

Office of the Inspector General

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A Review of the Approval for Lynches River Contracting as a South Carolina Department of Transportation Vendor

Case # 2015-1219-I

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I. Executive Summary

During the latter half of 2014, Boggs Paving, Inc. (BPI), a prime road construction contractor based in North Carolina, and its president Carl Andrew “Drew” Boggs pleaded guilty to federal charges in North Carolina, including conspiracy to defraud the Disadvantaged Business Enterprises Program, U.S. Department of Transportation (US DOT). As a result of the guilty pleas, BPI was debarred from participating in highway contracts involving federal funds. Several key BPI managers, including the company president, Drew Boggs III, were also suspended. Based on the federal debarment, the South Carolina Administrative Law Court also debarred BPI and its affiliates from doing business with the agency on any contract, federally funded or not. Suspended BPI affiliated companies included Boggs Materials, Inc. (BMI); Boggs Transport, Inc. (BTI); Buckhorn Materials, LLC; and Construction Materials, LLC. All of these affiliated companies provided equipment, or material, to BPI. At the time, all companies were owned by two brothers, Drew Boggs and David C. “Chris” Boggs. Chris Boggs would also be prevented from doing business as a principal of BPI under SC DOT regulation § 63-306(F)(4).

In September, 2014, shortly after the BPI guilty pleas, Lynches River Contracting (LRC) filed for incorporation in South Carolina. LRC’s ownership included: Thad Preslar (5%); Lee Sanders (5%); The Lynches River Trust (45%); and The David C. Boggs Family Dynasty Trust (45%). Preslar and Sanders were former BPI field managers. The two brothers who owned BPI, Drew Boggs and Chris Boggs, each established and funded one of LRC’s ownership trusts for the benefit of their young children. The brothers then sold their interest in the two debarred affiliated companies, Boggs Transport, Inc. and Boggs Materials, Inc., to these same two trusts in exchange for a down payment and long term payment plan. These two trusts named independent trustees to manage the trusts’ assets for the benefit of the children.

In December, 2014, LRC initially was prequalified by the South Carolina Department of Transportation (SC DOT) to conduct business with the state, however, this was revoked on January 9, 2015. On February 10, 2015, LRC obtained a temporary restraining order against SC DOT to allow LRC to bid on contracts the same day. LRC was subsequently the low bidder on eight contracts, which were held in abeyance awaiting SC DOT’s final adjudication on LRC’s prequalification application. On April 17, 2015, SC DOT approved LRC’s prequalification application to contract with SC DOT and the eight pending contracts were awarded.

The SC DOT’s final prequalification approval was based on the fact that there was no evidence that a debarred company, affiliated company, or key manager had managerial control or ownership of LRC. LRC was owned, in part, by two former BPI managers (5% each; 10% total) who were not debarred, and the residual 90% ownership was split between two irrevocable trusts belonging to the children of the debarred BPI owners. These two trusts were then managed by independent trustees. In addition to SC DOT permitting LRC to contract with the state, both the North Carolina Department of Transportation (NC DOT) and the US DOT also approved doing business with LRC. Three governmental bodies independently legally determined LRC has been structured in a way allowing it to do business without any impact from BPI’s debarment.

Despite LRC being legally structured to do business with SC DOT, complainants in the road construction vendor community still claimed unfairness in SC DOT's prequalification of LRC to do business with SC DOT. It is quite easy to understand this unfairness claim when LRC's business operations and components appear to be materially the same as the debarred BPI with the exception of the general ownership shifting from disqualified fathers to irrevocable trusts benefitting their young children. Further, the deterrent value of the state's debarment regulation is diluted when wrongdoers are debarred, yet the debarred business can essentially continue to generate economic wealth for their families, which indirectly benefits the debarred wrongdoers, by placing the debarred company's assets and business operations in a new company owned by trusts to benefit close family. However, to address this dilution of debarment's deterrent effect, SC DOT would have to establish new regulations to cover similar situations as BPI and LRC in the future.

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II. Background

A. Predicate

The office of State Inspector General (SIG) initiated this review predicated upon two complaints and several public media reports alleging basic unfairness in SC DOT's prequalification of and award of contracts to LRC. The complainants asserted LRC was just a shell company for BPI, which had been recently debarred from doing business with the state.

Reviews by the SIG are conducted in accordance with professional standards set forth by the Association of Inspectors General, often referred to as the "Green Book."

B. Scope

The review was scoped into two objectives:

- Examine LRC's approved prequalification to contract with the SC DOT to determine if it violated the state's debarment regulations, to include its ownership and management, being an "affiliated party" with BPI, which would preclude LRC from doing business with SC DOT; and
- Assess the state's debarment regulation for opportunity for improvement.

C. History

On July 2, 2013, BPI, a prime road construction contractor based in North Carolina, and its president Carl Andrew "Drew" Boggs III, were indicted on federal charges in North Carolina, to include defrauding the Disadvantaged Business Enterprises Program, US DOT. In August, 2014, Drew Boggs pleaded guilty to criminal conspiracy to defraud the US DOT and money laundering. On September 10, 2014, BPI corporately pleaded guilty to criminal conspiracy to defraud US DOT.

After BPI's guilty pleas, BPI was debarred from participating in highway contracts involving federal funds. Several key BPI managers, including Drew Boggs, were suspended. As a result of the federal debarment, SC DOT disqualified BPI and its affiliates from doing business with the agency on any contract, federally funded or not. The disqualified BPI affiliated companies included Boggs Materials, Inc.; Boggs Transport, Inc.; Buckhorn Materials, LLC; and Construction Materials, LLC. All of these affiliated companies provided equipment or material to BPI. Drew Boggs and David C. "Chris" Boggs owned all the companies. As a principal of the disqualified companies, Chris Boggs was also disqualified.

SC DOT's disqualification of BPI was based on an October 10, 2014, Administrative Law Court order which read in part:

“Petitioner (BPI), and its affiliates Boggs Group, BMI, BTI, Buckhorn Materials and Construction Materials Group, LLC, for so long as any have interlocking management with or are owned by petitioner or any disqualified person or have identity of interest among family members, shared facilities and equipment, or common use of employees with petitioner or any disqualified person, are hereby disqualified from bidding as a prime contractor or participating as a subcontractor, supplier or in any role on future contracts with SC DOT for so long as BPI is disqualified from bidding on federal aid projects and/or the affiliates are owned or managed by Carl Drew Boggs, III or have interlocking management with BPI.”

Despite BPI's suspension, it was allowed to finish outstanding contracts with SC DOT. As of August, 2015, there are still three projects still outstanding with SC DOT.

South Carolina state debarment statute is § 11-35-4220 and the SC DOT agency debarment regulations are found in § 63-306.

III. Prequalification of Lynches River Contracting by SC DOT

A. SC DOT Prequalified LRC

On September 23, 2014, LRC filed for incorporation in South Carolina. None of the principals in the BPI federal indictment were listed on the LRC paperwork filed in South Carolina with the Secretary of State, nor were they in the application for prequalification at SC DOT filed in December, 2014. Financial interests in LRC were listed as: Thad Preslar 5%; Lee Sanders 5%; The Lynches River Trust 45%; and The David C. Boggs Family Dynasty Trust 45%. The prequalification application listed Thad Preslar and Lee Sanders as President and Vice President, respectively, as well as both being LRC employees. However, while both Preslar and Sanders were former field managers of BPI, they were not parties under the federal indictment and were not suspended or debarred from doing work with SC DOT or US DOT.

SC DOT, pursuant to SC State Regulation § 63-301, looked to both the experience of the managers and the ability to perform in order to prequalify a company to contract with SC DOT. LRC's executive management team of Preslar and Sanders reported having 19 and 30 years of experience, respectively. LRC also had a surety bond in place. SC DOT looked for bonds and insurance to make sure the agency is made whole in the event of nonperformance. LRC, having met both those requirements, was prequalified in December, 2014, by SC DOT.

B. SC DOT Revocation of LRC Prequalification

In January, 2015, SC DOT was made aware of two issues with LRC, which called into question the veracity of the information provided in LRC's prequalification application. First, LRC's application to transact business in North Carolina, filed on October 1, 2014, was signed by David Christopher Boggs as president, who was a

principal with BPI (See Appendix C). Second, LRC's SC DOT prequalification application listed Thad Preslar (5% owner) as president of the company, yet he, as well as LRC Vice President Sanders (5% owner), were still BPI employees (See Appendix B). This created a dual employee issue with BPI and LRC and would not be allowed inasmuch as BPI was a debarred entity. On January 9, 2015, SC DOT met with representatives of LRC to discuss these issues. Based on these two issues, SC DOT revoked LRC's prequalification on January 9, 2015. LRC stated it would resolve the issues and submit a revised application.

IV. Legal Proceedings between SC DOT and LRC

At the end of January, 2015, LRC provided SC DOT new information pertaining to its prequalification application. On February 10, 2015, while SC DOT was in the process of verifying LRC's new information, LRC obtained a temporary restraining order in state circuit court against SC DOT. The order required SC DOT to allow LRC to bid at the agency's February construction contract letting held that same day. LRC was allowed to bid and was the low bidder on eight contracts.

On February 26, 2015, SC DOT and LRC entered into a settlement agreement, which among other issues, temporarily stopped hearings on pending litigation and allowed LRC to continue to bid while SC DOT thoroughly reviewed the new information presented by LRC. New information included documents demonstrating Thad Preslar, not Chris Boggs, was the president of LRC as of December 5, 2014. The two LRC principals, Preslar and Sanders, also submitted copies of their resignations to BPI, dated January 11, 2015.

To assist with its legal assessment, SC DOT retained outside counsel to review the business organization of LRC, including the two underlying trust agreements holding a combined 90% ownership interest in LRC. Carl Andrew Boggs established and funded the "Lynches River Trust" for the benefit of his minor children, while Chris Boggs created and funded the "David C. Boggs Family Dynasty Trust" for the benefit of his minor child and one child having just reached the age of majority. Each of the trusts named an independent trustee to manage the assets held by both trusts for the benefit of the children. For each trust, when the youngest child reaches age 25, the trust will end and the funds will be split into new trusts, one for each child and their descendants. Between the ages of 25 and 45, the trustee has some discretion as to allocation of assets, but after each child obtains the age of 45, he or she can direct the trustee as to how the assets are distributed.

At the end of December, 2014, both brothers also sold their interest in BPI's affiliated companies, Boggs Materials, Inc. and Boggs Transport Inc., to the two trusts; each trust owned 50% of each company. Boggs Materials Inc. handled manufacturing of asphalt and other construction aggregates and Boggs Transport Inc. was a hauling company supplying the trucks to move materials to job sites.

The SC DOT outside counsel's opinion was, while it was a close call, LRC was not an affiliate of BPI and neither Preslar nor Sanders were 'key employees' of BPI under South Carolina regulations. The opinion identified two key points: the two trusts were irrevocable; and the trustee was an outside independent third party. While the family of the two Boggs brothers could benefit financially from contracts with SC DOT, neither brother would be in a management, ownership, or controlling position with LRC.

On April 17, 2015, subsequent to this outside legal opinion, SC DOT prequalified LRC as a contractor. As a result and on that same day, the SC DOT Commission awarded the eight low bid contracts to LRC, which had been held in abeyance since February, 2014. SC DOT also noted LRC has been cleared for contracting by both US DOT and the North Carolina Department of Transportation.

V. Debarment Policy and Intent

The complainants initiating this review essentially felt justice was not served in the debarment of BPI when it appeared BPI's assets were shifted to a shell company, LRC, and allowed to continue to do business with SC DOT. SC DOT had a similar initial apprehension, which led to regulatory administrative and civil litigation with LRC in determining if it was an affiliated party to BPI. However, SC DOT ultimately determined LRC was, according to the existing state law and regulations, not an affiliated party to BPI and allowed to do business with SC DOT.

The Federal debarment or suspension of an organization or individual from doing business with the government was not designed to be punitive, but a remedy to ensure federally-funded business was conducted legally with responsible persons. Similarly, SC DOT regulations were designed to preserve the integrity of the public contracting process; the privilege of transacting business with the agency should be denied to persons involved in criminal and/or unethical conduct. Both federal and state debarment laws and regulations were remedies to provide immediate protection to the government and taxpayers from those who engage in dishonest or illegal conduct or are lacking in business integrity. Debarment was not a punishment, but a safety mechanism to protect government in future transactions.

Regardless of the strict legal interpretation of debarment laws and regulations, a derivative benefit is its deterrent effect on wrongdoing in SC DOT procurements. For a road construction vendor, the risk of losing the right to conduct business with SC DOT, or any project involving federal funds, would likely be terminal for many companies, which clearly has a deterrent value to discourage wrongdoing. Complainants from the SC DOT vendor community certainly raised the issue of BPI escaping the full consequences of the state's debarment regulations by establishing LRC to do business with SC DOT. Where is the deterrent value, or fairness, when a debarred wrongdoer apparently can materially use the same debarred company's assets and business operations in a new company, or trust, which continues to indirectly benefit the wrongdoer by channeling wealth to close family? In the words of one agency official, "LRC has complied with the letter of the law, but perhaps not the spirit."

Other facts giving pause to understanding the substance of LRC versus its form in distinguishing LRC from BPI included:

- When interviewing the site supervisor for one of the current Boggs projects with SC DOT, he stated several crews had already moved over to LRC and another crew stated they would be 'switched over' to LRC soon;

- The phone number listed on LRC’s prequalification application was registered to Boggs Transport, Inc.;
- LRC and Boggs Transport, Inc., shared the same address in Pageland, South Carolina; and
- The web domain given for LRC on its prequalification application is not active while the BPI site still shows BMI and BTI as affiliates of the greater ‘Boggs Group.’

Under this new type of organization through the use of trusts, a debarred owner apparently can still materially use his existing business models and components to generate wealth for his family, which indirectly benefits the debarred owner. Unfortunately, the debarment and suspension regulations are silent as to the use of trusts in this manner. If SC DOT chooses to increase the effect of debarment to include trusts or similar vehicles which shift a debarred owner’s operations to family members, the state’s regulations would need to be amended.

VI. Findings & Recommendations

Finding #1: LRC has been confirmed by a variety of government regulatory authorities to be legally structured in a way that allows it to do business with the South Carolina Department of Transportation.

Finding #2: The substance of LRC’s operational business model appears to be materially the same as the debarred BPI with the exception of the general ownership shifting from the two prior owners to trusts benefitting their young children, which has created a perception of unfairness in the SC DOT’s prequalification system within the vendor community, the public, and the media.

Recommendation #2: SC DOT should consider establishing regulations to prevent debarred business owners from shifting ownership to a close family member, or associate, through trusts or related party transactions, allowing the debarred business to continue to operate in materially the same form generating wealth for a debarred owner’s close family or associate, all of which undermine public’s confidence in the agency’s prequalification system.