQ at 2. The agency did not require or request the protester recertify its status, and, indeed, did not request that the SBA recertify the protester's status. Decl. of Contracting Officer at 2-3. The agency simply notified the SBA that the protester was the apparent awardee consistent with the SBA's post-acceptance instructions to the agency. *Id.* Here, where the solicitation put vendors on notice that the SBA had accepted the procurement, the agency's conduct

was neither facially inconsistent with the terms of the solicitation nor otherwise inappropriate.

The protest is dismissed.

Edda Emmanuelli Perez
General Counsel