

GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

APPEAL OF:)	
)	
PINNACLE TOWERS III, INC.)	CAB No. D-1183
)	
Under Antenna Site Management Agreement)	

For the Appellant: Ross W. Dembling, Esq., Holland & Knight, LLP. For the Government: Mark, D. Back, Esq. and Jacob D. Ritting, Esq. Assistant Attorneys General.

Opinion by Administrative Judge Matthew S. Watson, with Chief Administrative Judge Jonathan D. Zischkau, concurring.

OPINION

(LexisNexis Filing ID 6621172)

Pinnacle Towers III, Inc., successor to Shaffer & Associates, Inc. ("S&A") appealed the final decision of Chief Procurement Officer ("CPO") dated April 11, 2002, which found that the contract alleged by Pinnacle was void *ab initio*. The District moved to dismiss the Complaint, or alternatively, enter summary judgment in the District's favor on the basis that the formation of the contract violated the Procurement Practices Act ("PPA") and that the substance of the contract violated the District Charter limitations on multiyear contracts and the Federal Anti-Deficiency Act. Pinnacle asserts that the contract was not subject to the requirements of the PPA. We agree with the District that the contract was governed by the PPA and that its formation failed to comply with the PPA, making it as a matter of law void *ab initio*. Accordingly we grant the motion for summary judgment and dismiss the appeal

BACKGROUND

In August 1981 the District executed a five-year agreement with Channel 50, Inc., whereby Channel 50 leased certain space on a communications tower owned by the District for a base term of five years and four additional five-year option periods ending in August of 2011, if the options are fully exercised. Effective June 1, 1986, as part of the first five-year extension ("1986 Lease Extension"), the District and Channel 50 agreed that Channel 50 would build a new tower at the same site and dismantle the original tower. To pay for the cost of construction

of the new tower and dismantling of the original tower¹, Channel 50 was granted a leasehold in the new tower, known as the "Additional Tower Leasehold." Sublease by Channel 50 of space on the new tower was intended to provide the funds to repay Channel 50 its costs of construction. (Appeal File ("AF") Ex. 4, 7-8). The Additional Tower Leasehold was to terminate at the expiration of its stated term (including any renewals) or when Channel 50 recovered all its construction costs through sublease payments, whichever was earlier.

Under the terms of the 1986 Lease Extension, Channel 50 agreed to use its best efforts to sublet the Additional Tower Space "consistent with commercially reasonable terms and subject to approval by the District (which approval shall not unreasonably be withheld)." ("AF" Ex. 4, 8). Payment of rent by Channel 50 would be made monthly in the amount of \$3,625.00 reduced "by an amount equal to actual expenditures made by Lessee for services for maintenance of, and improvements to the Tower at the request of the District." (*Id.* at 4).

In September 1988, S&A, Appellant's predecessor, executed a contract with Channel 50 (the "S&A Contract") to act as Channel 50's agent to sublease space on the new tower. As compensation, S&A was to receive 25 percent of the Monthly User Charges defined as total charges less direct costs. The contract granted S&A, the service provider, but not Channel 50, an option to extend the contract for three additional five year periods for a total of 20 years. (AF 3, § 3(A)). Either party, however, could terminate the agreement without cause upon 90 days' notice to the other, provided that if Channel 50 terminated the agreement, Channel 50 was required to pay S&A an amount equal to approximately 14-months compensation. The S&A Contract, recognized the District as owner of the tower² and further, in its introductory recitals, recognized that if cumulative net sublease revenues exceeded the construction costs, the Additional Tower Leasehold could expire prior to the termination of the S&A Contract. (AF Ex. 3, 2). Paragraph 3 of the separately numbered paragraphs which preceded the specific terms of the agreement, stated:

The parties recognize and agree that as of the day on which Channel 50, Inc. shall have recovered all "Costs of Construction" as that term is defined in the Extension of Agreement of Lease . . . made and effective as of June 1, 1986, by and between [the District] and Channel 50, Inc. all rights and obligations of [Channel 50] under this Agreement shall revert to [the District] and this Agreement shall continue in effect with [District] substituted for Channel 50, Inc. for all purposes as Tower Manager.

¹ It does not appear that the original tower was ever dismantled.

² The capacity of the District in the agreement is, at best, ambiguous. In the signature block, the District is titled as "Owner," which is consistent with the capacity of an owner which consents, but does not become a party, to subleases. "Under the terms of the 1986 Lease Extension, Channel 50 agreed to use its best efforts to sublet the Additional Tower Space 'consistent with commercially reasonable terms and subject to approval by the District (which approval shall not unreasonably be withheld)'" (Opposition, 2; AF Ex. 4, 7-8). The District is not recognized as a party in the body of the agreement which speaks to rights and obligations of only two parties, Channel 50 and S&A. For instance, the District is given no right to terminate, even for cause. The agreement states, "This Agreement may, be terminated by the Tower Manager or S&A upon giving of ninety (90) days prior written notice to the other party" (§ 3(B)), and "This Agreement may be terminated by Tower Manager or S&A if the other party has failed to perform its obligations hereunder. . . ." (§ 3(D)).

Although the introductory recital appears, upon termination of the tower lease, to bind the District to Channel 50's remaining obligations under the S&A contract for the full term of the S&A contract, including renewals, this is not entirely consistent with the specific terms of the agreement. Paragraph 10 of the contract terms provides:

[Channel 50] may assign or transfer its interest in the facilities or under this agreement to [the District] or any other entity it may choose, provided, however, if [Channel 50] does not cause such assignee or transferee to assume [Channel 50's] obligations hereunder, [Channel 50] shall pay S&A the Termination Price whereupon this Agreement shall be deemed terminated.

This action is brought by Appellant against the District to enforce against the District, as successor to Channel 50's possessory interest in the tower, the terms of S&A's contract with Channel 50.

Between September 1989 and July 1995, Channel 50 executed a number of sublease agreements, each of which acknowledged S&A as the "firm retained by [Lessee] to manage and administer certain provisions of th[e] Agreement." In September 1993, S&A exercised its option to renew its contract for an additional period of five years through September 1998.

In September, 1997, the District executed a five-year lease with National Cable Satellite Corporation d/b/a C-SPAN ("C-SPAN Agreement") for certain portions of the Tower. Channel 50 was not a party to this lease. The District was identified as the "Lessor" and S&A as the "firm currently retained by the lessor to manage and administer certain portions of this Agreement, or any successor thereto." (C-SPAN Agreement, ¶ 1(a)(iv) attached as Ex. 7 to Appellant's Complaint). The Agreement continued the practice of requiring lease payments "to be made payable and mailed to Shaffer & Associates." (*Id.* at 3).

By letter dated May 15, 1998, S&A advised Channel 50³ of its intent to renew the S&A Contract⁴ for an additional period of five years through August 31, 2003. On January 14, 2000, Pinnacle Towers purchased all of the stock of S&A. (Opposition, 5). At some time prior to May 2000, Channel 50 had recouped its full construction cost, at which time the Additional Tower Lease and Channel 50's possessory rights in the new tower terminated. Beginning in May 2000 and continuing, Pinnacle has regularly remitted rent payments collected from tenants to the District less its compensation. (*See*, AF Ex. 1, 2). The District has, however, advised tenants to remit rent directly to it.

³ Even though the C-Span Agreement which had been entered into the previous year identified the District as the Lessor and S&A as the firm retained by the District to manage the tower property, the renewal letter was sent to Channel 50 and does not indicate that a copy was sent to the District.

⁴ On November 30, 2000, Pinnacle executed an amended sublease with an existing sublessee of Channel 50, APC Realty and Equipment Company, LLC. In the amended sublease, Pinnacle erroneously represented itself as being the successor to Jasas Corporation, the parent of Channel 50 and Pinnacle further erroneously represented itself as the "sublessor" in the transaction, (APC; attached as Exhibit 10 to Appellant's Complaint), implying that Pinnacle was the lessee of the tower from the District. Although the D.C. Office of Property Management ("OPM") and a D.C. Assistant Corporation Counsel approved the amended sublease for legal sufficiency Appellant was not the successor to Channel 50 or the lessee of the tower from the District. Appellant does not claim any rights under the Channel 50 lease in this matter.

DISCUSSION

Jurisdiction

The Board must initially determine its jurisdiction in this matter. Pinnacle filed this appeal invoking the jurisdiction of the Board pursuant to D.C. Code § 2-309.03. (Complaint ¶ 3).

Subsection (b) of that section provides:

(b) Jurisdiction of the Board shall be consistent with the coverage of [the Procurement Practices Act]

As an administrative agency created by statute, this Board has only those powers which are conferred either expressly or by necessary implication. *Ramos v. Department of Consumer & Regulatory Affairs*, 601 A.2d 1069, 1073 (D.C. 1992). The Board has consistently held that, as the statute explicitly provides, its jurisdiction does not exceed that of the PPA. *See, e.g. District of Columbia Local Development Corporation*, CAB No. P-0421, Nov. 14, 1994, 42 D.C. Reg. 4885, holding affirmed, but vacated on other grounds, Jan. 31, 1995, 42 D.C. Reg. 4914; *C. Peyton Barton, Jr.*, CAB No. P-0638, May 4, 2001, 49 D.C. Reg. 3359; *Safe, Inc.*, CAB No. P-0702, Jan. 26, 2005.

In its motion to dismiss, the District asserted that formation of the contract violated various sections of the PPA (Motion, 5-10) to which Pinnacle responded that “the agreement is a concession contract, not an acquisition contract subject to the Procurement Practices Act.” (Post Oral Argument Brief, 2)). If Pinnacle’s assertion is correct, its defense negates the jurisdiction of the Board and the appeal must be dismissed for lack of jurisdiction.

In *Eastern Ave. Development Corp.* CAB No. P-437, Sept 26, 1995, 44 D.C. Reg. 6384, the Board set forth four factors to be considered in determining whether the PPA covers particular contract actions, thus making them subject to our jurisdiction:

1. the type of contract or agreement contemplated;
2. the nature of the agency conducting the solicitation;
3. the basis for the procurement or contracting authority;
4. the statutory and regulatory scheme which controls the procurement or disposal being solicited.

(44 D.C. Reg. at 6387). Pinnacle’s assertion that the PPA does not apply to this contract fails on each of the considerations.

The contract is best categorized as a procurement contract. Pinnacle asserts that the contract is not a procurement contract, but rather a “concession” contract in which “the contractor (or concessionaire) pays a franchise fee for the privilege of operating on or in a government facility.” (Appellant’s Posthearing Brief, 2-3) Contrary to Appellant’s own definition of a concession contract, Appellant does not claim to pay the District a concession fee, but rather “deducts its agreed-to remuneration,” (Opposition 8), from funds it collects on behalf of the District. (*Id.*). Nor do the terms of the Agreement meet the common understanding of a

concession contract with a government agency. First, franchise fees are “typically less than five percent of gross revenues, for the privilege of operating on federal land. If they used government-owned facilities they paid an additional fee.” *Amfac Resorts, L. L. C. v. United States Dept. of Interior*, 350 U.S. App. D.C. 191, 282 F.3d 818, 834-835 (2002) The payment to the District under the Agreement, if the alleged contract is interpreted to be a concession contract would be 75% of net rental income. Second, the subject contract did not denominate the payment as a concession, but rather describes the amount retained by Pinnacle as a “Monthly Percentage Fee” to Appellant⁵, with the remainder remitted to Channel 50, as lessee, or the District as owner after termination of the lease. Further, Pinnacle does not allege that it provides services to the sublessees, but rather that it acts as leasing agent and manager for Channel 50 and subsequently the District. Concessionaires are understood to provide accommodations, facilities, and services not for the benefit of the government, but for private parties. (See, e.g., Bus Shelter Act of 1979, D.C. Law 3-67; National Park Service Concessions Management Improvement Act of 1998, 105 P.L. 391, 16 U.S.C. § 5951).

The District Department of Administrative Services (“DAS”), with whom this contract is alleged to have been made, was a line agency of the District of Columbia reporting to the Mayor whose procurements are generally subject to the PPA. (See, e.g. *Impex Industries, Inc.* CAB No. D-956 July 26, 2000,) The PPA was applicable to “all agencies and employees of the District government which are subordinate to the Mayor” at the time of execution of the S&A Agreement. (D.C. Code § 1-1181.4 (1981 ed. 1987 Supp.)). Appellant does not cite any general or specific exemption to the PPA for DAS.

Absent the PPA, DAS did not have procurement authority. The Board has found the PPA not to apply only where the procurements “were carried out under statutory and regulatory schemes entirely independent of the PPA.” *C&D Tree Service, Inc.*, CAB No. P-0440, Mar. 11, 1996; see, also, *Potomac Capital Investment Corp.*, CAB No. P-0383, Jan. 4, 1994, 41 D.C. Reg. 3885 and *Metropolitan Service & Maintenance Corp.*, CAB No. P-0388, Feb. 7, 1995, 42 D.C. Reg. 4918. There was no independent statutory or regulatory scheme governing procurements by DAS.

⁵ Section (k) of Exhibit B to the S&A agreement entitled Management Services provides:

Invoice and collect all Gross Charges (as defined above) from Users under the User Agreements. All User Agreements shall incorporate language directing that all fees due under such agreements are to be paid to S&A. Monthly, prior to the 10th day of each month, S&A shall determine the total of monthly User Charges by adding the total Gross Charges collected and subtracting the Deductible Costs (as defined above). S&A will then deduct its Monthly Percentage Fee from the remainder resulting after Deductible Costs are subtracted from Gross Charges. It will retain the amount necessary to pay the Deductible Costs and will timely pay such costs. The balance will then be remitted to Tower Manager monthly by the 15th of the month. S&A’s obligation hereunder is limited to employing ordinary collection procedures, without any responsibility on the part of S&A for amounts reasonably deemed uncollectible by S&A.

Although Appellant categorizes this procurement as a concession, it cites no District statutory or regulatory scheme which controls such procurements. No valid action can be taken without statutory or regulatory authority. In instances when concession agreements are authorized, detailed requirements are imposed. See *Metropolitan Service & Maintenance Corp.*, CAB No. P-0388, Feb. 7, 1995, 27 D.C. Reg. 1266 (discussing the District of Columbia Bus Shelter Act of 1979, D.C. Law 3-67; and the National Parks Omnibus Management Act of 1998, 16 U.S.C. §§ 5951 -5966)).

The Board finds no authority for the alleged contract other than the PPA and thus has jurisdiction to consider this appeal.

Formation of the alleged contract violated the Procurement Practices Act

The formation of the alleged contract violated the most basic principle of government procurement law, namely, that selection of the contractor and award of a contract be made by an authorized District contracting officer. There is no authority to delegate contracting officer responsibility outside the District Government. "The contracting officer shall be responsible for source selection." 27 DCMR §1614.3; see also D.C. Code § 2-301.07; 27 DCMR §§ 1905.4, 1622.6, 2623.1 and 48 CFR § 15.504. There is no dispute that no District official selected S&A or made any award. Appellant admits in its opposition to the motion:

... [T]he District did not award the 1988 contract. Instead, Channel 50, the Lessee under the 1981 Agreement of Lease awarded the contract. Channel 50 sought and received the District's approval of the S&A contract award, as contemplated by the 1986 Lease Extension. See AF Tab, 4 at Article 35 (as amended) section 6, p. 9. But neither this approval, nor the acknowledgment that the District was the owner of the tower, established or intended to create a contractual relationship with the District necessitating adherence to the PPA.⁶

(Opposition, at 9). The approval referenced by Appellant is pursuant to a standard lease requirement giving lessor the right to approve sublease or subcontract agreements, provided that such approval "shall not be unreasonably withheld." *Id.* Such approval, however, pursuant to regulation, does "not constitute a determination of the acceptability of the subcontract terms or price or of the allowability of costs." 27 DCMR § 2801.3. More importantly, the contracting officer is forbidden by the procurement regulations from consenting to a subcontract which requires, as Appellant asserts, that the District deal directly with the subcontractor. "The contracting officer shall not consent to subcontract . . . (c) [w]hen the contracting officer is obligated to deal directly with the subcontractor." (27 DCMR § 2801.4). Just as the District's approval of the Channel 50 contract with S&A does not create a contract between S&A and the District, the District's approval of subleases referencing the S&A Agreement does not award a contract and obviously does not reflect any "selection" of S&A by the District.

⁶ Appellant also stated on page 8, "S&A was a contractor to Channel 50 and Channel 50 was solely responsible for compensating S&A, and on page 10 "The party to whom Pinnacle (and its predecessor S&A) was bound was Channel 50, not the District, S&A did not look to the District for its compensation."

Notwithstanding Appellant's admission that the District did not select S&A or award a contract to it, and that "the contract was not the District's" (Opposition, at 9), Pinnacle, as successor to S&A, now requests the Board to "reinstate the Contract and require the District to specifically perform its obligations under the Contract." (Complaint, at 19). Appellant does not point to any subsequent selection of Pinnacle or its predecessor by the District, nor does Appellant point to any award by a District contracting officer of a contract to S&A or Pinnacle. The Board finds that no contract was entered into by the District.

It is further unclear that the actual parties to the S&A Agreement, Channel 50 and S&A, intended the District to be bound without further action by the District. Although the introductory recitals to the contract seem to imply that the District would stand in the shoes of Channel 50, the actual terms of the contract conflict with this intent.

Paragraph 3 of the separately numbered recitals state:

The parties recognize and agree that as of the day on which Channel 50, Inc. shall have recovered all "Costs of Construction" as that term is defined in the Extension of Agreement of Lease . . . made and effective as of June 1, 1986, by and between [the District] and Channel 50, Inc., all rights and obligations of [Channel 50] under this Agreement shall revert to [the District] and this Agreement shall continue in effect with [District] substituted for Channel 50, Inc. for all purposes as Tower Manager.

Section 10 of the specific contract terms states:

[Channel 50] may assign or transfer its interest in the facilities or under this agreement to the [District] or any other entity it may choose, provided, however, if [Channel 50] does not cause such assignee or transferee to assume [Channel 50's] obligations hereunder, [Channel 50] shall pay [Pinnacle] the Termination Price whereupon this Agreement shall be deemed terminated.

Although introductory recitals may indicate the understandings of the parties in entering into a contract, *Trilon Plaza v. Comptroller of N.Y.*, 788 A.2d 146, 151 (D.C. Cir. 2001), if the recitals and specific terms are in conflict, the specific terms will govern. *Kogod v. Stanley Co.*, 186 F.2d 763, 765 (D.C. Cir. 1950). The specific contract term contemplates potential transfer to the District but requires that, for the District to be bound to the obligations under the agreement, the District must at that time specifically assume those obligations. If there was not a specific assumption by the District of the obligations, as there was not, the contract is terminated and Channel 50, not the District as transferee, remains liable for the termination costs. Appellant has not shown any assumption by an authorized District official.⁷

⁷ The Board also questions the authority to include the option which is included in the agreement. In general, options permit the *District* to extend a contract. The option provision in this agreement permits the contractor to unilaterally extend the contract. (§ 3(A)). Appellant cites no authority which authorizes the District's obligation to pay the contractor to be unilaterally extended by the contractor.

The District further asserts that, in any event, the contract is void in violation of law for lack of competitive selection and for violation of restrictions on multiyear contracting.⁸ We agree with the District. Appellant asserts that "the PPA requires award by competitive bidding only for those contracts that contemplate expenditures in excess of \$25,000," (Opposition 10-11), and that no expenditures are involved.⁹ Appellant further asserts that the definition of competitive bidding requires "payment of a price." Appellant has inserted the words "expenditures" and "payment" which do not appear in the code. DC Code § 2-303.03 provides that "Contracts exceeding [\$25,000] shall be awarded by competitive sealed bidding . . ." D.C. Code § 2-303.21 reads, "Special small purchase procedures may be used . . . for procurements not exceeding \$25,000." D.C. Code § 2-301.07(10) provides "Competitive bidding means the "offering of prices . . . for a contract, privilege or right to supply specified services or materials."

Appellant admits that the agreement intended to compensate S&A stating "not surprisingly, [S&A] had to be compensated for its contractual duties. . . . [T]he agreement provided that S&A would receive its remuneration by deducting the agreed-to compensation from the rental revenue that S&A was collecting from subtenants on behalf of Channel 50." (Opposition, 8). Once Channel 50 had recovered its construction costs, the lease terminated and possession of the tower reverted to the District. If the agreement continues, S&A would collect rent from subtenants, now tenants, on behalf of the District. Based on the leases in the record, (Exs. 3-8 and 11), the District funds withheld as compensation by S&A will exceed \$25,000. The contract, as it would apply to the District, clearly exceeds \$25,000 triggering the requirement for compensation. Appellant's argument that the contract was "awarded" by Channel 50 and therefore not subject to the competition requirements of the PPA is without merit. The effect of the contract, if upheld by the Board, would be to compensate Pinnacle directly from funds belonging to the District. The requirements of the PPA cannot be avoided by an agreement which allegedly requires the District to assume a contract in being.

Based on the undisputed facts, we conclude that the contract alleged by Appellant is a nullity because award was never made by an authorized official of the District of Columbia and that even if an award could be construed to have been ratified by an authorized District official, the underlying award was not made pursuant to the competition requirements of the PPA. We also reject the alternative argument of the Appellant that the agreement is not void, but merely voidable. (Opposition, 12-14). To avoid the binding stamp of nullity, "a contract which is entered into in violation of this chapter or the rules and regulations issued pursuant to this chapter is void, unless it is determined in a proceeding pursuant to this chapter or subsequent

⁸ Since we find that the District never entered into a contract, it is unnecessary for the Board to determine whether, had the District entered in to a contract, it was a multiyear contract requiring approval by the Council. The Board notes, however, that it would be difficult to apply the multiyear review requirements, because, at the outset of the agreement, it was uncertain when, if ever, it would bind the District. Initially, as Appellant admits, Channel 50 was solely responsible for compensation of S&A. At some undetermined time when rent from sublessees had repaid Channel 50's construction costs, the District's alleged obligation would spring up. The Board does not decide whether Council approval of a contract which did not begin within the Council's then current period could bind a future Council from taking action to disapprove the contract during the Council period when the obligation of the District actually arises.

⁹ "To the contrary, S&A was to collect the rents from subtenants, with checks payable to Channel 50 [and subsequently the District] of the proceeds, less S&A's agreed-to expenses." Opposition, 10

judicial review that good faith has been shown by all parties, and there has been substantial compliance with the provisions of the chapter and the rules and regulations." D.C. Code § 2-302.5(1)(d); *Recycling Solutions, Inc.*, CAB No. P-0377, April 15, 1994, 42 D.C. Reg. 4550. In the instant matter, there was no attempt whatsoever to comply with the Procurement Practices Act.

The Board concludes that the alleged contract is void *ab initio*. The appeal is dismissed.

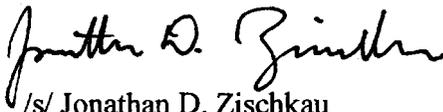
September 2, 2005



/s/ Matthew S. Watson

MATTHEW S. WATSON
Administrative Judge

Concur:



/s/ Jonathan D. Zischkau

JONATHAN D. ZISCHKAU
Chief Administrative Judge

GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

APPEAL OF:

J.E. TIBBS CONSTRUCTION COMPANY)
) CAB No. D-1169
Under Contract P.O. No. CBOP0000809)

For the Appellant: Harry T. Spikes, Esq. For the District of Columbia: Jennifer L. Longmeyer, Esq., Assistant Corporation Counsel.

Opinion by Chief Administrative Judge Jonathan D. Zischkau, with Administrative Judge Matthew S. Watson, concurring.

OPINION

LexisNexis Filing ID 6627691

Appellant J.E. Tibbs Construction Company entered into a contract with the District of Columbia at a stated price of \$33,079 to paint the 6th floor at the District's One Judiciary Square building. After the work was completed, though not fully to the satisfaction of the District, the contracting officer notified Tibbs that its contract was "cancelled", apparently because the contracting officer had violated law and regulation in executing the contract, and that Tibbs should submit a claim for compensation based on Tibbs' actual costs of performance. Tibbs submitted a claim in the amount of \$30,747.76. In his final decision, the contracting officer determined that Tibbs had established performance costs of \$10,517.82, but, after deducting amounts for an improper advance payment made to Tibbs at the start of performance, and damages Tibbs caused during performance, he concluded that Tibbs had been overpaid by \$4,703.02. The District filed a claim against Tibbs for the overpayment. Tibbs appealed both the final decision and the District claim. Tibbs claims he is entitled to \$13,974. We conclude that Tibbs is entitled to a contract balance of \$10,487.47, which amount will be withheld by the District until Tibbs has shown that it has fully paid its workers the amounts they are due as determined by the United States Department of Labor and complied with applicable payroll tax laws.

BACKGROUND

On September 22, 2000, Purchase Order No. CBOP0000809 was awarded to Appellant J.E. Tibbs Construction Company to paint the 6th floor, housing the Office of the Attorney General (formerly the Corporation Counsel) at the District Government's One Judiciary Square building, located at 441 4th Street, N.W. (Appeal File ("AF") Ex. 1). The work was to begin immediately and was to be finished on or before September 30, 2000. (AF Ex. 2). At Tibbs' request, the District issued an advance payment in the amount of \$11,026.33. (AF Ex. 4, at Bates No. 0000064; Hearing Transcript ("Tr.") 275-76). The total contract amount listed on the purchase order was \$33,079, and corresponds to the low bid made by Tibbs. (AF Ex. 2). Mr. Debor Dosunmu, a contracting officer for the District, signed the purchase order on behalf of the District. (AF Ex. 2). Mr. John Tibbs is

the owner of J.E. Tibbs Construction Company. (Vol. 1 Tr. 205). On September 23, 2000, Tibbs began performance. Ms. Sherry Roberts, support services manager for the Office of the Attorney General, testified that from the very beginning, there were serious performance problems. (Vol. 1 Tr. 133). On the Monday after Tibbs began the painting work, she was bombarded with complaints from District employees on the 6th floor who complained of paint on the floors and desks, missing items from their offices, broken glass in a picture frame, and beer cans "spread over the office." (Vol. 1 Tr. 133-37, 138-41). The missing items included postage stamps, CDs, running shoes, a briefcase, and office property including cell phones and tape recorders. (Vol. 1 Tr. 135; AF Ex. 4, at bates 65). Although these were serious concerns, Ms. Roberts did not feel that Tibbs' contract should be terminated for default at that early point in performance but instead she chose to work with Mr. Tibbs to have his company correct the performance problems. (Vol. 1 Tr. 133-34). When Ms. Roberts told Mr. Tibbs of the problems from the initial weekend, he assured her that he would take care of the problems and indicated to her that he had already spoken with his workers about their prior work. (Vol. 1 Tr. 138-39). Ms. Roberts met with Mr. Tibbs on a near daily basis. (Vol. 1 Tr. 136, 212). Ms. Roberts continued to inform Mr. Tibbs about problems on the job site, including paint on the carpets, missing items from the offices, and Tibbs' employees drinking alcoholic beverages on the job. (Vol. 1 Tr. 137-39; Vol. 2 Tr. 17, 160). If Mr. Tibbs was not available, Ms. Roberts spoke with Tibbs' foreman, Mr. Richmond. (Vol. 2 Tr. 16, 161; Vol. 1 Tr. 137-38). If neither Mr. Tibbs nor his foremen were available, Ms. Roberts would leave handwritten notes telling them what work had to be done and what, if any, problems that had to be corrected that day. (Vol. 1 Tr. 141).

Tibbs did not complete the contract work until mid- to late-October 2000. (Vol. 1 Tr. 159, 166, 212). By the time of job completion, Ms. Roberts concluded that Tibbs had done "a shabby job." (Vol. 1 Tr. 138, 174-75; Vol. 2 Tr. 140). As an example, Tibbs' workers did not move furniture away from the office walls, but painted around the furniture. (Vol. 1 Tr. 185). This "shabby job" included paint stains all over the carpet on the 6th floor. (Vol. 1 Tr. 164, 165). When informed of the paint stains, Tibbs offered to clean the carpet but he was unsuccessful in his attempt to clean the carpet stains. (Vol. 1 Tr. 165). In order to clean the paint stains from the carpet, the District was forced to bring in its maintenance company, Design Mark Services, and pay a fee in addition to its regular cleaning contract with Design Mark. (Vol. 1 Tr. 101, 188-191, 121-125). The area manager for the Office of Property Management, Mr. Leon Walker, was responsible for contacting Design Mark about cleaning the 6th floor. (Vol. 1 Tr. 187; 188). Mr. Walker measured the 6th floor and submitted the total square footage of the 6th floor to Design Mark for pricing. (Vol. 1 Tr. 189-190; AF Ex. 1, at bates 27-30). Design Mark cleaned the paint stains from the carpet and was paid \$3,126.20 for cleaning the carpet on the 6th floor. (Vol. 1 Tr. 102, 119, 192-193).

By letter dated November 29, 2000, the contracting officer stated to Tibbs:

This is to notify you that the purchase order . . . in the amount of \$33,079.00 is hereby cancelled. The remaining balance from that purchase order is also cancelled.

If you have any claim against this purchase order, you may forward your claim in writing to Mr. Debor Dosunmu

(AF Ex. 3). The letter does not expressly state that it is a final decision nor does it advise Tibbs of its appeal rights. (Vol. 1 Tr. 33, 39). The contracting officer testified that he cancelled the contract at the direction of the Chief Procurement Officer because *inter alia* the purchase order amount of \$33,079 exceeded the small purchase authority limit of \$25,000 provided by the Procurement Practices Act. (AF Ex. 1). Because of this procurement violation, the District's Chief Procurement Officer reprimanded the contracting officer. (Vol. 1 Tr. 26-27). There is no evidence in the record that a contracting officer with contracting authority above the small purchase authority ratified the contract at the amount of \$33,079.

As a result of the November 29, 2000 letter, Mr. Dosunmu met with Mr. Tibbs on three separate occasions, on December 1 and 19, 2000, and March 18, 2001, concerning his claim for costs, during which Tibbs submitted or resubmitted various receipts, times sheets, certified payroll records, and other documentation of its actual costs of performance. (Vol. 1 Tr. 42-46; AF Exs. 1, 4).

The contracting officer testified that he had his staff send two final decision letters, both dated June 20, 2001, by certified mail and facsimile to Tibbs. (Vol. 1 Tr. 77-78; *cf.* Nov. 27, 2002 Dosunmu Aff. ¶¶ 3-5).

One was a final decision (1) declaring the contract void for violating statute and regulation, (2) determining that Tibbs actual costs of performance were \$10,517.82, (3) assessing deductions against Tibbs for the District's expense in cleaning paint stains from the carpets (\$3,126.20), and the replacement cost for missing District items (\$1,068.31), (4) deducting an advance payment of \$11,026.33 made to Tibbs, and (5) concluding that Tibbs owed the District \$4,703.02. (AF Ex. 1). This first decision informed Tibbs of its right to appeal to the Board within 90 days from the date of receipt of the decision.

The other final decision determined that Tibbs had been overpaid in the amount of \$4,703.02 and demanded return of the overpayment within 30 days. This decision did not set forth the contractor's appeal rights.

Tibbs testified that he never received the first final decision relating to the contract cancellation and his claim, but rather received two envelopes around June 20, 2001, one containing an original, the other containing a copy, of the same final decision relating to the District claim against Tibbs for overpayment. Tibbs' attorney submitted an affidavit supporting Tibbs' testimony that he did not receive notice of the first final decision until October 15, 2001, when Tibbs' attorney handed Tibbs a copy of that final decision. On October 16, 2001, Tibbs filed a notice of appeal from the final decision canceling the purchase order and denying Tibbs' claim for compensation.

DISCUSSION

We exercise jurisdiction over this appeal pursuant to D.C. Code § 2-309.03(a)(2).

The first issue we decide concerns timeliness of the appeal of the first final decision. The District claims that Tibbs untimely filed its notice of appeal from the final decision which declared the contract void and denied Tibbs any compensation. After reviewing the record, we conclude that Tibbs timely filed the notice of appeal on October 16, 2001, based on the testimony of Tibbs and his attorney that Tibbs first received notice of the decision on October 15, 2001. The contracting officer did not persuasively contradict Tibbs' version of receiving an original and a copy of the other final decision which demanded that Tibbs repay the District for a claimed overpayment. Since the second final decision did not contain a notice of appeal rights, it was timely appealed as well.

The second issue is whether the Chief Procurement Officer correctly determined that the purchase order was void *ab initio* based on the purchase order exceeding the small purchase dollar threshold, the inadvertent omission from the purchase order of the applicable provisions of the Service Contract Act, and the erroneous allowance of an advance payment to Tibbs. We conclude that these violations do not render the contract void *ab initio*. The applicable Service Contract Act provisions are incorporated into the contract by operation of law and thus the provisions are applicable even if not expressly identified in the contract documents. The advance payment is not a violation that strikes at the formation of the contract and thus it provides no basis for declaring the contract void. The purchase order's price which exceeds the small purchase threshold presents the more difficult issue. In this case, we look to the partial validity rule found in the Restatement (Second) of Agency, § 164, which provides:

§ 164 Contracts Unauthorized in Part

(1) Except as stated in subsection (2), an agent for a disclosed or partially disclosed principal who exceeds his powers in making an unauthorized contract with a third person does not bind the principal either by the contract as made or by the contract as it would have been made had he acted in accordance with his authority.

(2) Where the only difference between the contract as authorized and the contract as made is a difference as to amount, or the inclusion or exclusion of a separable part, the principal is liable upon the contract as it was authorized to be made, provided that the other party seasonably manifests his willingness to accept the contract as it was authorized.

See DeBoer Construction, Inc., v. Reliance Insurance Co., 540 F2d 486, 493 (10th Cir. 1976), *cert. denied*, 429 U.S. 1041 (1977). In the present case, no contracting officer with authority in excess of the small purchase authority ever ratified the contract. However, Tibbs manifested its willingness to accept the contract as valid at the amount of \$25,000. (Appellant's Post Hearing Reply Brief, at 3). Accordingly, the contract is valid at the amount of \$25,000.

The District claims a deduction for the District's expense in cleaning paint stains from the carpets caused by Tibbs in the amount of \$3,126.20. We conclude that the evidence supports the District's offset for cleaning of the carpets by Design Mark Services and we have found adequate evidence from the testimony that Design Mark was paid that amount for the cleaning. (Vol. 1 Tr. 116-128). The District also seeks an offset of \$1,068.31, constituting the replacement cost for missing District items allegedly stolen by some of Tibbs' workers. The District did not meet its burden of establishing either the amount of the expenses or that Tibbs' workers were responsible for all of the missing items. Finally, there is no dispute that Tibbs received an advance payment of \$11,026.33 which must be offset against the total due to Tibbs. Subtracting the carpet cleaning expenses and the advance payment from the purchase order amount of \$25,000 results in a contract balance amount due to Tibbs of \$10,847.47.

The record indicates that the proper payment of Tibbs' workers is unresolved. Some workers have not received full payment of wages and the contracting officer referred an issue regarding the appropriate classification and pay of Tibbs' workers to the United States Department of Labor.

On the issue of workers not receiving full payment, Tibbs submitted for the first time at the hearing AF Exhibit 7 containing labor summaries, IRS Forms 1099-Misc, and what Mr. Richmond testified were the "master payroll spreadsheets" he had prepared under the contract. (AF Ex. 7, bates 80-98, 99-101; Vol. 2 Tr. 82-108, 195-203). Mr. Tibbs testified that the information in Exhibit 7 in its entirety is accurate. (Vol. 2 Tr. 108). The second through fourth pages of Exhibit 7 contain a summary of the 20 individuals who Tibbs and Richmond state provided labor under the contract. (AF Ex. 7, bates 81-83). The total dollar amount of the wages is \$21,779.58. The summary sheets and the testimony indicate that some of the laborers have not been paid their full amounts. (AF Ex. 7, bates 82-83; Vol. 2 Tr. 189-194). According to Messrs. Tibbs and Richmond, the master payroll spreadsheets of Exhibit 7 are a more accurate statement of the labor incurred by Tibbs in performing the work than in found in the 6-page payroll "worksheets" previously provided to the contracting officer, which only have a labor total of \$7,389 (see AF Ex. 1, at bates 6, 7-12).

On the issue regarding compliance with federal labor laws, the contracting officer states in his final decision:

Wage Determination No. 1994-2103, Revision No. 21 (06/09/00), the pertinent wage determination issued by the Wage and Hour Division, Employment Standards Administration of the U.S. Department of Labor, setting forth minimum monetary wages and benefits for service employees was not incorporated into this contract in accordance with the Service Contract Act of 1965, as amended. As a result, there remains an issue regarding the appropriate rate of pay for all the classifications of personnel of J.E. Tibbs Construction listed in the submitted notarized payroll document (Attachment B). I am referring the issue to the U.S. Department of Labor for advice and/or resolution.

Because AF Exhibit 7 contains the accurate statement of labor provided by Tibbs' personnel, the Department of Labor must determine the appropriate rate of pay for all of the workers listed on AF

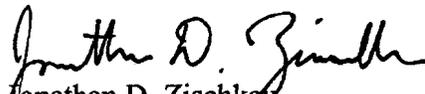
Exhibit 7 and then the District must verify that Tibbs pays the workers any additional amounts (and amounts that were previously withheld by Tibbs) to which the workers are entitled. The District shall withhold the \$10,847.47 contract balance until Tibbs has fully paid his workers the amounts they are due and submits to the District proper evidence of the same, including Tibbs' compliance with payment of required payroll taxes.

CONCLUSION

Tibbs is due a contract balance of \$10,847.47, which will be paid to Tibbs by the District after Tibbs has shown that it has fully paid its workers the amounts they are due and has paid applicable payroll taxes.

SO ORDERED.

DATED: September 2, 2005


/s/ Jonathan D. Zischkau
JONATHAN D. ZISCHKAU
Chief Administrative Judge

CONCURRING:


/s/ Matthew S. Watson
MATTHEW S. WATSON
Administrative Judge

GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

PROTEST OF:

URBAN SERVICE SYSTEMS CORPORATION)
) CAB No. P-0714
Under Solicitation No. DCAM-2005-B-0027)

For the Protester: Shelley D. Hayes, Esq. For the Intervenor, TAC Transport LLC: Mary Carolyn Brown, Esq., Holland & Knight LLP. For the District of Columbia Government: Howard Schwartz, Esq., Talia S. Cohen, Esq., Assistant Attorneys General.

Opinion by Chief Administrative Judge Jonathan D. Zischkau, with Administrative Judge Warren J. Nash, concurring.

OPINION

LexisNexis Filing ID 7439842

Urban Service Systems Corporation has protested what it anticipates will be the award of four aggregate award groups for trash collection and recycling services to TAC Transport, LLC ("TAC"), which has intervened in the protest. The District has not made an award or even completed responsibility determinations, but TAC is the apparent low bidder on four of award groups and Urban is the apparent low bidder on two of the remaining three award groups. In arriving at the low bid tabulations, the contracting officer with the District of Columbia's Office of Contracting and Procurement ("OCP") has determined that TAC and Urban are entitled to a 9 percent LSDBE preference reduction in their bid prices.

Urban's main challenge is that TAC should not have received a 9 percent preference because it is a multi-million dollar business located in Maryland and thus does not qualify as a local or disadvantaged District business enterprise. TAC had been previously certified by the District's Local Business Opportunity Commission ("LBOC") but that certification was to expire shortly before the bid opening date. TAC timely applied for recertification, but during the recertification process, the City Council substantially revised the certification process and standards when it enacted the Small, Local, and Disadvantaged Business Enterprise Development and Assistance Emergency Act of 2005 ("2005 Act"), D.C. Act 16-168. On the day of bid opening, TAC was granted a temporary certification in an acknowledgment letter issued by the Office of Local Business Development ("OLBD"), renamed the Department of Small and Local Business Development ("DSLBD") by the 2005 Act. The contracting officer applied a 9 percent preference to TAC's bid based on that letter. Although there are no implementing regulations for the 2005 Act to guide us, we conclude that the temporary certification constitutes a provisional certification under section 2362 of the 2005 Act and thus the contracting officer did not violate law or regulation in applying the 9 percent evaluation reduction to TAC's bid prices. Urban also claims that TAC did not submit a proper subcontracting plan in its bid to comply with the solicitation's 35 percent set-aside requirement and that TAC lacks requisite experience in trash collection and recycling services. We conclude that the former is a matter of responsibility that may be corrected up to the time of award and that the latter is premature because there has been no

responsibility determination made. Accordingly, Urban's protest is denied in part and dismissed in part.

BACKGROUND

On June 3, 2005, OCP issued in the open market Solicitation No. DCAM-2005-B-0027 ("IFB") on behalf of the Office of Property Management, Facility Management Division, for a contractor to provide all containers, equipment, personnel, management, recordkeeping, and other reporting services necessary to perform pick-up services for the collection of trash and recyclables from District Government owned and leased buildings and non-residential housing units located in the District and the State of Maryland. (Agency Report ("AR"), at 2; AR Ex. 1). The IFB contains seven aggregate award groups based on different locations. Bidders could bid on one or more award groups. The IFB provides for aggregate awards to one or more bidders, which will result in a requirements contract or contracts with payment based on unit prices for the pay items. The initial bid opening date was June 20, 2005. Between June 6, 2005, and August 16, 2005, OCP issued eleven amendments, which, among other things, extended the closing date to August 30, 2005. (AR, at 2-3; AR Ex.1).

The "Solicitation, Offer, and Award" page indicates that OCP issued the IFB as an "Open Market with Set-Aside 35% - set-aside for subcontracting." Section M.C. of the IFB captioned "Clause Applicable Only to Open Market Solicitations With LBE, DBE, or RBO Subcontracting Set-Aside" provides that the contractor must subcontract 35 percent of the dollar value of the contract to LBE, DBE, or Resident Business Ownerships ("RBOs"). Section M.1.a. provides preference points for any certified prime contractor that is an LBE, DBE, RBO, or DZE certified by the Local Business Opportunity Commission ("LBOC"). Section M.1.a. of the IFB also provides that an LBE will receive a 4 percent reduction in bid price, a DBE will receive a 3 percent reduction in bid price, an RBO will receive a 3 percent reduction in bid price, and a DZE will receive a 2 percent reduction in bid price. (AR, at 3; AR Ex.1). Section M.C. requires that the contractor "shall submit with its bid or proposal a notarized statement detailing its subcontracting plan." Section M.C. further provides that "[o]nce the plan is approved by the Contracting Officer, changes will only occur with the prior written approval of the Contracting Officer." Section M.2 of the IFB entitled "Liquidated Damages" states that if during the performance of the contract, the contractor fails to comply with the subcontracting plan submitted, the contractor shall pay the District \$250.00 per day for each day of noncompliance. (AR, at 3; AR Ex.1).

The Small, Local, and Disadvantaged Business Enterprise Development and Assistance Act of 2005, in its emergency (D.C. Act 16-168) and temporary (D.C. Law 16-14) versions, became effective on July 22, 2005. It repealed the Equal Opportunity for Local, Small, and Disadvantaged Business Enterprises Act of 1998, D.C. Law 12-268, but contains the following savings clause: "An order, rule, or regulation in effect under a law repealed by this section shall remain in effect under the corresponding provision enacted by this subtitle until repealed, amended or superseded." Section 2382(c) of the 2005 Act.

On August 30, 2005, the following six bidders submitted bids: BFI/Allied Waste ("BFI"), Century Disposal ("Century"), TAC, EJays Environmental Services ("EJays"), Urban Service Systems Corporation ("Urban" or "protester"), and F&L Construction ("F&L"). (AR, at 4; AR Ex.5). Both TAC and Urban submitted bids for all seven award groups. TAC's bid contained a temporary certification acknowledgement letter dated August 30, 2005, issued by Jacquelyn A. Flowers, Director

of the Office of Local Business Development ("OLBD"), acknowledging TAC's eligibility for preferences as follows:

[OLBD] received your application for certification into the Local, Small and Disadvantaged Business Enterprise Program. OLBD acknowledges that your business qualifies for participation in the Set-Aside and/or Preference Program established pursuant to the Equal Opportunity for Local, Small, and Disadvantaged Business Enterprises Act of 1998.

Pursuant to the self-certification procedures outlined in the rules promulgated in accordance with this Act, please attach a copy of this letter along with the Self-Certification Affidavit to bids and proposals acknowledging your eligibility for preference in the following industry classifications:

Business Services (Consulting & Management Services)
Transportation & Hauling Services
Local Business Enterprise (LBE)
Small Business Enterprise (SBE)
Disadvantage Business Enterprise (DBE) and
Development Zone Enterprise (DZE)

Your application has been assigned to a certification specialist who will conduct a thorough review of its contents and, if necessary, request additional information. Upon completion of this review, your application will be presented to the Local Business Opportunity Commission (LBOC) for a decision.

Your Temp. Cert. Letter is good until February 26, 2006 or upon the issuance of a certification letter; or denial of certification from the LBOC, which ever occurs first.

(AR, at 4; AR Ex. 6). TAC had submitted the self-certification affidavit to OLBD as part of its initial submission. Ms. Flowers, in an October 7, 2005 affidavit states that:

1. I am the Interim Director for the Department of Small and Local Business Development, District of Columbia Government ("DSLBD").
2. As Interim Director, pursuant to 27 DCMR 818.4(a), I followed the proper procedures when on August 30, 2005, I issued an acknowledgement letter to TAC Transport, LLC ("TAC") acknowledging TAC's eligibility for preferences for Local, Business Enterprise, Disadvantage Business Enterprise, and Development Zone Enterprise.
 - OLDB received the LSDBE application for TAC Transport on May 17, 2005.
 - TAC Transport's application was assigned to Corey Beasley, Certification Specialist on May 18, 2005.
 - OLDB sent an application deficiency letter to TAC Transport on June 16, 2005.

- TAC Transport turned in their application deficiencies and requested a temporary certification on August 5, 2005.
- TAC Transport's LSDBE certification expired on August 12, 2005. The Local Business Opportunity Commission's August meeting was cancelled for the month of August.
- OLBD determined that the TAC Transport application was complete and issued a self-acknowledgment letter on August 30, 2005.

(AR Ex. 7).

In addition, TAC's bid contained a Subcontract Summary Form (AR Ex. 2) in which TAC indicates an intention to subcontract to a firm named WM of MD, Inc., and 9 percent to a firm called LSI. On the "Subcontract Summary Form", TAC indicates that LSI is a minority subcontractor.

On September 13, 2005, Urban filed the instant protest. In its protest, Urban alleges that (1) OCP should reject TAC's bid as nonresponsive for failing to provide a subcontracting plan at bid opening, (2) OLBD improperly issued to TAC the acknowledgement letter qualifying TAC to participate in the preference program, and (3) TAC should not be found responsible and awarded a contract as TAC has no experience in trash collection and recycling and therefore is not a responsible bidder.

On September 21, 2005, OCP applied a 9 percent LSDBE preference reduction to TAC's, Urban's, and F&L's bids, and a 6 percent LSDBE reduction to Ejays' bid. As tabulated, TAC is the apparent lowest bidder for Award Groups I, III, VI, and VII. Urban is the apparent lowest bidder for Award Groups IV and V. Century (with no preference points) is the apparent lowest bidder for Award Group II. (AR, at 4-5; AR Ex.3). The District has not completed its responsibility determinations nor has it made any awards.

DISCUSSION

We exercise jurisdiction pursuant to D.C. Code § 2-309.03(a)(1).

TAC's Entitlement to a 9 Percent Preference Reduction

Urban contends that the contracting officer should not have provided a 9 percent LSDBE preference reduction in evaluating TAC's bid because, at the time of bid opening on August 30, 2005, OLBD improperly determined that TAC was entitled to temporary certification as an LBE, DBE, and DZE. Although TAC had been previously certified as an LBE, DBE, and DZE, Urban argues that TAC "was a multi-million dollar business with the majority of its assets located in Maryland" as of bid opening. According to Urban, re-certification was improper under the prior law, the Equal Opportunity for Local, Small, and Disadvantaged Business Enterprises Act of 1998, and the 2005 Act which became effective as emergency and temporary legislation on July 22, 2005 – a month before bid opening – and made permanent on October 20, 2005, D.C. Law 16-33. TAC submitted its re-certification application on May 17, 2005, while the prior LSDBE law was still in effect. The parties dispute how the new law applies to the facts here.

Urban states that the 2005 Act applies and that under its provisions TAC is not entitled to any bid price reduction. Urban quotes the language of section 2362 of the 2005 Act which provides:

Provisional certification; self-certification prohibited.

(a) The Department may authorize a business enterprise to participate in a program established under this part without receiving a certificate of registration under section 2361; provided, that such authorization shall be granted only when:

(1) A business enterprise is applying for certification in order to bid on a contract or procurement for which responses are due within the next 45 days;

(2) The business enterprise has submitted a majority of the information required under section 2361; and

(3) The Department reasonably believes that the Commission will certify the business enterprise after the business enterprise has submitted all of the information required under this subtitle or regulation promulgated pursuant to this subtitle.

(b) An authorization granted under this section shall not last for more than 120 days.

(c) The Department shall make authorizations under subsection (a) of this section pursuant to rules promulgated pursuant to this subtitle.

(d) A business entity may not self-certify or self-authorize to participate in a program established under sections 2343 through 2349.

Urban claims that under this section, the DSLBD must have a reasonable belief that the LBOC will certify the entity after all required information is provided before it can issue a provisional certification. According to Urban, the District has provided no testamentary or documentary evidence to show that the Department "reasonably believed" that TAC would qualify as an LBE, DBE or DZE under the 2005 Act's new definitions. Finally, Urban urges that subpart (d) of section 2362 of the 2005 Act prohibits TAC from relying solely on its self-certification to obtain a bid price reduction for this solicitation. Urban has raised the issue of TAC's lack of entitlement to certification as an LBE, DBE, or DZE in a complaint it filed with the LBOC (see Urban's Reply Memorandum, Attachment 3). According to Urban, "the LBOC now is considering whether TAC is entitled to certification as an LBE, DBE and DZE. The LBOC may soon very well decide, independently, that OCP was not entitled to rely on the August 30, 2005-acknowledgment letter, as Urban argues in this protest." (Urban Reply Memorandum, at 6, n.6).

The District counters that the 2005 Act, while effective before bid opening, was not "implemented" because the Mayor has not yet promulgated implementing regulations. Alternatively, the District argues that the self-certification was validly done and is not inconsistent with section 2362(d). Although there are ambiguities in the 2005 Act, we need not address them in this protest

because we conclude that the August 30, 2005 acknowledgment letter, issued by the agency during its transition from the OLBD under the 1998 Act to the DSLBD under the 2005 Act, properly constituted a provisional certification under section 2362 of the 2005 Act. The thrust of section 2362 is to replace the self-certification procedures by the applicant with a new procedure for provisional certification determined by the DSLBD. Urban does not challenge that subparts (a)(1)-(2) of section 2362 were satisfied. TAC submitted its recertification well in advance of its prior certification's August 12, 2005 expiration date, requesting temporary certification on August 5, 2005. OLDB/DSLBD determined that the application was complete. The LBOC would have been able to approve or reject the application for re-certification but for its decision not to conduct an August 2005 meeting. In view of LBOC's inaction, the transitional DSLBD issued its acknowledgement letter on August 30, 2005, to grant the provisional certification. Urban focuses on subpart (a)(3) of section 2362 which requires that "the Department reasonably believes that the [LBOC] will certify the business enterprise after the business enterprise has submitted all of the information required under this subtitle or regulations promulgated pursuant to this subtitle." We conclude that the August 30, 2005 acknowledgment letter, as well as the facts articulated by the Interim Director of the DSLBD in her affidavit, demonstrate that the DSLBD reasonably believed that the LBOC will re-certify TAC as an LBE, DBE, and DZE.

Although Urban urges us to review the determination made by the DSLBD, we decline to do so. Urban requested discovery from the Board on the documentation that the DSLBD relied upon in its August 30 determination. In our status conference with the parties on November 2, 2005, Urban stated that it had not sought such documents from the DSLBD because of the belief that a FOIA request would be denied based on an exemption. We ruled that we would not require the District to produce documents from the DSLBD/OLBD beyond what was already in the record because the circumstances do not justify reviewing the validity of the agency's provisional certification determination. Only in exceptional circumstances will we consider such a review, such as where the certifying agency has abdicated its function and we are left with no choice but to decide on the certification so as to protect the integrity of the procurement process and fulfill our statutory obligation under D.C. Code 2-309.08(d) of deciding whether an award complies with applicable law, regulations, and terms and conditions of the solicitation. *Cf. C&D Tree Service, Inc.*, CAB No. P-0440, Mar. 11, 1996, 44 D.C. Reg. 6426, 6433-6439 (Board concluded that bidder was not entitled to LBE or DBE preferences for bid evaluation purposes). In the present matter, Urban is challenging the determination made by DSLBD in a complaint filed with that agency pursuant to the 2005 Act. For purposes of this protest, however, we are satisfied from the record that DSLBD made a determination for provisional certification on August 30, which means that as of bid opening, the contracting officer properly relied on that determination in granting TAC the bid preferences for LBE, DBE, and DZE.

Subcontracting Plan

Urban contends that TAC's bid is nonresponsive since TAC failed to indicate in its bid its intent to subcontract the required 35 percent to LBOC certified entities. The District responds that the submission of a subcontracting plan is a matter of contractor responsibility and not a matter of bid responsiveness. We agree with the District. By signing the bid without reservation, TAC committed itself unequivocally to the terms of the contract, including the 35 percent set-aside subcontracting requirement. *Fort Myer Construction Corp.*, CAB No. P-0685, May 5, 2004, 52 D.C. Reg. 4173, 4175; *C&D Tree Service, Inc.*, CAB No. P-0295, Nov. 2, 1993, 41 D.C. Reg. 3691, 3696-97. The Board

concludes that TAC's bid was responsive and that the District could properly receive the subcontracting plan after receipt of bids and prior to award in order to determine TAC's responsibility.

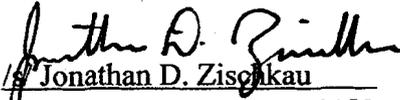
Lack of Requisite Experience and Bidder Responsibility

Finally, Urban alleges that TAC lacks experience in trash collection and recycling services, and therefore should be found a non-responsible bidder. The District states that this ground of the protest is premature because the contracting officer has not yet made any responsibility determination. Although Urban alternatively requests that we stay decision on this issue pending a responsibility determination, we believe the better course is to dismiss the protest ground at this time. If Urban is not satisfied with any forthcoming responsibility determination, it may file a new protest.

For the reasons discussed above, Urban Service's protest is denied in part and dismissed in part.

SO ORDERED.

DATED: November 15, 2005


Jonathan D. Zischkau
JONATHAN D. ZISCHKAU
Chief Administrative Judge

CONCURRING:


Warren J. Nash
WARREN J. NASH
Administrative Judge

that are open to the public. OCP has managed the solicitation, award, and administration of the contract for the Protective Services Division ("PSD") of the District. The solicitation, issued in the set-aside market, called for offers on four separate Aggregate Award Groups and allowed award of each group to a different offeror or to any combination of offerors. The solicitation allowed the award of all four groups to a single contractor. (Agency Report ("AR"), at 3; AR Ex. 1 (Solicitation §§ L.1.1 (page 47) and M.1 (pages 55-56); AR Ex. 19 (Contracting Officer's Business Clearance Memorandum ("BCM") (pages 5-6)); AR Ex. 21 (Declaration of Karen Hester, Contracting Officer ¶ 3).

Among other evaluation criteria, the offerors were to be scored separately for each of award groups 1, 2, 3 and 4, as specified by solicitation section M.1.1, as amended by Amendment 1. (AR Exs. 1 (page 56), 3 (pages 18-19), 19 (§ 4.1, page 5), 21 (¶ 6)). The following were the evaluation factors prescribed by the solicitation: technical factors worth a maximum of 60 points; price factors worth a maximum of 40 points; and LSDBE preference factors worth a maximum of 12 points. (AR Ex. 1 (page 58)). The technical criteria consisted of Experience and Past Performance (maximum of 40 points) and Management Capability (maximum of 20 points). The price evaluation was mathematically determined, with the lowest price offeror receiving the maximum 40 points, and other offerors receiving a proportionately lower total score.

For the Experience and Past Performance technical factor, Section L.3.1.1 states:

Offerors shall submit a technical plan that will detail its understanding of the requirements and its approach to successfully provide services to satisfy the District's requirements. Offerors shall detail its experience with providing security services as required in the RFP including abstracts of experience that would substantiate their qualifications and capabilities to perform the services required by the scope of work.

Section L.3.1.2 states:

Offerors shall submit five (5) references from current or prior customers, using the Past Performance Evaluation Form, Attachment J.9. Offerors shall assure that current and past performance customers listed in the proposal complete and sign the Performance Evaluation Form and return them with the proposal. The District reserves the right to contact known present customers of the Offeror, or past customers in the last three (3) years NOT provided as a reference, and the information received may be used in the evaluation of past performance. In addition, offerors shall provide the following information for each reference submitted: name and location of the project, brief description of the project, contract number, original and final contract value, start and completion date and email, fax and telephone number of the person providing the reference.

Regarding the technical factor for Management Capability, Section L.3.2 ("Section 2 – Management Plan") provides:

L.3.2.1 The Offeror shall submit a management plan detailing its organizational structure and quality assurance mechanisms including financial and accounting controls. This section shall contain all pertinent information relating to the Offeror's organization,

including resumes of personnel to be assigned and the percentage of time that each will devote to the contract.

L.3.2.2 Each proposal shall identify the aggregate group(s) (Attachment J.1), for which the offeror wishes to be considered. Each group shall be listed in the order of priority in which the offeror wishes to be considered.

L.3.2.3 This section shall also include the following information: (a) Location of headquarters; (b) A chart of the offeror's internal organization which shows the number of full-time personnel and their level of responsibility within that organization; and (c) The name of the person who manages the firm and makes policy.

Eleven offerors responded to the solicitation by submitting proposals. Five of the proposals were not evaluated, having been disqualified because either they were submitted later than the September 7, 2004 due date or were submitted by companies not certified for the set-aside market. Among the offerors entering the evaluation and selection process were Hawk One and Watkins. (AR, at 3-4; AR Ex. 19 (pages 5-6); AR Ex. 21 (¶¶ 3, 8)). The District commenced with technical and price evaluation of the remaining six proposals the week after the submission date for offers. OCP performed the first evaluation of initial offers with the assistance of a technical evaluation panel ("TEP") from the Protective Services Division ("PSD") of the D.C. Office of Property Management ("OPM") and cost/price analysts from OCP. This evaluation considered both technical and price factors.

The contracting officer held an orientation meeting with the TEP members on September 14, 2004, and provided them with the proposals and a "Proposal Evaluation Guidelines and Instructions" document to assist them in their evaluation. (AR Ex. 19; AR Ex.19(a); AR at 6). The Guidelines included rating sheets for the two technical factors, Management Capability and Experience and Past Performance, but these rating sheets did not provide for scoring at any subfactor level of detail. Therefore, the TEP members developed consensus subfactor ratings for the two technical factors, agreeing on subfactors and assigned corresponding point values for each subfactor, such that the total of the maximum subfactor points equaled the maximum number of points for the corresponding factor. The TEP members took the subfactors that they incorporated in the rating worksheet (see AR Ex. 22, Attachment), from the Proposal Evaluation Guidelines and Instructions which in turn was based on section L.3 of the solicitation. (AR at 11-12; AR Ex. 22, Declaration of Chief Bracy, PSD, TEP Panel Chairman). According to the TEP panel chairman, the TEP members individually used this subfactor rating worksheet to score each offeror's initial proposal (as well as the subsequent BAFO). (AR at 12).

The TEP members performed individual evaluations of the initial proposals. Each member used the subfactors and subfactor point values as guides to arrive at a total numerical score for each factor and a total technical score for both factors. Each also provided narrative ratings and evaluation comments on the strengths and weaknesses of each proposal. The TEP provided an initial "Technical Evaluation Summary Report" to the contracting officer on October 6, 2004. The record contains a "Consensus Report" dated October 4, 2004, signed by the TEP members and providing in spreadsheet form consensus evaluation scores for the six offerors being evaluated. (AR Ex. 19(b)). Hawk One received a consensus score of 35 for the Experience and Past Performance factor and 17.5 for the Management Capability factor, for a total consensus technical score of 52.5 (out of 60). Watkins received a consensus score of 25 for the Experience and Past Performance factor and 20 for the

Management Capability factor, for a total consensus technical score of 45 (out of 60). The other 4 offerors total technical scores were lower than the totals for Hawk One and Watkins.

After reviewing the report, the contracting officer re-directed the TEP "to clarify some of the narratives and evaluate each Offeror's proposal strictly against each criteria in the solicitation and to provide evaluator narratives detailing strengths and weaknesses for each evaluation factor." (AR Ex. 19, at 8). The TEP resumed their technical evaluations of the proposals and prepared individual evaluations on rating forms that are dated for the most part as of October 14 and 15, 2004. (AR Ex. 11). One evaluator's rating sheets for Watkins show scores of 34 for Experience and Past Performance and 17.5 for Management Capability, for a total of 51.5 out of 60 for the technical evaluation. Another evaluator's rating sheets for Watkins show scores of 30 for Experience and Past Performance and 15 for Management Capability, for a total of 45 out of 60 for the technical evaluation. The third evaluator's rating sheets for Watkins show scores of 34 for Experience and Past Performance and 18 for Management Capability, for a total of 52 out of 60 for the technical evaluation. For Hawk One, the rating sheets of the three TEP members show total technical ratings of 56, 53, and 49, out of the 60 maximum possible. (AR Ex. 11).

On October 15, 2004, the TEP members again met to discuss their evaluations and ratings and then determined a consensus evaluation for the six offerors. (AR Ex. 22, ¶ 5). The results are documented in a memorandum dated October 15, 2004, addressed to the contracting officer (Karen Hester) from the TEP chairman (Arnold Bracey). (AR Ex. 19(b)(1)). The one-page memorandum provides in relevant part:

Please find the following technical evaluations for your review. Each proposal was evaluated with strict conformity to the evaluation criteria in Section M.5 of the RFP. The Committee members evaluated and scored each proposal separately and then developed a consensus score.

The Committee utilized an objective scoring system strictly adhering to requirements and criteria listed in section L of the solicitation to develop the consensus score.

Using the above referenced scoring system the proposals scored as follows:

Hawk One	52.5 (Good)*	All Agg Grps
Watkins	45 (Acceptable)*	All Agg Grps

....

* It is the Committee's belief that these proposals can be easily corrected to address weaknesses in the BAFO process

The Committee also included the individual evaluations with comments.

It appears that the individual evaluation sheets were attached to this memorandum. Two of the three TEP members transferred individual factor scores and the total technical score to the factor rating sheets that the contracting officer had provided in the Proposal Evaluation Guidelines and Instructions, and included narratives of strengths and weaknesses on the factor rating sheets. They submitted to the

contracting officer the factor rating sheets, which included only the total numerical scores and narrative descriptions of strengths and weaknesses for each factor. These two members did not submit their subfactor rating sheets with the subfactor numerical scores. The third member submitted the factor rating sheets with the numerical scores but also submitted his subfactor rating sheets containing all of his numerical factor and subfactor ratings and narrative ratings. (AR at 12; AR Ex. 22, ¶ 4; AR Exs. 11, 12).

The contracting officer received the consensus report and evaluation sheets on October 19, 2005. (AR Ex. 19, BCM ¶ 5.2, at 8). After the initial technical evaluations were made by the TEP and the price evaluation was completed by the OCP analysts, the contracting officer made an independent evaluation of the proposals. (AR Ex. 21, ¶ 5, 8-11; AR Ex. 19, BCM, at 8-15). The contracting officer noted, *inter alia*, that Hawk One presented an excellent understanding of the District's requirements, that the proposal provided detailed information in response to the technical requirements of the scope of work, that Hawk One showed security services experience and submitted four of the required five references that were verified by OCP. The fifth reference related to its performance of security services for the District's Protective Services Division of OPM (covering over half of the facilities for which the District was seeking security services under this solicitation). Hawk One had submitted a reference form for the city-wide security services predecessor contracts to the contracting officer's technical representative, who happened to be Arnold Bracy, the TEP chairman for this solicitation, and Chief of the Protective Services Division. He states in an affidavit that Hawk One had timely requested by fax that he prepare a performance evaluation of Hawk One which it would include in its proposal as one of the five references. Bracy states:

For various reasons, I did not complete the evaluation form by the time the TEP met to evaluate initial proposals. I believed, and still believe, that Hawk One had requested the evaluation in a timely manner and should not be penalized. Therefore, I provided oral reports of Hawk One's good performance to the other TEP members when we performed the evaluations of the initial offers and to the Contracting Officer when she was performing her evaluation. . . .

(AR Ex. 29 ¶ 4). Bracy further states in his affidavit that he completed the past performance reference form for Hawk One on October 29, 2004.

The contracting officer's independent evaluation of Watkins' proposal noted that Watkins presented an "acceptable understanding" of the District's requirements, demonstrated capability with projects of similar size and scope with an "impressive past experience" that included the entire D.C. Public School System and two other contracts. The contracting officer noted that Watkins had submitted 3 of the required 5 references and that two references were verified by OCP while the reference from DCPS had not been verified. (AR Ex. 19, BCM, at 9). The contracting officer provides additionally in her assessment:

Major requirements of the security program were adequately addressed in the proposal, including management philosophy, recruitment and quality assurance. However, the proposal does not address the 16 hour first aid/CPR requirement or the 16 hour supervisory training requirement.

The evaluation committee rated Watkins' proposal as "Acceptable". Overall the Contracting Officer concurs with the findings of the evaluation committee.

(AR Ex. 19, BCM, at 10).

The contracting officer, in her Business Clearance Memorandum, reviewed the price analysis of the initial proposals, in which Hawk One received scores for the aggregate groups of 39, 39.3, 31, and 39.4, while Watkins received scores of 37, 37, 30, and 37. (AR Ex. 19, BCM, at 13-15). The contracting officer ranked the offerors according to highest overall score to lowest, for purposes of the competitive range determination, and Hawk One ranked first followed by Watkins in second place.

For preference points under the LSDBE Act, Hawk One received 9 points and Watkins received 6 points. (AR Ex. 19, BCM, at 8). At the time it submitted its proposal and supporting documents, Hawk One possessed a valid, current certification from the District's Local Business Opportunity Commission ("LBOC") that it was a Local Business Enterprise ("LBE"); a Small Business Enterprise ("SBE"); a Disadvantaged Business Enterprise ("DBE"); and a business located in a Development Enterprise Zone ("DEZ"). The certification was valid through June 24, 2005. (AR Ex. 20). Hawk One submitted the certification with its proposal and, in the proposal, identified its business address as 3172 Martin Luther King Avenue, S.E., Washington D.C. 20032, the same address used by the LBOC in its above certification. (AR Ex. 6 (page 18); AR Ex. 20). Based upon the LBOC certification, the contracting officer awarded Hawk One nine LSDBE preference points, consisting of two points for DEZ status; four points for LBE status; and three points for DBE status. (AR Ex. 19 (pages 8, 25)).

In a memorandum to the contracting officer dated November 15, 2004, submitted as an addendum to the October 15 memorandum consensus report, the TEP chairman stated that the TEP's initial scores "also represented the order of the aggregate group we felt they [the offerors] were best qualified for. . . ." (AR Ex. 19(b), at 2). The list showed Hawk One with aggregate group I, Watkins with group II, and two other offerors with groups III and IV.

Written discussions were conducted with the offerors in the competitive range. The contracting officer requested BAFOs from the offerors by letters dated November 23, 2004. The letters requested specific responses to questions posed to each offeror. In the letter to Watkins, one of the questions reads:

Offeror submitted three of the five references from current or prior customers, using the Past Performance Evaluation Form as required by Paragraph L.3.1.2. If the Offeror has no other references to submit please so state.

(AR Ex. 7). Hawk One and Watkins submitted BAFOs by the December 3, 2004 deadline.

Upon receiving the BAFOs and accompanying information from the offerors, each TEP member individually re-evaluated the technical proposals in light of the new information in the BAFOs. (AR Ex. 12). The TEP members then met, discussed the evaluations, and arrived at a consensus final evaluation, memorialized in a memorandum dated December 16, 2004, that the TEP submitted to the contracting officer. (AR Ex. 19(f)(1); AR Ex. 22, ¶ 5; AR Ex. 19). The contracting officer summarized the TEP's evaluation of the BAFOs together with the initial proposals as follows:

The [TEP's] initial scores provided the baseline scores upon which the BAFO technical proposals were evaluated. Upon evaluation of the BAFO submissions, the Panel adjusted up or down or left intact the baseline scores. Although adjustments were made to the scores of four (4) Offerors after evaluation of the BAFO submission, the ranking of the Offerors remained the same as it was after the initial evaluation. . . .

(AR Ex. 19, BCM, at 22). The contracting officer summarized the TEP's BAFO evaluation for each offeror, noting that Hawk One's technical score increased by one point and its adjectival rating remained "good." For Watkins, the summary provided as follows:

One panel member noted that the Watkins . . . BAFO did not adequately describe its supervisory curriculum and that it was confusing. Two additional references were submitted that rated the firm as outstanding. Past performance evaluation form from [customer] did not include the contract cost and period of performance. The panel increased the Offeror's technical score by five (5) points which raised the rating from "acceptable" to "good."

(AR Ex. 19, BCM, at 22-23).

In her independent assessment of the BAFO submissions, the contracting officer indicated that Hawk One's weaknesses in its initial proposal were addressed in the BAFO and that she agreed with the TEP assessment that the proposal was "good." The contracting officer similarly indicated that Watkins's BAFO had "addressed all questions raised by the District" and that she agreed with the TEP's rating of Watkins' proposal as "good." (AR Ex. 19, BCM, at 23-24).

The contracting officer received the price analysis report in early January 2005. Based upon the technical evaluations, price evaluations, and preference points awarded, the contracting officer concluded in her source selection decision to award all four aggregate groups to Hawk One because Hawk One was the highest ranked offeror under each award group. In a table listing the scoring data, for aggregate group 1, Hawk One had a technical score of 53.5, a price score of 39, and preference points of 9, for a total of 101.5 points. Watkins had a technical score of 50, a price score of 38.9, preference points of 6, for a total of 94.9 points. The other three aggregate groups had nearly identical scoring differentials. (AR Ex. 19, BCM, at 25). The contracting officer determined that Hawk One was a responsible contractor, with the resources, experience and financial capability to perform the requirements of all groups and to comply with the proposed performance schedules for the four groups, considering all existing commercial and governmental business. (AR Ex. 21 ¶ 12; AR Ex. 19, BCM, at 26; AR Ex. 19(g)).

From February 7, 2005, when the contracting officer issued the recommendation for award to Hawk One, until award of the contract to Hawk One on May 16, 2005, OCP was awaiting approval of the award recommendation by the District of Columbia Council. OCP prepared a recommendation for award for review by the Council, forwarded the recommendation, and awaited action by the Council and other officials that were involved in the recommended-approval action prior to its submission to the Council. By letter on May 13, 2005, the Council informed OCP that it was authorized to award the contract to Hawk One, because, on May 9, 2005, the award had been "deemed approved by virtue of the

Council having taken no action to disapprove it." During this extended pre-award period, OCP did not reopen discussions or negotiations with Hawk One or any other offeror after the source selection was made. (AR Ex. 13; AR Ex. 21, ¶¶ 13, 14).

The contracting officer conducted a debriefing for Watkins on August 3, 2005, having received notice from OCP's general counsel on July 25, 2005, of Watkins' request for debriefing. Watkins states that it requested the debriefing on May 18, 2005, a day after it received notice of the award to Hawk One. During the debriefing, Watkins was advised that it was the second-highest ranked offeror, that Hawk One's price was slightly less than Watkins, and that the point totals were "very close." (Protest, CAB No. P-0711, at 5). There was a lengthy discussion of attempts by the contracting officer's staff to verify the past performance evaluation of Watkins work on the then-continuing D.C. Public Schools ("DCPS") security contract though the parties disagree as to what was said.

On August 17, 2005, Watkins filed its first protest, docketed as CAB No. P-0711. In its protest, Watkins alleges that (1) the technical evaluation of Watkins' and Hawk One's proposals was irrational and inconsistent with the solicitation's evaluation criteria, and (2) Hawk One was not financially responsible and was ineligible for award. Watkins later withdrew its second count. Regarding the technical evaluation, Watkins contends that it was improperly downgraded due to the inability of the evaluators to obtain telephone confirmation from the author of the DCPS past performance evaluation of Watkins. In addition, Watkins states that it was wrongly downgraded for an allegedly deficient supervisory curriculum. In its protest, Watkins states that it received a redacted copy of the contracting officer's Business Clearance Memorandum on August 13, 2005. On August 26, 2005, Watkins filed its second protest, docketed as CAB No. P-0712, developing in more detail its attack on the technical evaluation of Hawk One and Watkins, and raising a third count challenging the award of 9 preference points to Hawk One.

The District filed its Agency Report on September 20, 2005, including a motion to dismiss certain grounds. Watkins filed comments on the Agency Report on September 29, 2005. The District responded to the comments on October 17, 2005, including an attachment with supplementary exhibits to the Agency Report. Watkins filed supplemental comments, including a motion styled as one for summary judgment, on October 26, 2005. In this submission, Watkins alleges that the drop of about 7.7 points in the Experience and Past Performance factor from the individual evaluations to the TEP consensus evaluation is unsupported in the record and this point differential carried through to the final BAFO evaluations. The District responded on November 9, 2005, and Watkins filed a reply on November 10, 2005.

DISCUSSION

We exercise jurisdiction pursuant to D.C. Code § 2-309.03(a)(1).

Experience and Past Performance Evaluation

Watkins' main challenge to the technical evaluation focuses on the Experience and Past Performance evaluation factor scoring. During evaluation of the initial proposals, the three technical evaluation panel members gave Watkins individual past performance scores each of 34, 34, and 30 out of a total possible score of 40 but during their consensus evaluation meeting, they came up with a score

of 25 for Watkins, reflecting a drop of about 7.7 points. Based on our review of the record, we see no basis for finding that the initial consensus evaluation was irrational or unsupported. The TEP members noted deficiencies in Watkins failure to provide two of the required five references. Although four references were included, one was so incomplete that it was discounted entirely. One reference gave an "outstanding" rating, another had an overall rating of "good" but with over half of the individual rating factors being only "satisfactory", and the third valid performance form gave Watkins a "very good" overall rating. Hawk One's four written past performance references were uniformly "very good" or "outstanding." Although Chief Bracy should have completed his written evaluation of Hawk One so that it could have been submitted with Hawk One's proposal, we do not find under the circumstances that it was improper for him to provide an oral assessment of Hawk One's performance to the other TEP members during the initial proposal consensus meeting. The contracting officer provided her own independent evaluation of the initial proposals which concisely described the strengths and weaknesses of each proposal. It is clear from the record that the subsequent BAFOs and re-evaluation of the proposals in light of the BAFOs led the TEP members to increase their rating of Watkins experience and past performance from 25 to 30 points, which no doubt took into account the newly submitted reference with an overall rating of "outstanding." While Watkins total score for this evaluation factor was still a few points below the final evaluation score of Hawk One, we find adequate support in the record for the conclusion of the TEP that Hawk One's experience and past performance was rated higher than Watkins'. Beyond simply one incomplete reference for Watkins (having an overall rating of "satisfactory"), there is support that the references, experience, and past performance of Hawk One were rated better than Watkins'. The contracting officer properly conducted her own independent evaluation of the proposals in light of the BAFOs and came to the same conclusion as the TEP with regard to the final technical evaluations.

Watkins contends that it learned of a downscoring of its past performance at the debriefing conducted by the contracting officer on August 3, 2005. The District responds that Watkins misunderstood the debriefing information and denies that such downscoring occurred. Watkins claims that the score for its proposal had been downgraded because of the contracting officer's inability to contact the cognizant DCPS representative by telephone. The contracting officer states that OCP personnel had already received emailed confirmation of the DCPS rating, signed March 8, 2004, for performance prior to that date which Watkins had submitted with its proposal. (AR Ex. 5, pages 28-29). The contracting officer states that she did not reduce Watkins' numerical score awarded by the TEP based upon this issue. Further, the TEP chairman states that he did not downgrade the Watkins score based upon lack of telephone confirmation of the DCPS reference and, from his recollection of TEP discussions, does not believe that the other TEP members had done so. None of the TEP members noted deficiencies for the DCPS rating, although two did mention that another of the required performance evaluations submitted by Watkins (AR Ex. 5, page 27) was incomplete, because it omitted information required on the form by solicitation section L.3.1.2. (AR Ex. 21, ¶ 15; AR Ex. 22, ¶ 7; AR Exs. 11, 12). We find no basis for concluding in the evaluation record that Watkins was downgraded for lack of telephone confirmation of the DCPS reference.

Watkins also argues that it has greater experience than Hawk One in performing large and complex security contracts and that Hawk One should have been scored lower than Watkins, not higher. We agree with the District that the record shows Hawk One had experience with large and complex security contracts. The work for the District government is reflected in the record and the contracting officer concluded that the past performance of a predecessor company, Eastern Shield, did not detract

from this experience.

Management Capability Evaluation

Watkins argues that the District did not fairly evaluate Watkins' and Hawk One's proposals regarding the supervisory curriculum component of the management capability factor. Watkins had received 20 points under Management Capability covering all elements of this factor, both at the initial proposal stage as well as after BAFO evaluation. Watkins complains, however, that Hawk One should not have been as highly rated as Watkins because Hawk One's supervisory curriculum consisted of only one paragraph in its proposal compared to the multi-page lesson plan summaries found in Watkins' BAFO. Although some of the evaluation materials seem to cite deficiencies in Watkins' initial proposal and BAFO on this point, Watkins nonetheless was not downgraded in any way. Hawk One's initial proposal submission, though far less detailed than Watkins' BAFO materials, was apparently sufficiently stated to meet the specification requirement and receive appropriate credit for this one element of the overall management capability factor from the TEP and the contracting officer. We are not persuaded that the evaluation on this element of the management capability factor was unreasonable or demonstrated unequal treatment of the offerors.

Watkins also contends that Hawk One had a deficiency in its management section of the proposal after BAFO, namely that Hawk One had not submitted required resumes as part of its management plan. The requirement in solicitation section L.3.2.1 is for "resumes of personnel to be assigned and the percentage of time that each will devote to the contract." The District agrees that the biographical data that Hawk One submitted with its proposal were not literally traditional resumes. (AR Ex. 6, at 92-99 of 104). The District contends that the Hawk One submission met the requirement for resumes and that the TEP and contracting officer properly so found. Hawk One did not cure this issue in its BAFO submission, but relied upon its original proposal biographies. The contracting officer did not consider the lack of resumes to be a deficiency that would require downgrading of the management section of Hawk One's proposal from the good rating by the TEP. She determined that the biographies submitted by Hawk One contained the necessary information and thus served the same purpose as resumes. We conclude that the contracting officer did not violate the terms of the solicitation in concluding that the biographies submitted by Hawk One were the functional equivalent of the resumes required by the solicitation.

Documentation of the Technical Evaluation

Watkins argues that the technical evaluation was not adequately documented. Clearly, the October 15, 2004 consensus report for the initial proposals should have contained detailed narrative explaining the consensus evaluation of the TEP according to the evaluation factors set forth in the solicitation. Although the rather lean one-page consensus report fails to document the consensus evaluation including strengths and weaknesses, we find that the contracting officer's detailed evaluation in the Business Clearance Memorandum, when considered with the evaluation rating sheets of the TEP, provide adequate documentation of the technical evaluation, both at the initial proposal evaluation stage as well as at the BAFO evaluation phase. Regarding the BAFO evaluation, we think the contracting officer should have recorded in her Business Clearance Memorandum more detail concerning her independent BAFO technical evaluation, including strengths and weaknesses, according to the evaluation factors. Nevertheless, when viewing the totality of the record, we conclude that the

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technical evaluation was adequately documented.

Watkins' citation to the lack of documentation relating to the November 15, 2004 memorandum from Bracy is of little relevance. The memorandum does not, in our view, reflect a significant event in the evaluation of the proposals. In sum, we believe the evaluation documentation found in the record adequately documents the basis for the evaluations conducted by the TEP and the contracting officer.

LSDBE Preference Points awarded to Hawk One

The District has moved to dismiss this protest ground as untimely because Watkins knew of the underlying facts long before it filed this protest count on August 26, 2005. We agree with Watkins that the ground was timely filed because Watkins did not know that this issue prejudiced it until it received the Business Clearance Memorandum of the contracting officer.

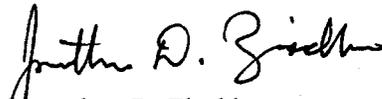
On the merits, we conclude that the contracting officer did not err in awarding 9 points to Hawk One. There is no question that Hawk One was properly certified as of the date it submitted its proposal and therefore met the certification requirements for all of the LSDBE preferences, including the DEZ preference. It continued to be certified through the date of contract award. The fact that Hawk One's certification was to expire approximately a month after award does not form a basis for negating the application of the preference points here.

CONCLUSION

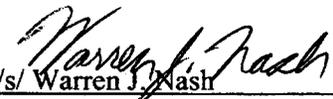
Watkins has not demonstrated that the technical evaluation of Hawk One and itself violated law or the terms of the solicitation. We find that the record adequately supports the findings of the TEP and the contracting officer. The contracting officer properly made an independent and thorough evaluation of the proposals as supplemented by the BAFOs, and we find no error in either her ultimate rankings or in the source selection. We have carefully considered each of Watkins' arguments, but conclude that the award should be sustained. Accordingly, for the reasons discussed above, Watkins' consolidated protests are denied.

SO ORDERED.

DATED: December 21, 2005


/s/ Jonathan D. Zischkau
JONATHAN D. ZISCHKAU
Chief Administrative Judge

CONCURRING:


/s/ Warren J. Nash
WARREN J. NASH
Administrative Judge

GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

PROTEST OF:

TRAFFIC LINES, INC.)	
)	CAB No. P-0715
Under Solicitation IFB)	
No. POKA-2005-B-0011-CR)	

For the Protester, Traffic Lines, Inc.: John W. Wopat, III, Esq., Efros & Wopat. For the Intervenor, D.C. Lines, Inc.: Robert A. Klimek, Jr., Esq. For the Government: Howard S. Schwartz, Esq., and Talia S. Cohen, Esq., Assistant Attorneys General, District of Columbia Government.

Opinion by Administrative Judge Warren J. Nash, with Chief Administrative Judge Jonathan D. Zischkau, concurring.

OPINION

(Lexis-Nexis Filing ID 7698144)

Protester Traffic Lines, Inc., alleged in its protest that the District had improperly rejected Traffic's bid as late. The District's Agency Report and the Intervenor's brief assert that the Board must reject Traffic's bid because the bid was late. The Board agrees that the District properly rejected Traffic's bid as late.

BACKGROUND

The District of Columbia Department of Transportation ("DDOT"), Office of Administrative Services, Construction Procurement Support Branch, issued WASA issued Solicitation No. POKA-2005-B-0011-CR for FY 05 Federal Aid Hot Thermoplastic Pavement Marking. On August 25, 2005, DDOT issued an amendment changing the bid opening date to August 29, 2005. The bid opening time remained at 2:00 p.m. (AR Ex. 1). The bid form required bidders to submit their bids to the Department of Transportation, Office of Administrative Services, Construction Procurement Support Branch, 2000 14th Street, NW, 3rd Floor, Washington, DC, 20009. (AR Ex. 1). The IFB also required bidders to mark the bid in the following manner:

Mark envelope in upper left corner as follows:
 Invitation No.: **POKA-2005-B-0011-CR**
 To be opened (date):
 At 2:00 P.M.

According to the protester, DHL Express delivered on August 29, 2005, at 10:21 A.M., a package to Temisha Lassiter, Customer Services Representative, Traffic Services Administration, DDOT. The package was addressed to the "Government of the District of

Columbia, 2000 14th St., N.W. 3rd floor, Washington, DC 20009, Contracting and Procurement, 202-698-3602. (AR Ex. 2). There were no markings on the package to indicate that the package included a bid.

Ms. Lassiter placed the package in the Field Operations Box so that the package could be sent to Mr. Frank Pacifico. (AR Ex. 5). At approximately 3:05 p.m., Mr. Pacifico came to retrieve his mail. Mr. Pacifico told Ms. Lassiter that the package should have been delivered to the bid room. (AR Ex. 5). At that point, Ms. Lassiter took the package to the bid room at approximately 3:17 P.M. (AR Ex. 3). On September 21, 2005, the Contracting Officer notified Traffic by letter that the District had rejected Traffic's bid because the bid was late. On September 30, 2005, Traffic filed its protest. D.C. Line, Inc., intervened in the protest on October 19, 2005.

DISCUSSION

Traffic asserts in its protest that the bid was timely delivered to the required address, and that it has no control over the internal routing of mail at the building. Traffic also asserts that it could not determine whether the low bidder, D.C. Line, Inc., truly exists. Because we conclude that Traffic's bid was untimely delivered, there is no need to address Traffic's assertion regarding the existence of the low bidder.

The District asserts that the protester's delivery vendor, DHL Express, delivered the package to the address noted on the package, and that the package did not include the delivery markings set forth in the IFB.

D.C. Code § 2-303.04 governs procurement by competitive sealed bidding. Title 27, Chapter 15, sets forth the procurement regulations applicable to competitive sealed bidding. Regulations addressing receipt of bids are set forth at 27 DCMR § 1523.2 and regulations governing consideration of a late bid for award are set forth at 27 DCMR § 1523.5. In pertinent part, these regulations provide:

1523.2 Any bid received at the place designated in the solicitation after the time and date set for receipt of bids shall be considered a "late" bid unless it was received prior to the contract award and either of the following applies:

- (a) It was sent by registered or certified mail not later than five (5) calendar days before the bid receipt date specified; or
- (b) It was sent by mail (or telegram if authorized) and the contracting officer determines that the late receipt was due solely to mishandling by the District after receipt at the location specified in the IFB.

As a general rule, bidders are responsible for delivering their bids to the proper place at the proper time. A late bid delivered by a commercial carrier may not be considered where it is late due to the failure of the bidder to fulfill its responsibility for ensuring timely delivery to the designated location. If the bidder did not significantly contribute to the late delivery, and the sole or paramount cause of the bid's late receipt in the bid opening room is due to government mishandling, the bid should be considered timely submitted. *See W.S. Jenks & Son*, CAB No. P-

0644, Aug. 14, 2001, 49 D.C. Reg. 3374, and *Quest Diagnostics*, CAB No. P-0480, July 9, 1997, 44 D.C. Reg. 6849.

Here, Traffic significantly contributed to the late delivery by failing to properly address the envelope containing its bid and by failing to deposit the bid at the location indicated in the solicitation ("Government of the District of Columbia" rather than "Department of Transportation, Office of Administrative Services, Construction Procurement Support Branch, 2000 14th Street, NW, 3rd Floor, Washington, DC 20009").¹ Traffic also failed to indicate the Invitation number and bid opening date and time on the upper left corner of the envelope.

Accordingly, the contracting officer did not violate law or regulations in concluding that Traffic's bid was untimely. We deny the protest.

SO ORDERED.

DATE: December 21, 2005


/s/ Warren J. Nash
WARREN J. NASH
Administrative Judge

CONCURRING:


/s/ Jonathan D. Zischkau
JONATHAN D. ZISCHKAU
Chief Administrative Judge

¹ We note that the address set forth on the bid form at the bottom of the page in the instructions for marking the bid envelope ("Address as follows") does not contain the line "Department of Transportation" that is included in items 1 and 3 in the instructions at the top of the Title Page (MD Ex. 1). However, Traffic did not mark its bid with either variation of the address.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

PROTEST OF:

CONFIGURATION, INC.)	
)	CAB No. P-0713
Under Request for Task Order Proposals)	
No. DCJA-2005-T-0048, under GSA Federal)	
Supply Schedule GS 29F0165G)	

For the Protester, *pro se*, Christopher Powell, President, Configuration, Inc. For the Government: Howard S. Schwartz, Esq., Senior Assistant Attorney General, and Jon N. Kulish, Esq., Assistant Attorney General, District of Columbia Government.

Opinion by Administrative Judge Warren J. Nash, with Chief Administrative Judge Jonathan D. Zischkau, concurring.

OPINION

(Lexis-Nexis Filing ID 7740130)

Protester Configuration, Inc., alleges that the District improperly awarded the above GSA task order to Standard Office Supply/Standard Business Furniture (“Standard”). In its Motion to Dismiss, the District asserts that the District determination voiding the GSA task order renders moot the Configuration protest. The Board agrees that the void task order moots the protest.

BACKGROUND

The District of Columbia Office of Contracting and Procurement (“OCP”) on August 16, 2005, issued a Request for Task Order Proposal, DCJA-2005-T-0048 (“RTOP”) under GSA Federal Supply Schedule No. GS 29F0165G for furniture removal, design, purchase, and installation for the Department of Human Services (“DHS”). (Motion to Dismiss (“MD”) Ex. 1). OCP issued technical amendments on August 22, 2005, and August 24, 2005. (MD Ex. 1). Standard and Configuration submitted proposals to OCP on August 29, 2005. OCP evaluated the proposals and determined that Standard was the highest scored vendor. (MD Ex. 3). On August 31, 2005, OCP issued to Standard purchase order PO161904-V2 for delivery and installation of office furniture. (MD Ex. 2). On September 7, 2005, Configuration filed its protest with the Board.

On September 9, 2005, OCP declared void purchase order PO161904-V2. (MD Ex. 2 and 3). By Determination and Findings to Declare Contract Void, dated September 14, 2005, and approved by the Chief Procurement Officer on September 15, 2005, the Contracting Officer set forth several deficiencies in the evaluation process. The Contracting Officer recommended that the Chief Procurement Officer determine that the contract was entered into in violation of the Procurement Practices Act and is therefore void. By letter dated September 14, 2005, the

Contracting Officer notified Standard that Standard's purchase order PO161904-V2 was void *ab initio*.

By Determination and Findings for Sole Source under Federal Supply Schedule, dated September 19, 2005, the Contracting Officer memorialized a sole source purchase order that had been issued to Standard on September 14, 2005, for the purchase of furniture. (MD Ex. 5). On September 21, 2005, the District filed its motion to dismiss.

CONCLUSION

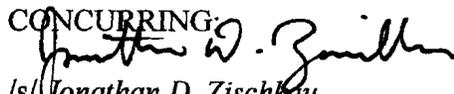
Configuration asserts that OCP improperly evaluated Standard's proposal under the GSA Schedule, and that OCP should void the award. OCP, in its Determination and Findings to Declare Contract Void, dated September 14, 2005, voided the purchase order that is the subject of the protest.¹ Because OCP voided purchase order PO161904-V2, there remain no grounds for a protest and thus the protest is moot. Accordingly, the Board dismisses the protest.

SO ORDERED.

DATE: December 29, 2005


/s/ Warren J. Nash
WARREN J. NASH
Administrative Judge

CONCURRING:


/s/ Jonathan D. Zischkau
JONATHAN D. ZISCHKAU
Chief Administrative Judge

¹ Subsequent to voiding the evaluated purchase order, OCP awarded to Standard on September 14, 2005, a sole source purchase order for the furniture. In the determination and findings to justify sole source award, OCP set forth the District's minimum need by stating that DHS needed to purchase furniture which would match and could be interchanged with Trendway furniture that DHS currently uses. DHS determined that Standard is the only GSA vendor that can provide the Trendway furniture and that Standard is also certified as a District local, small, and disadvantaged business enterprise.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

PROTEST OF:

The ARRIBA Center)	
1925 K Street, N.W. #220)	CAB No. P-0718
Washington, D.C. 20006)	
)	
Under Education Grant RFA 1215-06)	

For the Protester, Arriba Center: Dr. Cris Covelli, Executive Director, Arriba Center. For the Government: Howard S. Schwartz, Esq., and Talia S. Cohen, Esq., Assistant Attorneys General, District of Columbia Government.

Opinion by Administrative Judge Warren J. Nash, with Chief Administrative Judge Jonathan D. Zischkau, concurring.

OPINION

(Lexis-Nexis Filing ID 10458203)

Protester Arriba Center alleged in its protest that the District had improperly excluded Arriba from the award of a grant under Education Grant Request for Applications ("RFA") No. 1215-06. The RFA closed on July 15, 2005. On October 20, 2005, Arriba filed its protest. The District filed a Motion to Dismiss the protest, asserting that the Board lacks jurisdiction to review a grant award. The Board agrees and dismisses the protest.

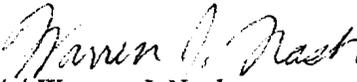
DISCUSSION

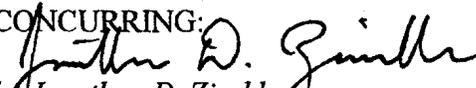
On May 26, 2005, the Office on Latino Affairs ("OLA") issued RFA No. 1216-06 for award of educational grants (Motion to Dismiss, Ex. 1). The source of the grant funds is the OLA Latino Community Education Grant Program. Arriba submitted its application to OLA in response to the RFA. The FY 2006 Latino Community Education Grant Program offers grants of up to \$85,000 to community based organizations located in the District of Columbia. The grant funds are intended to enhance existing and startup programs focused on education and job preparedness. A successful application for the funds would result in a grant to the party that submitted the application.

The Board's jurisdiction is established by the Procurement Practices Act. D.C. Code § 2-309.03 (2001 ed.). That Act specifically excludes from its coverage, and therefore from the Board's jurisdiction, any "contract or agreement receiving or making grants-in-aid or for federal financial assistance." *Id.* § 2-301.04(b). Since this matter relates to the award of a grant, the Board is without jurisdiction. *Community Health Ministry*, CAB No. P-0665, Mar. 25, 2003, 50 D.C. Reg. 7486.

The protest is dismissed for lack of jurisdiction.

DATE: January 31, 2006


/s/ Warren J. Nash
WARREN J. NASH
Administrative Judge

CONCURRING:

/s/ Jonathan D. Zischkau
JONATHAN D. ZISCHKAU
Chief Administrative Judge

GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

APPEAL OF:

EFFIE FORDE, ESQ.)	
)	CAB No. D-1216
Under Term Agreement for Employment)	
Of Expert/Consultant dated January 29, 2003)	

For the Appellant: Effie Forde, Esq., *pro se*. For the District of Columbia Public Schools: Erika Pierson, Esq., Deputy General Counsel.

Opinion by Chief Administrative Judge Jonathan D. Zischkau, with Administrative Judge Warren J. Nash, concurring.

OPINION

LexisNexis Filing ID 10551046

Appellant Effie Forde, Esq., entered into a contract with the District of Columbia Public Schools ("DCPS") to provide services as a special education hearing officer. The contract period was to be February 3, 2003, through September 30, 2004. However, DCPS terminated the contract on March 21, 2003. Forde appealed from a deemed denial of two claims for wrongful termination and unpaid contract balances. In her complaint, Forde seeks \$6,000 for unpaid performance during the weeks of March 17 and March 24, 2003, and \$142,500 for wrongful termination. We sustain Forde's claim for \$3,000 for unpaid performance costs and \$28.60 in winding up costs, and deny her claim for wrongful termination.

BACKGROUND

The parties agree that on January 29, 2003, Forde entered into a contract with DCPS to provide 20 hours per week of legal services as a special education hearing officer, for a fixed price of \$1,500 per week. (02-18-2004 Forde Aff. at 1; 09-08-2003 DCPS Dispositive Motion, at 2; 12-11-2003 Cashmon Aff. ¶ 6, at 1-2). The terms of the contract can be discerned from a document entitled "Term Agreement for Employment of Expert/Consultant" which is signed by Forde and dated January 29, 2003, and a document entitled "Request for Purchase Order for Engaging Services of Expert/Consultant" which is signed by the contracting officer's technical representative, John Cashmon, and dated January 24, 2003. The latter document sets forth the price term of \$1,500 per week. The Term Agreement states with regard to performance and payment:

[DCPS] agrees to hire Effie E. Forde, as an expert in accordance with the terms and conditions of this agreement. This contract is made in accordance with established policies and procedures. Services will be monitored while in process to ensure they are in accordance with the consummated agreement. If services have not been completed in accordance with the agreement, payment will be denied, but only after the expert has been informed in writing (to include full justification, outlining in detail the services which were not completed as expected).

The Term Agreement contains the following termination clause:

This Contract may be terminated at any time during the contractual period, at the request of the hiring authority or when services are no longer required by DCPS. The Contractee may also terminate this contract by providing two weeks notice, in writing to the Student Hearing Office.

(Complaint Ex. 1). The Term Agreement was prepared by Cashmon and contains a signature block for Debor Dosunmu, the DCPS contracting officer, but the copy in the record is not signed by him. (02-09-2004 DCPS Submission (Cashmon Aff. ¶5)). We find from the record that Dosunmu was aware of the contract documents and ratified them. (02-09-2004 DCPS Submission; 02-27-2004 Brief of Appellant, at 10). Cashmon used the same Term Agreement form to contract independent hearing officer services from 7 other licensed attorneys besides Forde during January 2003. The agreements all provided that the hearing officers would work 20 hours per week and be compensated at a fixed weekly amount of \$1,500, to be invoiced bi-weekly. (Cashmon Aff. ¶¶ 6-7).

Ms. Forde began performance on February 3, 2003. (02-09-2004 DCPS Submission (04-07-2003 Forde "Compensation" Letter to Wendy Gee and John Cashmon)). Soon after the hearing officers began their performance, Cashmon determined that DCPS needed additional hours to be worked due to the heavy workload. Therefore, in mid-February, Cashmon offered each hearing officer the opportunity to increase hours from 20 to 32 per week with an increase in weekly compensation to \$3,000. The other seven hearing officers immediately accepted the offer and began working the increased hours but no contract modifications were ever executed to reflect those changes. Forde expressed some reluctance to enter into the arrangement due to concerns regarding her outside legal practice. (Cashmon Aff. ¶ 9; 02-09-2004 DCPS Submission (04-07-2003 Forde "Compensation" Letter to Wendy Gee and John Cashmon)). Forde subsequently orally accepted the increased hours arrangement in mid-March 2003, with the understanding that she would begin providing 32 hours of work for DCPS starting the week of March 17, 2003.

The record indicates that Forde provided 20 hours of weekly services for the weeks of February 3, February 10, February 17, February 24, March 3, and March 10, 2003. She invoiced biweekly for those services using a standard form letter entitled "Certification of Services Rendered" which are dated February 14 (for the period February 3-14), February 26 (for the period February 17-28), and March 17 (for the period March 3-14). As an example, the February 14, 2003 "Request for Payment Expert/Consultant Agreement" form is addressed to the DCPS Controller, and states in pertinent part:

This is to certify that the services contracted for, between myself and the District of Columbia Public Schools, have been duly rendered for the period as stated in the contractual agreement dated January 29, 2003. It is hereby requested that payment be made in accordance with the terms of the contract. Attached you will find all applicable receipts and required supporting documents for the period 2/3/03-2/14/03. Request payment in the amount of \$3,000.00.

It is signed by Forde, and below her signature is an "Approved" section which reads:

I certify that the contractor has satisfactorily performed the contracted services rendered during the period Feb. 3-14, 2003 and should be paid \$3,000.00.

Under this language, Cashmon signed and dated the approval section. There is a separate document apparently attached to the Request for Payment form which is entitled "Certification of Services Rendered", dated February 14, 2003, on Forde's letterhead, which describes briefly the names of the cases which were heard by her and for which she submitted hearing officer decisions to the Student Hearing Office on February 12, 2003.

Forde agrees that she was paid \$1,500 per week for her services through March 14, 2003. (02-18-2004 Forde Aff. ¶ 10).

There appears to be no dispute that for the week of March 17-21, 2003, Forde provided the increased 32 hours of service with the understanding that her payment would be \$3,000 per week. However, during this same week, DCPS decided to terminate Forde's contract. In a letter of March 21, 2003, Cashmon states:

This letter is to inform you that, effective 21 March 2003, the Office of Compliance is terminating your contract with [DCPS]. In order to receive your final payment for the services that you have rendered, the hearing officer determinations for the cases that you have heard must be submitted not later than the close of business on Friday, 28 March; together with any Student Hearing Office materials that you may possess.

(Complaint Ex. 2). Cashmon states that the decision to terminate Forde's contract was in response to "concerns" from DCPS's and parents' counsel who appeared before her in the special education hearings she was conducting. We find from the record that Dosunmu was aware of the termination notice and ratified it. (02-09-2004 DCPS Submission (04-07-2003 Forde Termination Claim Letter to Dosunmu)). For the week of March 17-21, 2003, Forde submitted a certification dated March 24, 2003, stating that she presided over various hearings and submitted certain decisions in her cases, including decisions that she had started to prepare during the previous period but had not submitted until the week of March 17. In a March 25, 2003 letter, Forde states that she came to the Student Hearing Office on March 20 and 21 but was not assigned any hearings. (02-09-2004 DCPS Submission (03-25-2003 Forde Letter to Wendy Gee)). There is a Request for Payment form in the amount of \$3,000 which is signed by Forde but not signed by Cashmon. Cashmon states that the invoice for the week of March 17 was rejected because the DCPS Chief Hearing Officer had to reconstruct several hearings and issue written hearing officer decisions because Forde failed to provide them to the Student Hearing Office. (Cashmon Aff. ¶ 10). DCPS provides no additional details. Forde submitted another Request for Payment dated March 31, 2003, for an additional \$3,000 for the week of March 24, 2003. (Appellant's Ex. 9). The record also contains receipts of postage expenses incurred by Forde in the amounts of \$4.30 and \$24.30. (Appellant's Exs. 12, 14).

On April 7, 2003, Forde submitted two separate claims, one for wrongful termination addressed to Gee, Cashmon, and Dosunmu, and another for compensation, addressed to Gee and

Cashmon. With regard to the termination, Forde contended that her termination was unlawful because it was done without justification, notice, and good faith, and the notice was not signed by Dosunmu, the contracting officer. She further points out that the contracting officer also did not sign the original contract. Forde requests as relief that she be paid \$147,000 which she contends is the maximum amount of compensation she would have received had the contract not been terminated. In the other April 7 claim letter, entitled "Compensation", she states that she submitted "invoices for the month of March 2003 and up through the period of April 4, 2003 which have not been paid." Forde also requested that she be compensated at the rate of \$3,000 per week throughout the entire period of February 3 – April 4, 2003. There is no indication that DCPS ever responded to the April 7, 2003 claim letters. On July 18, 2003, Forde filed a combined complaint and notice of appeal from a deemed denial of her claims. Her complaint, as supplemented, seeks only unpaid amounts totaling \$6,000 for the weeks of March 17 and March 24, 2003.

The parties have requested that the Board decide the case on the written record.

DISCUSSION

We exercise jurisdiction over this appeal pursuant to D.C. Code § 2-309.03(a)(2).

Termination

Forde claims that the termination of her contract was unjustified and that DCPS failed to provide notice to her prior to the termination. The termination clause authorizes DCPS to terminate the contract at will and such a termination will be treated under District procurement law as a convenience termination in the absence of evidence that a termination for default was intended. In this case, although DCPS indicated concerns with Forde's performance, the record is clear that DCPS is not pursuing a default termination but rather a convenience termination. Forde intimates bad faith on the part of DCPS and Cashmon, but we find the record devoid of any evidence of bad faith. Forde has clearly not sustained her burden on bad faith. Forde is not entitled to receive contract payments for periods beyond her actual performance of services. Thus, Forde's claim for \$142,500 for termination damages is without merit. However, Forde is entitled to her winding up costs resulting from the termination. She has established with evidence in the record a total of \$28.60 in postage expenses.

Unpaid Contract Balance Claim

Forde claims unpaid contract balances totaling \$6,000 for services performed during the weeks of March 17 and March 24, 2003. DCPS rejected her claim for payment for the week of March 17 because, according to DCPS, the Chief Hearing Officer had to reconstruct several of Forde's hearings and issue written hearing officer decisions which Forde failed to provide to the Student Hearing Office. The Term Agreement provides that payment may be denied only after the hearing officer "has been informed in writing (to include full justification, outlining in detail the services which were not completed as expected)." DCPS's rejection of payment for the March 17 work week is not supported by the type of detail required by the contract. We sustain Forde's claim for \$3,000 for the week of March 17. We deny Forde's claim for \$3,000 for the week of March 24 because Forde has not sustained her burden of showing that she performed 32 hours of hearing

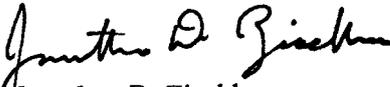
officer services for that week.

CONCLUSION

Forde is entitled to unpaid contract payments of \$3,000 for the week of March 17, 2003, plus winding up costs from the termination in the amount of \$28.60. Accordingly, we sustain Forde's claim in the amount of \$3,028.60, plus 4 percent interest per annum from July 18, 2003.

SO ORDERED.

DATED: February 10, 2006


/s/ Jonathan D. Zischkau
JONATHAN D. ZISCHKAU
Chief Administrative Judge

CONCURRING:


/s/ Warren J. Nash
WARREN J. NASH
Administrative Judge

GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

PROTEST OF:

FARBER SPECIALTY VEHICLES)	
7052 Americana Parkway)	CAB No. P-0721
Reynoldsburg, Ohio, 43068)	
)	
Under RFP No. POKT-2005-B-0065-LV)	

For the Protester, Farber Specialty Vehicles: Ken Farber, CEO, *pro se*. For the District Government: Howard S. Schwartz, Esq., and Talia S. Cohen, Esq., Assistant Attorneys General.

Opinion by Administrative Judge Warren J. Nash, with Chief Administrative Judge Jonathan D. Zischkau, concurring.

OPINION
(Lexis-Nexis Filing ID 10737596)

Protester Farber Specialty Vehicles (“Farber”) alleges in its protest that the District improperly awarded a contract for a mobile health unit to a bidder that submitted a bid with a higher price. The District in its Agency Report asserts that the District properly awarded the contract to Lifeline Shelter Systems, Inc. (“Lifeline”).

BACKGROUND

On June 2, 2005, District of Columbia Office of Contracting and Procurement (“OCP”), on behalf of the District of Columbia Department of Public Works (“DPW”) Fleet Management Administration (“FMA”) and the Department of Health (“DOH”), issued IFB POKT-2005-B-0065-LV for purchase of a Mobile Medical Clinic Unit (“mobile health unit”) to be delivered no more than 150 days after the date of award. (Agency Report (“AR”) Ex. 1). On June 6, 2005, OCP issued an amendment to the IFB that clarified the bid due date of July 6, 2005. Both Farber and Lifeline submitted nonresponsive bids. OCP then cancelled the solicitation and proceeded to complete the procurement process through negotiation. (AR Ex. 3). OCP revised the solicitation and reissued it to Farber and Lifeline. (AR Ex. 4). The reissued solicitation required offerors to insert the earliest delivery date that offerors could deliver to the District the mobile health unit rather than mandate a 150 day delivery date. (AR Ex. 4).

Revised solicitation section L.1.2 stated that the District intended to award the contract to the responsive and responsible bidder who had the lowest evaluated bid price taking into consideration the bidder’s proposed delivery date. (AR Ex. 4). On August 26, 2005, Farber and Lifeline submitted new bids. (AR Ex. 5). Farber offered to sell the mobile health unit to the District for \$282,000, and to deliver the unit to the District in 210 days. (AR Ex. 5). Lifeline offered to sell the mobile health unit to the District for \$298,880, and to deliver the unit to the District in 150 days. (AR Ex. 5). On November 9, 2005, the contracting officer awarded the contract to Lifeline after determining that DOH had an urgent need for the mobile health unit for the delivery of critical health

services to communities that do not have adequate or accessible health facilities. (AR Ex. 6). On November 15, 2005, the District awarded the contract to Lifeline. (AR Ex. 7). On November 15, 2005, DPW notified Farber of the award to Lifeline. (AR Ex. 7). On November 25, 2005, Farber filed its protest with the Board. On December 19, 2005, the District filed its determination and finding to proceed with award notwithstanding the protest. In the D&F to proceed, the District set forth its urgent need to proceed with contract award and performance as quickly as possible. The protester did not challenge the D&F.

DISCUSSION

Farber apparently asserts in its protest that the District should have awarded the contract to Farber since Farber's price was lower than Lifeline's price. The District responds that the District properly awarded the contract to Lifeline since the Contracting Officer reasonably determined that Lifeline's offer was in the best interest of the District when considering both the price and the proposed delivery date. We conclude that the District properly awarded the contract to Lifeline.

The District in its Agency Report sets forth the Board's standard of review regarding the contracting officer's evaluation decision. This Board examines the record to determine whether the decision was reasonable and in accord with the evaluation criteria set forth in the solicitation. *Health Right Inc., et al.*, CAB Nos. P-507, P-510, and P-511, Oct. 15, 1997, 45 D.C. Reg. 8612, 8635. This Board will also examine the record to determine whether there were any violations of procurement laws or regulations. As we stated in *Health Right*: "Considering the totality of the record, evaluations must be reasonable and must bear a rational relationship to the announced criteria upon which competing offers are to be selected." (45 D.C. Reg. at 8635).

By affidavit dated December 15, 2005, the contracting officer stated that the District's health and safety needs outweighed Farber's lower price. (AR Ex. 8). The contracting officer determined that awarding the contract to Lifeline, who promised to deliver the mobile health unit to the District sixty days earlier than Farber, was in the best interest of the District. (AR Ex. 8). The District's D&F to proceed set forth the District's urgent need to award the contract. (D&F to Proceed dated December 19, 2005), and Farber did not challenge the D&F.

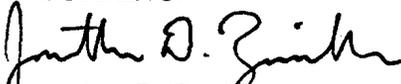
Accordingly, we determine that the contracting officer did not violate law or regulations in awarding the contract to Lifeline. We deny the protest.

SO ORDERED.

DATE: March 7, 2006


/s/ Warren J. Nash
WARREN J. NASH
Administrative Judge

CONCURRING:


/s/ Jonathan D. Zischkau
JONATHAN D. ZISCHKAU
Chief Administrative Judge

award to CMC since CMC had the highest technical score and offered the lowest price, pending determination of CMC's responsibility and certification of the availability of funding. (AR Exs. 2 and 3). However, two issues arose that required the District to reconsider the award of the multi-year contract under the RFP. The first issue was the unavailability of funding needed to make an award. (AR Ex. 3). The second issue was the change in the agency's minimum needs to consolidate the scope of work to include both external and internal health care for the Corrections population.

Faced with these two issues, on August 15, 2005, the District requested an extension of the offerors' proposals until December 31, 2005, and also prepared for continuity of services in the event that the District decided to revise its minimum needs. (AR Ex. 3). The contracting agency did not inform CMC of these issues in its August 15, 2005 communication. By Determination and Findings for Sole Source, dated August 19, 2005, the Interim Chief Procurement Officer ("CPO") determined that in order to continue to provide medical and mental services to DOC inmates without interruption while the District revised its minimum needs, analyzed the cost effect, and prepared, issued and awarded a new multi-year contract, an interim one year sole source contract with the incumbent contractor, CCHPS, was justified. On September 30, 2005, the District issued CCHPS a one-year contract, No. DCFL-2005-D-0044, for the period of October 1, 2005, through September 30, 2006, to continue to provide internal comprehensive medical and mental health services at the District's detention facilities. (AR Ex. 7). The contracting agency did not timely inform CMC of the sole source award to CCHPS.

By email dated November 18, 2005, the Deputy Mayor for Public Safety and Justice recommended that the CPO cancel the RFP so that the scope of work could be substantially changed. (AR Ex. 5). On December 2, 2005, the CPO signed the determination and findings to cancel the RFP. (AR Ex. 4). The CPO determined that it was in the best interest of the District to cancel the RFP so that the RFP's scope of work could be substantially changed. Since another ongoing contract for external health services is scheduled to expire on May 31, 2006, the CPO agreed that it was in the District's best interest to combine into one solicitation both the internal and external health services and "seek one vendor or a coalition of vendors who would provide and coordinate all health care for the Corrections population." (AR at 4; AR Ex. 4).

On December 8, 2005, the District notified CMC of its determination to cancel the RFP. (Protest). On December 16, 2005, CMC filed its protest. The District filed an Agency Report on January 9, 2006. CMC has not responded to the Agency Report.

DISCUSSION

We exercise jurisdiction pursuant to D.C. Code § 2-309.03(a)(1). Our Board rules provide in pertinent part:

307.3 Failure of the protester to file comments, or to file a statement requesting that the case be decided on the existing record, or to request an extension of time for filing, shall result in closing the record of the case and may result in dismissal of the protest.

307.4 When a protester fails to file comments on an Agency Report, factual allegations in the Agency Report's statement of facts not otherwise contradicted by the protest, or the documents in the record, may be treated by the Board as conceded.

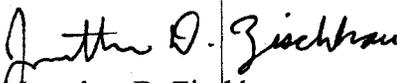
We treat as conceded the District's statement of facts in its Agency Report regarding the bases for the determination to cancel the RFP and to award a sole source interim contract to CCHPS. Our standard of review of a cancellation determination is well settled. A request for proposals may be cancelled only if the CPO determines in writing that the action is taken in the best interest of the District government and there is a reasonable basis for cancellation. D.C. Code § 2-303.07 (2001); *JHARBO Limited, Inc.*, CAB No. P-0527, Jan. 16, 1998, 45 D.C. Reg. 8701, 8703; *Singleton Electric Co.*, CAB No. P-0411, Nov. 15, 1994, 42 D.C. Reg. 4888, 4893. A sole source procurement may be used only under the standards provided in D.C. Code § 2-303.05 (2001). Because CMC has conceded the factual bases for the District's actions, we sustain the determinations to cancel the RFP and to award the sole source interim contract.

We believe the contracting agency should have notified CMC of the funding issue and change in minimum needs at the time it requested the extension of CMC's offer. In addition, we do not understand why the contracting agency was unable to compete the 1-year interim contract requirements and chose rather to issue a sole source award to CCHPS. Here, the contracting agency had identified two viable providers as a result of the RFP, CMC and CCHPS, and with regard to the RFP, CMC had the highest technical score and lowest price. In any event, once the agency made the sole source award to CCHPS, it promptly should have advised CMC of the sole source award because it clearly related to the pending solicitation and covered the same services.

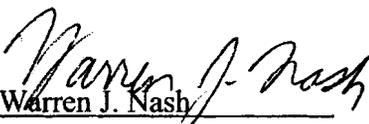
Based on the record presented to us, we deny CMC's protest.

SO ORDERED.

DATED: March 20, 2006


/s/ Jonathan D. Zischkau
JONATHAN D. ZISCHKAU
Chief Administrative Judge

CONCURRING:


/s/ Warren J. Nash
WARREN J. NASH
Administrative Judge

GOVERNMENT OF THE DISTRICT OF COLUMBIA
 CONTRACT APPEALS BOARD

PROTEST OF:

MONT "T" QUE INC.)
) CAB No. P-0725
 Under IFB No. POKT-2005-B-0082-CM)

For the Protester: Ms. Renee Wallace, President, Mont "T" Que Inc., *pro se*. For the District of Columbia Government: Howard Schwartz, Esq., Senior Assistant Attorney General, Talia S. Cohen, Esq., Assistant Attorney General.

Opinion by Chief Administrative Judge Jonathan D. Zischkau, with Administrative Judge Warren J. Nash, concurring.

OPINION DENYING PROTEST

LexisNexis Filing ID 10982505

Mont "T" Que Inc. ("MTQ"), has protested the award of a contract to Patch Management, Inc., for rental of spray patchers with drivers/operators for pothole patching and road repair services. The contracting officer rejected MTQ's bid as nonresponsive because MTQ's bid price, although apparently substantially lower than Patch's bid price, was ambiguous. MTQ's bid contained hand-written notations under the price schedule table seemingly identifying prices for materials. The District filed an Agency Report asserting that the protest was untimely filed and that the decision to reject MTQ's bid was correct. We conclude that MTQ timely filed the protest but that the contracting officer properly determined that MTQ's bid was ambiguous due to the handwritten annotations on the price schedule and thus nonresponsive. Accordingly, we deny the protest.

BACKGROUND

On August 1, 2005, the District's Office of Contracting and Procurement ("OCP") issued Invitation for Bids No. POKT-2005-C-0082-CM on behalf of the District Department of Transportation ("DDOT") for the rental of spray patchers with drivers/operators for pothole patching and road repair services. (Agency Report ("AR") at 2-3; AR Ex. 1). Section B.2 of the solicitation contemplated a requirements contract with payment based on fixed-unit prices for specified services. The price schedule under section B.3 provided as follows:

Contract Line Item No. (CLIN)	Item Description	Monthly Rental Rates	Estimated Quantity	Total Rate for 12 months Rental Period
0001	Rental of spray injection patchers with drivers/operators and materials for pothole patching and road repair services	\$ _____	3	\$ _____

Under the table, was the following:

Prices shall be effective for a period of one (1) year from date of award. The District reserves the right to exercise the option years for three (3) additional years at the same price, terms and conditions.

Bid opening was on September 6, 2005, with bids submitted by MTQ and Patch. (AR Exs. 1 and 2). Patch's bid for twelve months was \$892,800.00, based on a monthly unit price of \$24,800. (AR Ex. 9). MTQ's price schedule in the bid read as follows:

Contract Line Item No.(CLIN)	Item Description	Monthly Rental Rates	Estimated Quantity	Total Rate for 12 months Rental Period
0001	Rental of spray injection patchers with drivers /operators and materials for pothole patching and road repair services	\$ <u>16,000</u>	3	\$ <u>48,000</u> x 12 = \$576,000

Below the price schedule table, appeared the following handwritten notations made by MTQ:

Unit Cost

- Diesel Fuel \$5.00 per gallon
- Asphalt per ton \$48.00
- Liquid TAC \$40.00 per 5 gallon bucket

(AR Ex. 3). By memorandum dated September 15, 2005, the contracting officer found MTQ's bid nonresponsive "for failure to include the cost for required materials in its unit bid price as required in Section B of the solicitation." (AR Ex. 4). The contracting officer requested advice from OCP's legal counsel regarding the finding that MTQ's bid was nonresponsive. (AR Ex. 4). OCP legal counsel advised OCP to issue a letter to MTQ requesting that MTQ clarify whether it intended to include the handwritten information below the CLIN No. 0001 price schedule in its bid. (AR Ex. 5). By letter of October 13, 2005, the contracting officer wrote to MTQ:

The Office of Contracting and Procurement (OCP) has reviewed your bid submitted in response to the above referenced solicitation. OCP is seeking clarification of the handwritten information on the Price Schedule page with respect to the instructions under Section C.1 of the solicitation.

Please advise if the handwritten information is to be included in the total bid price. Your response should be received in [this] office by October 21, 2005.

(AR Ex. 6). On October 13, 2005, the contract specialist sent the clarification letter to MTQ via United Parcel Services and UPS confirmed that MTQ received the clarification letter on October 14, 2005.

(AR Ex. 8). On October 13, 2005, the contract specialist also attempted to contact MTQ by telephone and to fax the letter to MTQ using the numbers provided in its bid. Both telephone numbers in the bid were disconnected and the fax transmission to the listed MTQ fax number failed. (AR Exs. 2 and 9). MTQ never responded to the October 13, 2005 clarification letter. On November 9, 2005, the contracting officer called MTQ and left a voicemail message giving MTQ until close of business on November 10, 2005, to respond. MTQ did not respond. (AR Ex. 9). By a determination and findings dated November 23, 2005, the contracting officer decided to award the contract to Patch because MTQ's bid was ambiguous as to its total price. (AR Ex. 9). The contracting officer determined that Patch's bid of \$24,800 per month was fair and reasonable based on the government estimate of \$24,500 per month. On December 23, 2005, Patch received award of Contract No. POKT-2005C-0082-CM pursuant to the solicitation. (AR Ex. 12). On January 5, 2006, the contract specialist mailed to MTQ a notice of the contract award to Patch which is dated January 4, 2006.

On January 12, 2006, MTQ filed its protest, alleging that MTQ had the lowest bid price and should have been awarded the contract. The District filed its Agency Report on February 2, 2006. MTQ responded to the Agency Report on February 16, 2006. In its response, MTQ claims that its bid price was \$576,000 and that the "handwritten information at the bottom of page 3 – section B.3 had nothing to do with the bid price in Line item CLIN 0001."

DISCUSSION

We exercise jurisdiction pursuant to D.C. Code § 2-309.03(a)(1).

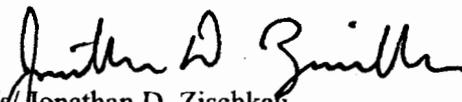
The District argues that the protest is untimely because MTQ should have known the basis of its protest on October 14, 2005, when it received the October 13 clarification letter. Citing our decision in *Sigal Construction Corp.*, CAB No. P-0690, et al., Nov. 24, 2004, 52 D.C. Reg. 4243, 4254-56, the District argues that the clarification letter was "functionally equivalent to an official action taken by the contracting officer which is adverse to MTQ . . ." (AR at 6). We do not agree. That communication from the contracting officer required MTQ to respond, clarifying its bid, but it did not constitute any adverse action against MTQ. MTQ's receipt of the January 4, 2006 notice of the award started the 10-day period for filing its protest. Since MTQ filed its protest on January 12, the protest was timely.

On the merits, we deny MTQ's protest because the handwritten notations created an ambiguity in MTQ's bid price. "Bids that are indefinite, uncertain, or ambiguous are normally rejected as nonresponsive." J. Cibinic & R. Nash, *Formation of Government Contracts* 569 (3d ed. 1998). Although the annotations on MTQ's bid could be interpreted as simply reciting elements already incorporated in the monthly unit price, it is also reasonable to read the notation as providing the pricing for road repair materials beyond what is specified in the monthly unit price which would require additional payment by the District government. Under the latter interpretation, the bid would be nonresponsive as it did not offer a firm fixed price as required by the IFB. *See, e.g., Reid & Gary Strickland Co.*, B-239700, Sept. 17, 1990, 90-2 CPD ¶ 222 (notation on Strickland's bid that it had "allowed \$500,000" for doors rendered the bid ambiguous as to price and thus nonresponsive). Section B.2 of the solicitation required bidders to submit fixed unit prices. MTQ's handwritten "unit cost" information on the price schedule page rendered the bid ambiguous as to whether MTQ's bid included these handwritten "unit cost" amounts for materials. Since MTQ's bid was ambiguous as to the total bid price, the contracting officer properly determined to reject MTQ's bid as nonresponsive.

For the reasons discussed above, we deny MTQ's protest.

SO ORDERED.

DATED: April 6, 2006


/s/ Jonathan D. Zischkau
JONATHAN D. ZISCHKAU
Chief Administrative Judge

CONCURRING:


/s/ Warren J. Nash
WARREN J. NASH
Administrative Judge

GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

PROTEST OF:

VISTA CONTRACTING, INC.)
) CAB No. P-0726
 Under IFB NO. POFA-2005-B-0040-BJ)

For the Appellant Vista Contracting, Inc.: Thomas O. Mason, Esq., and Francis E. Purcell, Jr., Esq., Williams Mullen. For the District of Columbia: Howard Schwartz, Esq., and Talia S. Cohen, Esq., Office of the Attorney General.

Opinion by Administrative Judge Warren J. Nash, with Chief Administrative Judge Jonathan D. Zischkau, concurring.

OPINION

(LexisNexis Filing ID 11324690)

Vista Contracting, Inc. ("Vista") protests the award of a contract to Skanska USA Building, Inc. ("Skanska"), for the construction of an indoor firing range at 3665 Blue Plains Drive, S.W., Washington, D.C., for the Metropolitan Police Department ("MPD"). Vista alleges that its proposal was technically acceptable and lower priced, and that the contracting officer improperly determined that Vista failed to meet the solicitation's special standards of responsibility. The District responds that it properly awarded the contract to Skanska. We conclude that Vista has not shown error in the District's determination of Vista's non-responsibility and accordingly we deny the protest.

BACKGROUND

On August 25, 2005, the District of Columbia Office of Contracting and Procurement ("OCP"), on behalf of the MPD, issued IFB POFA-2005-B-0040-BJ for construction of an indoor firing range. (Agency Report ("AR") Ex. 1). Section L.26.1 of the IFB required the contractor and key personnel to show that they had knowledge of and experience in the construction of a walk-down firing range that would be configured without shooting booths but with fixed pneumatic firing systems. Section L.26.1 contains the following language:

The Contractor, including key personnel assigned to perform the work on the indoor firing range, must demonstrate knowledge of and experience in the construction of a walk-down firing range that is configured without shooting booths but includes fixed pneumatic target systems. The bidder shall provide the following information with its bid for each similar firing range constructed:

- a. Time Period of the construction;
- b. Name and location of range;

- c. Name of contact person; and
- d. Phone number of contact person.

The District will not find responsible any bidder that does not provide, with its bid or within 5 calendar days of request by the Contracting Officer, information adequate to determine its compliance with the stated Special Standards of Responsibility.

(AR Ex. 1). By amendment, the District extended the closing date of the IFB to October 3, 2005. (AR Ex. 1). Six bidders submitted bids. (AR Ex. 11). According to the contracting officer, only Skanska submitted adequate information that allowed the District to determine that Skanska had complied with Section L.26.1. (AR Ex. 11).

By letter dated October 27, 2005, OCP sent letters to four of the remaining bidders requesting information to determine whether those bidders complied with Section L.26.1. (AR Exs. 5, 6). Only Vista responded to the District's request, by letter dated November 1, 2005. (AR Ex. 7). Vista stated that it would employ a reputable and experienced Firing Range Manufacturer. (AR Ex. 7). In the letter, Vista stated:

We believe the following projects demonstrate our experience in the construction of Firing Ranges:

1. FBI – Fire Range, 900 Penn Ave., NW, (1993); Contact: Tony Wildgruber, 202-436-8050. Project Description: Remove 9 lane Firing Range and install new range including, but not limited to replacement of bullet trap system, epoxy flooring, acoustical baffles.
2. FBI – HEPA Exhaust Filter for Small Pistol Range, 900 Penn Ave., NW; (1994); Contract: Tony Wildgruber, 202-436-8050. Project Description: Improve exhaust system for Pistol Range.
3. FBI – Ballistic Wall for Outdoor Firing range; (1992); Contact: Ron Chiodi, 202-324-2459 or Jane Brown, 202-324-2458. Project Description: Install ballistic wall 500 feet long, 12 feet high, including but not limited to concrete footers, steel beams, timber, paint, steel plates, etc.

On November 4, 2005, Eric Coard, Senior Executive Director, Corporate Support, Metropolitan Police Department, evaluated Vista's response and concluded that the information presented by Vista did not "adequately relate to Vista's involvement or experience in constructing walk down firing ranges." (AR Ex. 8). Bobby Jones, OCP's contract specialist, attempted to verify the information set forth in Vista's November 1, 2005 letter. (AR Ex. 13). OCP provided the following information in its Verification of References document:

The Contract Specialist, Bobby Jones called Mr. Tony Wildgruber (reference) at FBI, 900 Pennsylvania Ave. on several occasions without success. However, after calling the second reference, Mr. Ron Chiodi, it was learned that Vista had constructed a ballistic wall for an outdoor firing range. He had no knowledge of Vista's participation in the construction of a complete firing range and that the range, 900 Pennsylvania Ave. was constructed by Specialty Construction Management (SCM) approximately two years ago. Contacted SCM and spoke with Monty, 202-832-7250. Monty had no record of Vista's involvement with the construction of that range.

On 11/10/05, Mr. Tony Wildgruber was contacted. He stated that the firing range in question was renovated two years ago by SCM, but that the original range was built by Vista. That particular range is considerably smaller at 9-point vs. the 15-point range to be built as a replacement for the current MPD range at the Police Training Academy. Mr. Wildgruber did not provide confirmation that the FBI range was a walk-down range but stated that it may be possible to use as such.

The references' information received by MPD differs from the information received by OCP. In order to resolve the issue, OCP requested permission to visit and observe the FBI's range. For some reason, the FBI refused permission for OCP to visit their facility. For further information, Mr. Wildgruber (electrical engineer) referred me to the Director of Range Construction/Maintenance. The Director of construction/maintenance is Mr. Juan Inga. The Contract Specialist contacted Mr. Inga on 11/15/05 to follow up on the previous conversation he had with MPD representative, Mr. Eric Coard concerning the builder of their firing range. Mr. Inga confirmed that the FBI's firing range was upgraded two years ago by SCM from a Caswell system to a Snail lead abatement system and that Vista may have been the firm who constructed the range over 15 years ago. The firing range supposedly constructed by Vista at the FBI facility on Penn. Ave is an 8 lane indoor range and not specifically a walk-down range.

On November 16, 2005, Mr. Jones and the assistant commodity manager concluded that Vista "has not demonstrated the knowledge of and experience with constructing a walk-down firing range as specified in Section L.26.1 of the solicitation." (AR Ex. 13).

On November 21, 2005, the Deputy Mayor for Operations and Chief Procurement Officer determined that only Skanska's bid complied with the requirements set forth in Section L.26.1, since only Skanska had previous experience in constructing a walk-down firing range. (AR Ex. 9). The CPO determined that Vista was not responsible because Vista's references did not confirm that Vista had constructed a walk-down indoor firing range. (AR Ex. 9).

On January 23, 2006, the District awarded to Skanska a contract for construction of the walk-down indoor firing range. (AR Ex. 12). Vista filed this protest on February 8, 2006.

DISCUSSION

Vista asserts in its protest that the District should have awarded the contract to Vista since Vista's bid was technically acceptable and Vista's price was lower than Skanska's price. The District responds that the District properly awarded the contract to Skanska since the contracting officer reasonably determined that Skanska was the only bidder that met the special standard of responsibility set forth in the IFB. We conclude that the District properly awarded the contract to Skanska.

The IFB required the bidder to show that it could perform the contract in compliance with the special standards of responsibility set forth in Section L.26.1. The District required bidders to demonstrate that they had the experience and expertise needed to build the firing range set forth in the IFB. The IFB does not contain a definition of the term "walk-down firing range."¹ Vista asserts that it has experience in building the required range.

The District's contract specialist and MPD program personnel attempted to verify Vista's assertions regarding Vista's experience in building walk-down firing ranges. Bobby Jones, OCP's contract specialist, attempted to verify the information set forth in Vista's November 1, 2005 letter. (AR Ex. 13). Vista provided three references, but only the first reference dealt with a complete indoor range. (AR Ex. 7, 13). The vague information provided by the FBI suggested that the FBI range was not expressly a "walk-down firing range" but "it may be possible to use as such." The FBI's Director of Construction Maintenance in a subsequent discussion with OCP's contract specialist stated only that Vista may have been the firm which constructed the FBI range approximately 15 years ago, that the range is an 8 lane indoor range, and that it was not specifically a walk-down firing range.

Vista did not submit the required special responsibility information in its bid. Vista had an opportunity to provide further information to show that it met the special standards of responsibility. Vista was uniquely positioned to provide to the District sufficient information that the District needed to verify whether Vista met the requirements of Section L.26.1. Since the District could not verify Vista's assertions regarding its experience, and the FBI contacts tended to contradict that the first reference met the requirements, we see no error in the District's non-responsibility determination.

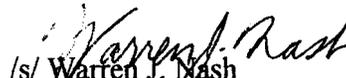
¹ Vista did not object to the District's assertion that the contract drawings set forth an adequate description of the project, notwithstanding the fact that the IFB itself did not explicitly define "walk-down firing range." After reviewing the drawings, the Board agrees that the drawings set forth an adequate description of the project and that the District could properly determine whether a bidder had experience in building that type of firing range.

Vista also argues that the District ignored the experience of Vista's proposed subcontractors. Although Vista proposed two possible alternate subcontractors to perform work, Vista did not submit the information required by Section L.26.1 to demonstrate that either prospective subcontractor possessed knowledge and experience constructing the specified type of walk-down firing range.

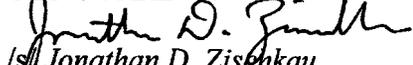
The contracting agency made reasonable efforts to verify Vista's compliance with the special standards of responsibility through repeated attempts to obtain information from the FBI concerning Vista's first reference. The information garnered from the FBI representatives support the conclusion of the contracting officer that Vista had not demonstrated "knowledge of and experience in the construction of a walk-down indoor firing range that is configured without shooting booths but includes fixed pneumatic target systems" as required by IFB Section L.26.1.

We conclude that Vista has not shown that the contracting officer erred in determining that Vista did not meet the special standards of responsibility set forth in Section L.26.1. Accordingly, we deny the protest.

DATED: May 19, 2006


/s/ Warren J. Nash
WARREN J. NASH
Administrative Judge

CONCURRING:


/s/ Jonathan D. Zischkau
JONATHAN D. ZISCHKAU
Chief Administrative Judge

GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

PROTEST OF:

PETERSEN MFG. CO., INC.)
) CAB No. P-0728
Under IFB No. POKT-2006-B-0018-CM)

For the Protester, Petersen Mfg. Co., Inc.: Michael Siemer, Vice President. For the Government: Howard S. Schwartz, Esq., and Talia S. Cohen, Esq., Assistant Attorneys General, District of Columbia Government.

Opinion by Administrative Judge Warren J. Nash, with Chief Administrative Judge Jonathan D. Zischkau, concurring.

OPINION

(Lexis-Nexis Filing ID 11825818)

By letter to the Board dated March 16, 2006, protester Petersen Mfg. Co., Inc. ("Petersen") protests the responsiveness of the Victor Stanley, Inc. ("Victor Stanley") bid, submitted to the District of Columbia on March 10, 2006. The District filed a Motion to Dismiss the protest, asserting that the protest is premature because the District had not yet determined whether any of the bidders had submitted a responsive bid. The Board agrees and dismisses the protest.

FACTS

On January 26, 2006, the Office of Contracting and Procurement ("OCP") issued IFB No. POKT-2006-B-0018-CM for purchase of trash receptacles and liners. (Motion to Dismiss, Ex. 1). Bids were originally due on February 28, 2006. (Motion to Dismiss, Ex. 1). After amendment, bids were opened on March 10, 2006. (Motion to Dismiss, Ex. 1). Three bidders, including protester, submitted bids. (Motion to Dismiss, Ex. 5). The protester's bid was the highest of the three bids. (Motion to Dismiss, Ex. 5). The protest was filed at the Board on March 21, 2006.

DISCUSSION

In its April 10, 2006, Motion to Dismiss, the District asserts that the Board should dismiss the protest because the District has not yet awarded a contract, nor has the District determined whether any of the bidders submitted responsive bids. In support of that argument, the District cites *Consolidated Waste Industries*, CAB No. P-0430, June 12, 1995, 42 D.C. Reg. 4983. In *Consolidated*, the Board found premature a protest where OCP had neither completed its determination nor awarded a contract. In this protest, OCP has not yet made its evaluation or

determination. Thus, in keeping with precedent, and in view of the lengthy delay by OCP in completing the procurement, the Board believes the proper action is to dismiss the protest as premature, without prejudice to Petersen to file a new protest if it is aggrieved by subsequent actions of OCP.

The protest is dismissed as premature.

DATE: July 18, 2006


/s/ Warren J. Nash
WARREN J. NASH
Administrative Judge

CONCURRING:


/s/ Jonathan D. Zischkau
JONATHAN D. ZISCHKAU
Chief Administrative Judge