

Thirteen companies picked up copies of the RFP. Five of those companies appeared to be able to meet the RFP bonding requirements. (AR Ex. 1 and 10). The District conducted a pre-proposal conference on December 21, 2005, attended by representatives of all thirteen potential offerors. (AR Ex. 10). Amendment No. 2, issued December 30, 2005, requested proposals from offerors on January 31, 2006. (AR Ex. 1 and 10).

Prospective offerors at the pre-proposal conference submitted 42 questions. ICA submitted two additional questions by e-mail dated December 22, 2005. (AR Ex. 10). OCP and DDOT provided written responses to these questions in Amendment No. 3, dated January 6, 2006. In the response, OCP declined ICA's request to extend the proposal deadline for an additional 45 days beyond January 10, 2006, as well as ICA's request to extend the mobilization period for an additional 30 days. (AR Ex. 4). OCP and DDOT issued Amendment No. 4 on January 20, 2006. Amendment No. 4 answered three additional questions submitted by potential offerors. (AR Ex. 4). On January 31, 2006, VMS, Inc. submitted the only timely proposal. (AR Ex. 10).

DDOT's evaluators met on February 8, 2006, to consider the VMS proposal. (AR Ex. 10). DDOT held negotiation sessions with VMS on February 17 and March 17, 2006. (AR Ex. 10). After the second session DDOT decided to revise the RFP. In the amendment, DDOT deleted a number of locations that had already been paved under other contracts. (AR Ex. 10). The effect of the amendment was to reduce the scope of work and thus the cost of the job. DDOT hoped the amendment would encourage the other prospective contractors to submit proposals.

DDOT issued Amendment No. 5 to the RFP, dated March 29, 2006, to all potential offerors on the bidders list, except the District initially failed to send Amendment No. 5 to VMS. (AR Ex. 5). The District later sent Amendment No. 5 to VMS by facsimile on April 14, 2006. (AR Ex. 10). Amendment No. 5 removed several items of work from the RFP. (AR Ex. 6). Amendment No. 5 adjusted the method of testing for the International Roughness Index ("IRI"), by excluding from the index utility cuts. (The IRI prescribes tests for pavement smoothness). Amendment No. 5 also allowed the contractor additional time to meet the IRI compliance date by extending the IRI compliance date from six months after award to a full year after award. (AR Ex. 10). Amendment No. 5 erroneously stated that the January 31, 2006, due date for proposals was not extended. However, the amendment required offerors to acknowledge receipt of the amendment by April 14, 2006. (AR Ex. 10).

There is no indication that ICA contacted DDOT about Amendment No. 5 from March 29 through April 9, 2006. On April 10, 2006, David Rader from ICA contacted DDOT by telephone and spoke with OCP Supervisory Contract Specialist Kathy Hatcher regarding Amendment No. 5. (AR Ex. 9). In that conversation, Ms. Hatcher confirmed that the District was in negotiations with VMS, but stated that the District had modified several terms and conditions that could affect prices and change the quality of services and delivery schedule. Ms. Hatcher told Mr. Rader that the District had decided to send the addendum to all firms that had received a copy of the RFP to give those firms an opportunity to respond by submitting proposals. Ms. Hatcher told Mr. Rader that, if asked, the District would grant an extension of time of two weeks beyond the (presumed) closing date of April 14, 2006, in which to respond to the revised RFP. According to Ms. Hatcher, Mr. Rader informed her that two weeks was not

enough time, and that ICA needed from 60 to 90 days to submit a proposal. (AR Ex. 9). ICA filed its protest on April 13, 2006.

By Amendment No. 6 dated April 14, 2006, the District extended the date for submission of offers to April 28, 2006. (AR Ex. 7). By Amendment No. 7, dated April 28, 2006, but actually signed and faxed to all prospective offerors on April 24, 2006, the District extended the date for submission of offers to May 8, 2006. (AR Ex. 8 and 10). The May 8 deadline passed without any new submissions from prospective offerors or even a revised offer from VMS. DDOT states that VMS's original proposal is still under consideration.

DISCUSSION

ICA asserts that Amendment No.5 was a substantial change to the solicitation, and that the District should have allowed prospective offerors more time to respond to the new requirements of the solicitation. The District responds that OCP complied with all regulations when it issued Amendment No. 5 and that ICA has not shown the District any reason to extend the proposal due date.

We begin by observing that ICA has not demonstrated – with evidence of record – why it could not prepare a proposal from March 29 through May 8, a total of 40 calendar days. On that basis, we must deny its protest in view of the affidavit from DDOT indicating that the response time was reasonable. Nevertheless, the District clearly must appreciate that during this period – intended to spur additional competition – not a single new offer was submitted nor did VMS submit a revised proposal. Moreover, the issuance of the last three solicitation amendments were accompanied by glaring errors and sloppy work by the contracting agency. There is no indication in the record that the contracting officer has completed negotiations with VMS, much less made an award. Thus, nearly seven weeks after the revised closing date, we are left wondering if perhaps the contracting officer should not have given prospective offerors more time to offerors to respond. Apart from ICA, none of the other eleven prospective offerors seems interested in the procurement. We hope that DDOT has made inquiry to see why that is, and, with the contracting officer, is working on a plan to inject some meaningful competition into a project that clearly should have ample competition.

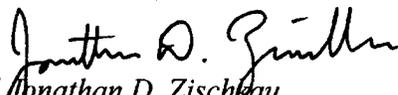
CONCLUSION

For the reasons discussed above, we deny the protest.

DATE: July 18, 2006


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

CONCURRING:


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

DISTRICT OF COLUMBIA REGISTER

GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

PROTEST OF:

HORTON & BARBER CONSTRUCTION SERVICES, LLC)
) CAB No. P-0729
Under IFB No. DCHA-2006-B-0010-HP)

For the Protester: Will Purcell, Esq. For the District of Columbia Government: Howard Schwartz, Esq., Senior Assistant Attorney General, and Talia S. Cohen, Esq., Assistant Attorney General.

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

OPINION

LexisNexis Filing ID 11854890

Horton & Barber Construction Services, LLC, has protested the award to RBK Landscaping and Construction, Inc., of a contract to provide comprehensive landscape maintenance and management services for approximately 450 acres of land at 72 recreational centers and facilities in the District. Horton & Barber, along with 6 of the other 9 bidders, were determined to be nonresponsible. The contracting officer determined Horton & Barber to be nonresponsible due to poor past performance, lack of adequate equipment and facilities to perform the work, noncompliance with the District's First Source employment requirements, and failure to meet or seek a waiver of the 35 percent LSDBE subcontracting requirements. Horton & Barber denies that it has a poor past performance record, and responds that it was capable of performing the job when considering its proposed subcontractors and equipment acquisitions. We sustain the nonresponsibility determination on the record presented, concluding that Horton & Barber has not demonstrated that the contracting officer's determination lacked a reasonable basis. We have considered each of Horton & Barber's challenges but find that none have merit. Because the contracting officer did not violate either the law or the terms of the solicitation, we deny the protest.

BACKGROUND

On February 23, 2006, the Office of Contracting and Procurement ("OCP") issued IFB No. DCHA-2006-B-0010-HP ("IFB") in the open market with a 35 percent set-aside for local, small, and disadvantaged business enterprise ("LSDBE") subcontracting, on behalf of the Department of Parks and Recreation ("DPR"), Office of Natural Resources, for a contractor to provide comprehensive landscape maintenance and management services for approximately 450 acres of land at 72 recreational centers and facilities in Wards 1 through 8. (Agency Report ("AR"), Ex. 1). Bidders were to bid fixed-unit prices that would result in a requirements contract with payment based on a firm-fixed price. (AR Ex. 1). The bid opening date was February 23, 2006. The following ten bidders submitted bids:

Bidder	Bid Price for Base Year and Two Option Years	LSDBE Points	Evaluated Bid Price
1. Horton & Barber	\$1,276,968.76	12	\$1,123,732.51
2. Kennedy Development	\$2,331,375.00	0	\$2,331,375.00
3. JJPS Inc.	\$2,899,308.47	9	\$2,638,370.71
4. IIU Consulting	\$3,015,908.54	9	\$2,744,476.77
5. Bocalji Services	\$3,154,096.00	7	\$2,933,309.28
6. KC Home Improvement	\$4,322,841.00	7	\$4,020,242.13
7. RBK	\$4,940,021.56	12	\$4,347,218.97
8. Clover Leaf	\$3,763,483.50	0	\$3,763,483.50
9. TruGreen Landcare, LLC	\$7,365,700.90	0	\$7,365,700.90
10. Turf Center Lawns, Inc.	13,117,632.00	0	\$13,117,632.00

(AR at 2-3; AR Ex. 4). Horton & Barber was the apparent low bidder.

On March 1 and 3, 2006, OCP sent Horton & Barber letters requesting responsibility data. On March 6, 2006, Horton & Barber responded to the letters, submitting an unaudited balance sheet and statement of earnings for the year ending December 31, 2005, a list of past contracts covering the period 1995 through 2003, the resumes of Horton & Barber's president and its master plumber/field supervisor, and a list of tools and equipment. (AR at 3; AR Ex. 7). During the week of March 6, 2006, the OCP contract specialist and the contracting officer technical representative made site visits to all the bidders. (AR at 3; AR Ex. 5). On or about March 16, 2006, OCP determined the following seven bidders, including Horton & Barber, to be nonresponsible: Horton & Barber, Kennedy Development, JJPS Inc., IIU Consulting, Bocalji Services, KC Home Improvement, and Clover Leaf. (AR Exs. 5, 8). The reasons for Horton & Barber's nonresponsibility determination are principally: (1) documented poor past performance record based on poor evaluations by other District Government agencies, (2) its facility is in a state of disrepair, containing four discarded buses, a house trailer, and one inoperable tractor; (3) equipment for the job was insufficient and inoperable; (4) failure to submit projected goals and time table as part of the employment plan for the First Source requirements; and (5) failure to request a waiver of the solicitation's 35 percent LSDBE subcontracting requirement. (AR Ex. 8).

On March 14, 2006, by a Determination and Finding for Contractor Responsibility, OCP determined RBK a responsible bidder. (AR Ex. 9). On March 16, 2006, OCP requested that the Department of Small and Local Business Development grant RBK a waiver from the 35 percent LSDBE subcontracting requirement of the IFB. The waiver request was approved. On March 16, 2006, the District awarded to RBK the landscape and maintenance work under Contract No. DCHA-2006-C-

0010-HP. On March 31, 2006, Horton & Barber filed the instant protest challenging the District's determination of nonresponsibility. On March 31, 2006, as a result of the protest, OCP notified RBK to cease performance of the contract. By a determination and findings to proceed with performance, dated April 3, 2006, OCP determined that urgent and compelling circumstances required that RBK continue with contract performance pending the protest. The Board sustained the determination to proceed. The District filed its Agency Report on April 24, 2006, Horton & Barber responded to the Agency Report, and the District filed a reply to Horton & Barber's response. Subsequently, counsel for Horton & Barber filed an unopposed motion to withdraw his appearance which the Board hereby grants.

DISCUSSION

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

In its response to the Agency Report, Horton & Barber asserts that during a debriefing with the contracting officer Horton & Barber representatives were told that the nonresponsibility determination was based on a lack of personnel and lawn mowers necessary to perform the contract. Because the actual determination and findings includes other bases as well, *i.e.*, a poor performance record, failure to meet the 35 percent subcontracting requirement or request a waiver, insufficient and inoperable equipment, and facility in a state of disrepair, Horton & Barber states that the determination and findings "are disingenuous and establishes the fact that the contracting officer acted in bad faith and/or acted without any reasonable basis for a finding of non-responsibility." (Response to Agency Report, at 2 n.1). In its response, Horton & Barber "succinctly responds that it does not have a poor performance record, and did not possess inoperable equipment and facilities." (*Id.* at 2-3). Horton & Barber also demands that the District provide proof to support its allegations. Horton & Barber did not submit any affidavits or documentation for the record beyond what is contained in the Agency Report and exhibits.

We conclude that Horton & Barber has not demonstrated that the contracting officer violated law or the terms of the solicitation. The record from the agency documents poor past performance on other District Government contracts. Horton & Barber submitted no affidavits, performance data, or other evidence to rebut the evidence submitted by the District. Horton & Barber's reliance on its original response to the requests for responsibility data simply is inadequate to rebut the contracting officer's findings that Horton & Barber had a poor past performance record and had insufficient and inoperable equipment and inadequate facilities to perform this large contract. The agency provided detailed observations of what Horton & Barber offered for the job with an assessment that the equipment and facilities were inadequate. No evidence has been provided to rebut the agency's record. Although Horton & Barber complains that it was not told of all bases supporting the nonresponsibility determination at the debriefing, it did not provide an affidavit to support its assertion, and even if it had, we see no prejudicial error to Horton & Barber having to respond to the bases as set forth in the Agency Report including the attached determination and findings.

With regard to Horton & Barber's allegation of bad faith conduct, we conclude that there is no evidence establishing that the contracting officer acted in bad faith. In addition, Horton & Barber's reliance on proposed subcontractors is misplaced because it did not provide evidence of the specific facilities, equipment, and personnel that were committed to the work. Horton & Barber's other argument, that the District evaluated it on undisclosed criteria, is without merit. The standards of

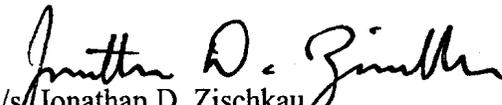
responsibility found in the Procurement Practices Act and in 27 DCMR Chapter 22 are incorporated by law into the terms and conditions of the solicitation. The contracting officer properly considered Horton & Barber's responsibility pursuant to those standards. Finally, Horton & Barber argues that the District failed to refer the nonresponsibility finding to the "Minority Business Opportunity Commission" pursuant to 27 DCMR § 2202.6. Although the authorizing legislation for this regulation has been repealed, the contracting officer nevertheless referred the nonresponsibility determination to the successor agency, the Department of Small and Local Business Development. (District May 9, 2006 Reply, Attachment A).

CONCLUSION

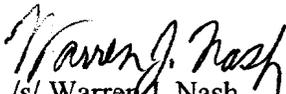
Horton & Barber has not demonstrated that the determination of its nonresponsibility violated law or the terms of the solicitation. We find that the record adequately supports the findings of the contracting officer. Accordingly, for the reasons discussed above, we deny Horton & Barber's protest.

SO ORDERED.

DATED: July 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

APPEALS OF:

DOXA, INC.)	
)	
Under Contracts regarding)	CAB Nos. D-1284 and D-1285
D.C. PSC Formal Case Nos. 766, 945,)	
982, 991, 1002, 1009, 1017, 1023, and 1026)	

For the Appellant DOXA, Inc.: Mr. Karl Richard Pavlovic, *pro se*. For the District of Columbia Office of People’s Counsel: Barbara L. Burton, Esq., Assistant People’s Counsel.

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

OPINION

LexisNexis Filing ID 11960520

Appellant DOXA, Inc., performed consulting services for the District of Columbia Office of People’s Counsel relating to various cases before the District of Columbia Public Service Commission. Under the contracts between DOXA and the Office of People’s Counsel, DOXA was to perform its consulting services and invoice People’s Counsel for its work. People’s Counsel was to pay DOXA on a monthly basis. People’s Counsel paid the principal amounts of the invoices but at least some of the payments were paid later than stipulated in their contracts. DOXA seeks interest penalties for those late payments pursuant to the Quick Payment Act (“QPA”), D.C. Code §§ 2-221.01 to 2-221.06 (2001), but People’s Counsel refused to pay interest penalties. DOXA appealed the denial of its claim for interest penalties. People’s Counsel has filed a motion to dismiss, contending that the Office of People’s Counsel is not subject to the Quick Payment Act or the Procurement Practices Act. We agree with People’s Counsel that the Quick Payment Act does not apply to it because it enjoys the same exemption as the Public Service Commission. For the same reason, People’s Counsel, like the Public Service Commission, is not subject to the Procurement Practices Act because of the specific exemptions found at D.C. Code §§ 2-301.04 and 2-303.20(1). Accordingly, we dismiss the appeals.

BACKGROUND

DOXA performed consulting services for the Office of People’s Counsel relating to Public Service Commission Formal Case Nos. 766, 945, 982, 991, 1002, 1009, 1017, 1023, and 1026 before the Public Service Commission from 1999 through 2005. DOXA payment invoices submitted to the Office of People’s Counsel were paid, although many payments were made more than 30 days after the invoice date. In September 2005, DOXA submitted claims to the People’s Counsel for interest penalties pursuant to the Quick Payment Act on the invoices which were paid late. People’s Counsel

made no decision respecting the QPA claims, and on December 23, 2005, DOXA filed notices of appeal with the Board based on the People's Counsel's deemed denials of its claims. In CAB No. D-1284, DOXA claims QPA interest penalties of \$2,482.27 and interest upon unpaid interest penalties of \$49.48, and in CAB No. D-1285, DOXA claims QPA interest penalties of \$35,117.55 and interest upon unpaid interest penalties of \$2,584.64. People's Counsel filed motions to dismiss in each of the cases and the Board has heard the arguments of the parties during status conferences.

DISCUSSION

DOXA's claims for penalty interest are based upon D.C. Code § 2-221.04(a) which provides in relevant part:

- (a)(1) Claims for interest penalties which a District agency has failed to pay in accordance with the requirements of §§ 2-221.02 and 2-221.03 shall be filed with the contracting officer for a decision. Interest penalties under this subchapter shall not continue to accrue: (A) after the filing of an appeal for the penalties with the Contract Appeals Board; or (B) for more than one year.
- (2) The contracting officer shall issue a decision within 60 days from the receipt of any claim submitted under this subchapter.
- (3) Within 90 days from the receipt of a decision of the contracting officer, the contractor may appeal the decision to the Contract Appeals Board.
- (4) The contractor shall file a claim for interest penalties and any amendments to such claim within 90 days after the principal is paid

The term "District agency" as used in section 2-221.04(a)(1), is defined in the "Definitions" section of the QPA, D.C. Code § 2-221.01, as follows:

- (3) "District agency" means any office, department, division, board, commission, or other agency of the District government, including, unless otherwise provided, an independent agency, required by law or by the Mayor or the Council to administer any law or any rule adopted under the authority of a law. For the purposes of this definition, the term "independent agency" means any agency of government not subject to the administrative control of the Mayor and includes, but is not limited to, the Superior Court of the District of Columbia, District of Columbia Court of Appeals, Council of the District of Columbia, Board of Elections and Ethics, Armory Board, Zoning Commission, Convention Center Board of Directors, District of Columbia Board of Education, and Public Service Commission.

This definition of "District agency" includes both dependent agencies – *i.e.*, those under the direct administrative control of the Mayor – as well as independent agencies which are not subject to the direct administrative control of the Mayor. The Public Service Commission is specifically listed as

an independent agency.

Section 2-221.02, referenced above in section 2-221.04, establishes which District agencies are required to pay QPA interest penalties, identifies how to compute the interest penalty amounts, and authorizes rules and regulations to be issued by the Mayor for agencies under the Mayor's direct control. This section provides in relevant part (emphasis added):

(a)(1) In accordance with rules and regulations issued by the Mayor of the District of Columbia ("Mayor"), each agency of the District of Columbia government ("District"), *under the direct control of the Mayor*, which acquires property or services from a business concern but which does not make payment for each complete delivered item of property or service by the required payment date shall pay an interest penalty to the business concern in accordance with this section on the amount of the payment which is due.

We believe that this subsection make agencies under the direct control of the Mayor subject to QPA interest penalties. Although independent agencies are included in the section 2-221.01(3) definition of "District agency", there is no clear manifestation here that the Council intended to make all independent agencies subject to the QPA interest penalties, particularly those that are exempt from the Procurement Practices Act. Section 2-221.02(b)(1A) states: "Each contract executed pursuant to Chapter 3 of Title 2 shall include in the solicitation a description of the contractor's rights and responsibilities under the chapter." The reference to Chapter 3 of Title 2 must be a reference to the Procurement Practices Act, which is found at Unit A of Chapter 3 of Title 2 of the D.C. Code. Thus, contracts executed pursuant to the PPA are subject to the QPA and must include a clause describing the QPA requirements and the contractor's rights and responsibilities under the QPA.

The Mayor's regulations implementing the QPA, 1 DCMR § 1700, support this interpretation. Section 1700.2 states:

Pursuant to section 3 of the [QPA], these rules shall apply to any office, department, division, board, commission or other agency of the District other than an independent agency required either by law, the Mayor or the Council of the District of Columbia (Council), to administer any law or any rule adopted under the authority of a law.

To complete the analysis, we look to see whether People's Counsel is subject to the PPA. The coverage of the PPA is set forth in D.C. Code § 2-301.04 ("Application of Chapter"), which states:

(a) Except as provided in § 2-2-303.20, this chapter shall apply to all departments, agencies, instrumentalities, and employees of the District government, including agencies which are subordinate to the Mayor, independent agencies, boards, and commissions, but excluding the Council of the District of Columbia, [and] District of Columbia courts

(l) Nothing in this chapter shall affect the authority of the District of Columbia Public Service Commission pursuant to Chapter 8 of Title 34.

Thus, the Public Service Commission is not covered by the PPA. A review of Chapter 8 of Title 34 reveals that the Office of People's Counsel is created within the Public Service Commission:

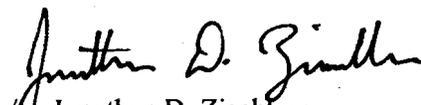
There is hereby established within the Public Service Commission of the District of Columbia, established by § 34-801, an office to be known as the Office of the People's Counsel. The Office shall be a party, as of right, in any investigation, valuation, revaluation, or proceeding of any nature by the Public Service Commission of or concerning any public utility operating in the District of Columbia.

D.C. Code § 34-804(a). Because the Office of People's Counsel is created within the Public Service Commission, the Council must have intended that its exemption of the Public Service Commission from the PPA also included the Office of People's Counsel. Since both the Public Service Commission and the Office of People's Counsel are exempt from the PPA, and they are both independent agencies not subject to the direct administrative control of the Mayor, the conclusion follows that neither is subject to the QPA.

In sum, we conclude that the Office of People's Counsel is not subject to the Quick Payment Act and we must dismiss the appeals.

SO ORDERED.

DATED: August 2, 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:

ROBERSON INTERNATIONAL)

) CAB No. P-0734

Under IFB No. DCAM-2006-B-0033)

For the Protester: Mr. Steven Roberson, *pro se*. For the District of Columbia Government: Howard Schwartz, Esq., Senior Assistant Attorney General, and 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 12165314

Roberson International has protested its failure to receive an award to provide janitorial and related supplemental services at various District facilities. The contracting officer determined Roberson to be nonresponsible due to insufficient evidence of its financial condition and its ability to perform the requested services. Roberson has not responded to the District's Agency Report. Therefore, we conclude that Roberson concedes the facts presented by the District. Because Roberson has not rebutted the evidence presented by the District supporting the nonresponsibility determination, we deny the protest.

BACKGROUND

On November 23, 2005, the District issued Invitation for Bids ("IFB") No. DCAM-2006-B-0033 for janitorial and related supplemental services at various District facilities in support of the Office of Property Management, the Department of Human Services, the Metropolitan Police Department, the Department of Public Works, the Department of Motor Vehicles, and the University of the District of Columbia. (Agency Report ("AR") Ex. 1, at 2-20; Declaration of Hans Paeffgen, Contracting Officer, AR Ex. 7 (¶ 3)).

The IFB was set aside for certified Small Business Enterprise ("SBE") bidders under the provisions of the Small, Local, and Disadvantaged Business Enterprise Development and Assistance Act of 2005, Title II, Subtitle N, of the Fiscal Year 2006 Budget Support Act of 2005, D.C. Law 16-33, effective October 20, 2005. SBEs eligible to bid were to be certified as small in the procurement category of General Services—Building Maintenance/Janitorial Services. (AR Ex. 1, §§ B-3; AR Ex. 7 (¶ 4)). The IFB provided for the award, under each of aggregate award groups 1-5, of up to five requirements contracts with payment based on fixed unit prices. Each contract would have a one-year base term and up to four one-year option periods. (AR Ex. 1, §§ B-2 and F.2-F.3; AR Ex. 7 (¶ 4)).

On December 19, 2005, the Office of Contracting and Procurement ("OCP") issued Amendment

No. 1, which extended the bid opening date until January 10, 2006. By Amendment No. 2, issued on December 21, 2005, OCP established a date for a pre-bid conference, which was held on December 30, 2005. In addition, OCP scheduled a site visit for prospective contractors to view core buildings and facilities and conducted the site visit on January 5, 2006. By Amendment No. 3, issued on January 5, 2006, OCP extended the bid opening date and answered written questions submitted by prospective bidders. On January 10, 2006, by IFB Amendment No. 4, OCP made a final extension of the bid opening date to January 20, 2006. (AR Exs. 7 (¶ 5) and 2).

The IFB provided for award to the responsible bidder who submitted a responsive bid with the lowest evaluated price for the combined base year and four options years. (AR Exs. 7 (¶ 6) and 1, IFB §§ B, L.1, L.13, L.14 and L.16). The evaluated price, in each award group would be the bidder's actual bid price reduced by the LSDBE preferences provided in IFB § M.2, namely a percentage reduction of the offered price based upon the LSDBE points for the LSDBE categories in which each bidder was certified by the District's Department of Small and Local Business Development. For evaluation purposes, a maximum twelve percent reduction in each actual bid price was possible. (AR Exs. 7 (¶ 6) and 1).

On or before January 10, 2006, eighteen prospective contractors, including Roberson, submitted bids for each of the five aggregate award groups. OCP analysts prepared independent bid tabulations for the base and option years for each of the five aggregate award groups. The Janitorial Bid Summary, Exhibit 3 to the District's Agency Report, summarizes the prices offered by each of the bidders for the base and option years, the total prices offered by each of the bidders for all five years, and the evaluated prices offered by each of the bidders for all years. (AR Exs. 7 (¶ 7) and 3).

By letter dated February 28, 2006, the contracting officer informed Roberson that it was the apparent low bidder for award group 4 and requested that Roberson provide the District with certain financial information for the District to make its responsibility determination. (AR Ex. 5). In response to the District's letter, Roberson submitted the following documents: financial information for 2003 and 2004, key personnel information, and a commercial lease agreement. (AR Ex. 5). By a determination and findings dated March 31, 2006, the contracting officer determined Roberson nonresponsible. In support of the determination, the contracting officer found that: (1) Roberson failed to provide the District with 2005 financials thus preventing the contracting officer from determining whether Roberson currently had the financial resources adequate to perform the contract; (2) Roberson did not demonstrate that it had past experience in the requisite size or scope to perform the requirements of the contract; and (3) Roberson did not perform any janitorial service contracts in 2004 since Roberson's income for 2004 was derived entirely from hauling and storage rather than from janitorial services.

By a determination and findings dated March 29, 2006, the contracting officer determined that Motir Services Inc. ("Motir") was the lowest evaluated responsive and responsible bidder for aggregate award groups 1, 2 and 3 and that R&R Janitorial, Painting, and Building Services, Inc. ("R&R Janitorial") was the lowest evaluated responsive and responsible bidder for aggregate award groups 4 and 5. (AR Exs. 7 and 8). The contracting officer thereafter made awards to Motir and R&R Janitorial.

On May 30, 2006, Roberson filed the instant protest challenging the District's awards, arguing

that it was the lowest bidder for award group 4 and thus should have received award. Roberson concluded that the contracting officer must have improperly evaluated the bids based on criteria not disclosed in the solicitation. The District filed its Agency Report on June 20, 2006. Despite requests from the Board, Roberson has never responded to the Agency Report.

DISCUSSION

We exercise jurisdiction over this protest 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.

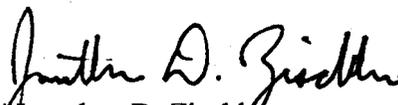
We treat as conceded the District's statement of facts in its Agency Report regarding the bases for the nonresponsibility determination and conclude that Roberson has not demonstrated that the contracting officer violated law or the terms of the solicitation in determining Roberson nonresponsible. Roberson has provided no evidence to rebut the agency's record of the nonresponsibility determination.

CONCLUSION

We conclude that the record adequately supports the determination and findings of the contracting officer. Accordingly, for the reasons discussed above, we deny Roberson's protest.

SO ORDERED.

DATED: August 23, 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:

SYSTEMS ASSESSMENT & RESEARCH, INC.)
) CAB No. P-0738
Under Solicitation No. GAGA-2006-R-0176)

For the Protester: Julian H. Spirer, Esq., and Brian M. Lowinger, Esq., Spirer & Goldberg, P.C.
For the District of Columbia Public Schools: Erika L. Pierson, Esq., Deputy General Counsel, and
Aaron E. Price, Sr., Esq., Attorney-Advisor.

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

OPINION

LexisNexis Filing ID 12431107

Systems Assessment & Research, Inc. ("SAR"), protests the award of a contract to Columbus Educational Services, LLC, as a special education services provider who would provide a variety of special education personnel to assist the District of Columbia Public Schools ("DCPS") in the implementation of a consent decree entered in the federal class action lawsuit *Blackman v. District of Columbia, et al.*, 97-CV-1629 (D.D.C.) ("Blackman consent decree"). Columbus had the highest evaluated proposal, and SAR was scored a distant second. Although the evaluation record is poorly documented before us, perhaps because SAR did not frame its *pro se* protest particularly well, we conclude that the protest should be dismissed because the federal court in *Blackman* exempted the District of Columbia from the Procurement Practices Act for procurements implementing the *Blackman* consent decree, and the procurement at issue clearly is meant to implement the consent decree. Accordingly, we dismiss the protest.

BACKGROUND

On April 13, 2006, DCPS's Office of Contracts and Acquisitions ("OCA") issued Solicitation No. GAGA-2006-R-0176 for the procurement of special education instructional and related services to assist in the implementation of the *Blackman* consent decree. (Agency Report ("AR") Exs. 1, 10). The special education personnel to be provided included physical therapists, occupational therapists, psychologists, speech language pathologists, master social workers, special education teachers, a project coordinator, and a project director.

On April 14, 2006, the *Blackman* court entered an order providing in pertinent part: "Ordered that pending final approval of the Consent Decree, in order to implement the preliminary approved Consent Decree, the [District of Columbia Government is] not bound by the D.C. Procurement Practices Act or any other District or federal law relating to procurement, or any regulations thereunder." (AR Ex. 9).

The closing date for proposals was April 21, 2006. Five proposals were timely received. OCA conducted an initial screening of the proposals, determining that only three offers were within the competitive range: (1) Tai Pedro & Associates, (2) SAR, and (3) Columbus. On May 12, 2006, OCA began negotiations with these offerors. After negotiations had concluded, OCA requested best and final offers ("BAFOs"). The BAFOs were evaluated by a panel of agency personnel knowledgeable about special education, special education related services, and special education services providers. The panel ultimately selected Columbus for the award. The record, however, does not contain any evaluation score sheets, consensus reports of the technical evaluation team, or the independent evaluation and selection reports of the contracting officer. All the record contains are summary sheets of the initial technical evaluations and BAFO evaluations, listing simply the total technical evaluation scores of the evaluators which presumably were adopted by the contracting officer. (AR Exs. 6, 7). The Agency Report states that the "[evaluation] panel ultimately selected Columbus for the award." (AR at 2).

In its efforts to begin immediate implementation of the consent decree's terms, OCA issued a letter contract to Columbus on June 1, 2006, with instructions to begin performance. (AR at 2). Subsequently, OCA conducted a debriefing with SAR to review its proposal and evaluation. During the course of this debriefing, SAR was informed of the shortcomings in its proposal. On June 26, 2006, in the midst of the awardee's performance under the letter contract, SAR, *pro se*, filed the instant protest. SAR asserts that DCPS: (1) eliminated the requirement for a resume and position description for the project director position; (2) discounted the protester's proposal for lack of a subcontracting plan; (3) misread the SAR's staffing ability; (4) unjustifiably credited Columbus with past performance experience; and (5) failed to include in the solicitation a local business participation requirement.

On June 30, 2006, the final consent decree was entered in the *Blackman* case, which provides in part: "Under this Consent Decree, the [District of Columbia Government is] not bound by the D.C. Procurement Practices Act, D.C. Code Section 2-301.01 et seq., any other District or federal law relating to procurement, and any regulation thereunder." (AR Ex. 10).

DCPS filed its Agency Report on July 20, 2006, addressing each of the grounds raised by the protest. On July 27, SAR, represented by counsel, filed its comments on the Agency Report. In its comments, SAR dropped all of the initial protest challenges except for the ones relating to the evaluation based on the project director resume and the timing of staffing availability. SAR's comments raised, for the first time, the failure of the contracting officer and the technical evaluation team to consider the evaluation factors, as reflected in the absence of records documenting how the evaluators arrived at the summary scores presented in the protest record. DCPS did not respond to SAR's comments.

DISCUSSION

In its Agency Report, DCPS contends that it has fully complied with the District's procurement laws. Before reaching the merits, however, we must decide whether we properly exercise jurisdiction pursuant to D.C. Code § 2-309.03(a)(1). DCPS states in the final sentence of its Agency Report, that "the United States District Court in [*Blackman*] waived the procurement laws of the District of Columbia as they apply to implementation of the [*Blackman*] Consent Decree." SAR did not address

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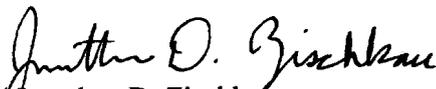
SAR, Inc., CAB No. P-0738

the consent decree exemption in its comments on the Agency Report.

We have carefully reviewed the language of the April 14, 2006 court order and the final consent decree of June 30, 2006, along with DCPS's record of the special education services procurement at issue. We conclude that the federal court order and consent decree in *Blackman* clearly exempt the protested procurement from the Procurement Practices Act. Accordingly, we dismiss the protest for lack of jurisdiction.

SO ORDERED.

DATED: September 21, 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:

CAPITOL PAVING OF D.C., INC.)
) CAB No. P-0736
Under RFP No. POKA-2005-B-0015-LS)

For the Protester: Douglas A. Datt, Esq. For the District of Columbia Government: Howard Schwartz, Esq., Senior Assistant Attorney General, and Jennifer L. Longmeyer-Wood, Esq., Assistant Attorney General. For Fort Myer Construction Corp.: Christopher M. Kerns, Esq.

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

OPINION

LexisNexis Filing ID 12616269

Capitol Paving of D.C., Inc., has protested the District’s award of an alley rehabilitation contract to Fort Myer Construction Corporation, arguing that the contracting officer should not have assigned to Fort Myer during bid evaluation a 10 percent bid preference as a “longtime resident business” (“LRB”) – a new form of preference instituted pursuant to the recently enacted Small, Local, and Disadvantaged Business Enterprise Development and Assistance Act of 2005, D.C. Law 16-33 (“SLDBEDA Act”). Capitol Paving attacks the validity of the LRB certification on a number of bases, including that the Small, Local Business Opportunity Commission (“SLBOC”) incorrectly certified Fort Myer as a LRB, that no certifications could be made in the absence of implementing regulations, that LRB certification cannot be made to anyone until the year 2012, and that Fort Myer has not shown 20 years of eligibility for local business enterprise status as a prerequisite to LRB certification. Because the record shows that SLBOC certified Fort Myer as a LRB, and we defer to SLBOC’s interpretation of the SLDBEDA Act, we conclude that Capitol Paving has not shown that the contracting officer’s reliance on that certification violated law, regulation, or the terms of the solicitation. Accordingly, we deny the protest.

BACKGROUND

On March 3, 2006, the Office of Contracting and Procurement (“OCP”) issued Solicitation No. POKA-2005-B-0015-LS on behalf of the District’s Department of Transportation (“DDOT”) to seek a contractor to rehabilitate alleys at various locations throughout the District. Nine amendments were issued, and the bid opening date was extended from April 5, 2006, to May 26, 2006.

Solicitation Section M, entitled “Evaluation Factors”, contains the following relevant provisions:

M.1.1 Preferences for Local Businesses, Disadvantaged Businesses, Resident-owned Businesses, Small Businesses, Longtime Resident Businesses, Longtime Resident Businesses, or Local Businesses with Principal Offices Located in an Enterprise Zone

Under the provisions of the "Small, Local, and Disadvantaged Business Enterprise Development and Assistance Act of 2005", D.C. Law 16-33, effective October 20, 2005, the District shall apply preferences in evaluating bids or proposals from businesses that are small, local, disadvantaged, resident-owned, longtime resident, or local with a principal office located in an enterprise zone of the District of Columbia.

M.1 General Preferences

For evaluation purposes, the allowable preferences under the Act for this procurement are as follows:

.....

M.1.1.3 Ten percent reduction in the bid price or the addition of ten points on a 100-point scale for a longtime resident business (LRB) certified by the SLBOC or the DSLBD, as applicable;

M.1.1.4 Two percent reduction in the bid price or the addition of two points on a 100-point scale for a local business enterprise (LBE) certified by the SLBOC or the DSLBD, as applicable;

.....

M.1.2 Application of Preferences

The preferences shall be applicable to prime contractors as follows:

.....

M.1.2.3 Any prime contractor that is an LRB certified by the SLBOC or DSLBD, as applicable, will receive a ten percent (10%) reduction in the bid price for a bid submitted by the LRB in response to an IFB or the addition of ten points on a 100-point scale added to the overall score for proposals submitted by the LRB in response to an RFP.

M.1.2.4 Any prime contractor that is an LBE certified by the SLBOC or the DSLBD, as applicable, will receive a two percent (2%) reduction in the bid price for a bid submitted by the LBE in response to an IFB or the addition of two points on a 100-point scale added to the overall score for proposals submitted by the LBE in response to an RFP....

(AR Ex. 1). Section M.1.5.1 recites that any vendor seeking to receive preferences on the solicitation must submit documentation at the time of its bid evidencing the vendor's certification by the SLBOC as an SBE, LBE, DBE, DZE, LRB, or RBO.

Section J entitled "List of Attachments" includes subsection J.11 ("LSDBE Certification

Package (27 Pages))” containing various materials from the predecessor to the DSLBD including an obsolete listing the certification categories -- SBE, LBE, DBE, DZE, and RBO -- but not including the new category for LRB that was part of the 2005 SLDBEDA Act. The attachment contains other informational materials concerning the LSDBE program such as a fact sheet, user’s guide, frequently asked questions, checklist, waiver application, and LSDBE certification application, but none of these other materials mention the new LRB certification category.

On March 22, 2006, OCP conducted a pre-bid conference. Four bids were received and opened on the bid opening date, May 26, 2006. At bid tabulation on June 1, 2006, Capitol Paving was the apparent low bidder before preference points. On June 2, 2006, the contract specialist completed the “Local, Small, Disadvantaged Business Enterprise Responsiveness Determination and Percentage Reduction Worksheet” (“worksheet”) for all four bidders. The contract specialist states that the preference percentage reductions found in his worksheet were based on the evidence of certifications which he verified electronically using the LSDBE website. (AR, Ex. 6). Capitol Paving received a 2 percent reduction in its bid price for evaluation purposes based on its certification as an LBE. A September 30, 2005 letter certifying Capitol Paving as an LBE was attached to the worksheet. (See AR Ex. 2). The 2 percent reduction lowers Capitol Paving’s bid price from \$26,556,255 to \$26,025,129.90. The Fort Myer worksheet states that it is entitled to a 12 percent reduction because it is certified as both a LBE and a LRB. The 12 percent reduction lowers Fort Myers bid price from \$27,132,323.20 to \$23,876,444.42. Capitol Paving was advised on June 7, 2006, that Fort Myer was the low evaluated bidder after the application of preference points.

Capitol Paving challenges the certification of Fort Myer. From the record, we find that Fort Myer had been certified by the former LBOC effective on September 21, 2004, as a LBE, with an expiration date of September 21, 2006. On March 20, 2006, Fort Myer submitted to the SLBOC an application for certification as a LRB. (Fort Myer Surreply Ex. B). The submission contains prior certification letters of Fort Myer issued by predecessors to the SLBOC – the District’s former Minority Business Opportunity Commission (“MBOC”) and the District’s former LBOC – spanning the period March 4, 1986, through the most recent certification on September 21, 2004. Fort Myer also included copies of realty leases, corporate annual reports, certificates of good standing, and other documentation in support of its application for LRB status. By letter of April 4, 2006, the SLBOC approved the certification of Fort Myer as a LBE and LRB. The April 4 letter states in relevant part:

The District of Columbia Small & Local Business Opportunity Commission (SLBOC) during its meeting on 09/21/2004, approved your application for Certification and registered your business enterprise in the Small, Local, and Disadvantaged Business Enterprise Program as established by the Small, Local, and Disadvantaged Business Development and Assistance Act of 2005, effective October 20, 2005 (D.C. Law 16-33; 52 DCR 7503), as amended. The business enterprise is duly registered by the Commission as a:

....

Local Business Enterprise
Longtime Resident Business

.....

This Certification of Registration, pursuant to D.C. Law 16-33 Subpart 3 will expire two (2) years from the effective date of approval. . . .

DATE OF APPROVAL: 09/21/2004

DATE OF EXPIRATION: 09/21/2006

(AR, Ex 4). Although the SLBOC's certification letter confusingly states that the "approval" was on September 21, 2004, which is impossible because the letter references and relies on the SLDBEDA Act which was enacted in 2005, and Fort Myer's request for certification was submitted on March 20, 2006, we find that the SLBOC simply expanded Fort Myer's prior certification of September 21, 2004, as an LBE, to include LRB status. Thus, LRB certification was effective from the date of the SLBOC letter of April 4, 2006, through the expiration date of the original LBE certification (September 21, 2006) so that both certifications would expire on the same date. (*See* Fort Myer Surreply, at 2, n.2).

On June 16, 2006, Capitol Paving filed its protest with the Board, arguing that the solicitation does not properly incorporate section M, that section M conflicts with section J, and that for various reasons Fort Myer should not have received the 10 percent preference for LRB status.

DISCUSSION

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

Capitol Paving first argues that under block 11 of the cover page the solicitation only references sections B through L and omits mention of section M. We do not find this argument persuasive because pages 127 through 131 do indeed contain section M, and those pages and the section are referenced in the upper right hand corner of the cover page which reads "Page 1 of Pages 131 Includes Sec. B thru M and attachments." Although cover page block 11 incorrectly identifies section L for the page ranges covering both section L and M, the pages for section M (pages 127-131) are identified and no bidder could have been prejudiced by this typographical error on the cover sheet. Capitol Paving also argues that section M conflicts with section J because the attachments for section J.11 do not make any mention of LRB status. We see no conflict and even if there were an ambiguity, Capitol Paving had to raise that prior to bid opening. Section J contains information about the LSDBE program and some forms that may be used. However, no reasonable bidder could interpret the guidance in section J as contradicting the clear references in section M to evaluation preferences being determined under the provisions of the SLDBEDA Act of 2005. Moreover, section M's direct and repeated references to the availability of preferences for a Longtime Resident Business (LRB) can leave no doubt that the contracting agency would be applying the current law governing the LSDBE program, notwithstanding the fact that section J's guidance and informational data had not been updated by the SLBOC and the contracting agency to reflect the current law.

Next, Capitol Paving raises a number of arguments as to why Fort Myer should not have been

certified as a LRB and should not have received the 10 percent LRB preference. The SLDBEDA Act created a new definitions provision, codified at D.C. Code § 2-218.02, which contains the following definition for "Longtime resident business":

"Longtime resident business" means a business which has been continuously eligible for certification as a local business enterprise, as defined in §2-218.31, for 20 consecutive years.

D.C. Code § 2-218.31 states:

A business enterprise shall be eligible for certification as a local business enterprise if the business enterprise:

- (1) Has its principal office located physically in the District of Columbia;
- (2) Requires that its chief executive officer and the highest level managerial employees of the business enterprise maintain their offices and perform their managerial functions in the District; and
- (3)(A) Is licensed pursuant to Chapter 28 of Title 47;
- (B) Is subject to the tax levied under Chapter 18 of Title 47; or
- (C) Is a business enterprise identified in § 47-1808.01 (1) through (5) and more than 50% of the business is owned by residents of the District.

Capitol Paving observes that the Mayor has not issued any regulations implementing the SLDBEDA Act, particularly with regard to the new certification category of LRB, and thus the SLBOC cannot make a LRB certification without regulatory guidance. In addition, according to Capitol Paving, without implementing regulations, contractors cannot know if they could qualify for a waiver of any of the provisions for LBE status that in turn support LRB status. Because the preference for the LRB is so much greater than the other preferences, Capitol Paving argues that the lack of a waiver provision eliminates competition in the heavy construction and asphalt paving and road work industry since only Fort Myer qualifies for LRB status. Capitol Paving also contends that since the LBE preference category was created in 1992 by virtue of the Equal Opportunity for Local, Small, and Disadvantaged Business Enterprises Act of 1992, no contractor could be eligible for LBE status for 20 consecutive years. Under this logic, the first year that an entity could qualify for LRB status would be 2012, that is, 20 years after 1992. Finally, Capitol Paving argues that Fort Myer has not been "continuously" eligible for LBE certification because Fort Myer had been debarred by the Federal Highway Administration and later by the District government in 2003. According to Capitol Paving, the debarment interrupted Fort Myer's eligibility and thus it did not meet the 20 continuous years requirement for LRB status.

We conclude that there is no basis in the law or the facts here to justify our reviewing the legitimacy of the action by the SLBOC to certify Fort Myer as an LRB. Although there are no implementing regulations, we believe that the SLBOC made its LRB certification of Fort Myer based on the language of the SLDBEDA Act, and again, we see no basis for intruding on the SLBOC's interpretation of a statute that it is charged to interpret. 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

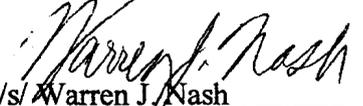
with applicable law, regulations, and terms and conditions of the solicitation. Cf. Urban Service Systems Corp., CAB No. P-0714, Nov. 15, 2005, with C&D Tree Service, Inc., CAB No. P-0440, Mar. 11, 1996, 44 D.C. Reg. 6426, 6433-6439. Those exceptional circumstances are not present here. Such challenges to a certification are properly addressed to the SLBOC through the statutory mechanism provided in the SLDBEDA Act. Each of the arguments raised by Capitol Paving with regard to how SLBOC could properly certify Fort Myer are not properly before us and we find no error by the contracting officer in relying on the certification made by the SLBOC in this case. Accordingly, we deny the protest.

SO ORDERED.

DATED: October 12, 2006


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

CONCURRING:


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

MAR 2 2007

GOVERNMENT OF THE DISTRICT OF COLUMBIA
 CONTRACT APPEALS BOARD

PROTESTS OF:

URBAN SERVICE SYSTEMS CORPORATION)
) CAB Nos. P-0735, P-0739
 Under Solicitation No. DCAM-2005-B-0027)

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

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

OPINION DENYING PROTESTS*LexisNexis Filing ID 12641245*

Urban Service Systems Corporation has filed two protests concerning the long-delayed award of three aggregate award groups for trash collection and recycling services to TAC Transport LLC ("TAC"), challenging the award of a 9 percent bid preference reduction to TAC's August 2005 bid prices and alleging that TAC failed to meet its "contractual requirement to commit to using certified local, small, and disadvantaged firms (LSDBEs) as subcontractors for 35% of the work." Similar issues were raised by Urban in a prior protest it filed on September 13, 2005, in CAB No. P-0714, challenging an anticipated award to TAC. In CAB No. P-0714, we denied Urban's challenge to the 9 percent preference given to TAC on the record which showed that the Department of Small and Local Business Development ("DSLBD") made a determination for provisional certification of TAC on August 30, 2005. We concluded that the contracting officer could rely on the provisional certification as of bid opening that same day, August 30, in granting TAC the 9 percent bid preference.

The District has moved to dismiss the current protests on the grounds that the new protests are untimely and that the Board previously considered and decided against Urban on the same issues raised here. We conclude that the protests are timely. The factual differences are that we now know that the preference certifying authority, the Small, Local Business Opportunity Commission ("SLBOC") denied recertifying TAC into the LSDBE program at its meeting in November 2005, and that the provisional certification expired in December 2005. Given the nearly 9-month period from bid opening to award, and the fact that the SLBOC denied TAC's recertification approximately 2 months after bid opening, we question the contracting officer's decision not to seek new bids, and evaluate on the firms' current LSDBE status. Nevertheless, we conclude that the contracting officer did not violate the law, regulations, or the terms of the solicitation in deciding to award to TAC on the basis of the bids opened on August 30, 2005. Because bids are evaluated as of bid opening date, in this case August 30, 2005, TAC was properly certified through a provisional certification and entitled to a 9 percent reduction in its bid prices as we previously held in CAB No. P-0714. We also conclude that there is no legal infirmity in the contracting officer's determination that TAC satisfied the 35 percent LSDBE subcontracting requirement. Having carefully considered each of Urban's arguments, we deny the consolidated protests.

BACKGROUND

We summarize from our findings made in CAB No. P-0714 and supplement them as relevant to our resolution of the current protests. On June 3, 2005, OCP issued Solicitation No. DCAM-2005-B-0027 ("IFB") on behalf of the Office of Property Management 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") Ex. 1). The IFB provided for seven separate award groups, numbered I through VII. Through amendment, bid opening was extended to August 30, 2005. (AR Ex. 1).

Section M.1.a. of the solicitation provides preference points for a prime contractor that is a local business enterprise ("LBE"), disadvantaged business enterprise ("DBE"), resident business ownership enterprise ("RBO"), or development zone enterprise ("DZE") certified by the SLBOC. Although the solicitation refers to the Local Business Opportunity Commission and its supporting Office of Local Business Development, the City Council enacted the Small, Local, and Disadvantaged Business Enterprise Development and Assistance Act of 2005 ("SLDBEDA Act") effective as temporary legislation on July 22, 2005, which made substantial changes to the preference program, renamed the certifying agency from the Local Business Opportunity Commission ("LBOC") to the SLBOC, and renamed the SLBOC's supporting agency from the Office of Local Business Development ("OLBD"), to the Department of Small and Local Business Development ("DSLBD").

Section M.1.c (AR Ex. 1) provides as follows:

Under the provisions of 27 DCMR 801.2(b), 39 DCR 5571 (July 24, 1992), thirty-five percent (35%) of the total dollar value of this contract has been set aside for performance through subcontracting with local business enterprises, disadvantaged business enterprises, or resident business ownerships. Any Prime Contractor responding to this solicitation shall submit with its bid or proposal a notarized statement detailing its subcontracting plan (See Clause C.1, Subcontracting Plan and Clause C.2, Liquidated Damages). Once the plan is approved by the Contracting Officer, changes will only occur with the prior written approval of the Contracting Officer.

On August 30, 2005, bids were opened from six bidders including Urban and TAC. 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 the DSLBD/OLBD, because the SLBOC had not met during August 2005 to consider TAC's pending application for its LSDBE recertification (it had previously been certified but that certification expired on August 12, 2005). OCP applied a 9 percent LSDBE preference reduction to the bids of TAC and Urban. As tabulated, TAC was the apparent low bidder for Award Groups I, III, VI, and VII, while Urban was the apparent low bidder for Award Groups IV and V. If TAC had not received the 9 percent LSDBE preferences, Urban would have been the low bidder additionally on Award Groups I and VII. Because Award Group VII was ultimately cancelled from the solicitation, the only award at issue here is Award Group I.

On September 13, 2005, Urban filed a protest, docketed as CAB No. P-0714, challenging any

proposed award to TAC on the ground that TAC was not a responsible bidder, TAC did not provide with its bid a proper subcontracting plan, and TAC was not entitled to a 9 percent LSDBE preference because it was a multi-million dollar firm located principally in Maryland rather than the District. While the protest was pending, OCP conducted a pre-award survey of TAC and Urban on October 5-7, 2005. OCP also examined the responsibility of TAC's subcontractor, Jerome L. Taylor Trucking, Inc. ("JLT Trucking").

On November 8, 2005, the SLBOC held one of its regular monthly meetings to consider pending applications for certification and recertification, including TAC's recertification application. According to the transcript of the hearing provided by Urban in the current protest proceedings, the SLBOC denied recertifying TAC under the LSDBE program because it found the preponderance of business functions occurring outside of the District. The transcript seems to indicate that TAC's recertification had come to the SLBOC at its October 20, 2005 meeting but the matter was deferred to the subsequent November 2005 meeting. We were not aware of the SLBOC's November 8 denial of recertification when we issued our decision in CAB No. P-0714 on November 15, 2005. In our decision, we held that the August 30, 2005 temporary certification letter constituted a provisional certification under the SLDBEDA Act and that the contracting officer properly relied on the provisional certification in applying a 9 percent preference reduction to TAC's bid. We also held that the issue of TAC's subcontracting plan was a matter of responsibility that may be addressed up to the time of award and that Urban's challenge of TAC's responsibility was premature because the contracting officer had not made a responsibility determination.

After our decision, OCP continued its responsibility investigation of TAC. Based on revisions to TAC's subcontracting plan during December 2005, the contracting officer determined that TAC's revised subcontracting plan met the 35 percent subcontracting requirements. (AR Ex. 8). A proposed contract award to TAC was submitted in February 2006 to the Council for approval, but it was subsequently withdrawn by the Mayor on March 7, 2006. (AR Ex. 8). Additional responsibility data was obtained by OCP relating to TAC and its subcontractor, JLT Trucking, including that JLT Trucking would perform approximately 37 percent of the work under Award Groups I, III, and VI. After Award Group VII was cancelled from the solicitation on March 16, 2006, the contracting officer concluded that TAC was a responsible bidder for Award Groups I, III, and VI. (AR Ex. 8, 11).

On May 2, 2006, Urban filed a motion for a preliminary injunction with the Superior Court to prevent the award of any proposed contract to TAC of Aggregate Award Groups I, III, and VI. (AR Ex. 12). On May 12, 2006, the Office of the Mayor submitted to the Council a new proposed contract for awarding Award Groups I, III, and VI to TAC. On May 24, 2006, Urban filed a temporary restraining order with the Superior Court to enjoin the Council from approving the proposed contract but the Court denied Urban's motion. (AR Exs. 12, 14). On May 25, 2006, the proposed contract to TAC was deemed approved by the Council. (AR Ex. 8). On June 7, 2006, Urban filed the first of its two protests docketed as CAB No. P-0735. On June 22, 2006, the Chief Procurement Officer determined to proceed with performance during the protest proceedings. On June 22, 2006, the District awarded the contract to TAC for Award Groups I, III, and VI. (AR Ex. 13). On July 10, 2006, Urban filed a second protest, docketed as CAB No. P-0739, challenging TAC's receiving a 9 percent LSDBE preference reduction for bid evaluation purposes, and asserting that Urban was entitled to a 12 percent LSDBE preference, that TAC's bid was nonresponsive for failing to include a valid subcontracting plan, and that TAC was not a responsible bidder because JLT Trucking is not capable of performing 35 percent of the contract

work.

DISCUSSION

Timeliness

The District argues that we should dismiss the consolidated protests because Urban failed to file the protest in CAB No. P-0735 within 10 business days of the time that it knew or should have known of the basis of the protest. The District relies on the statement in Urban's protest that "[u]pon learning that the Mayor's Office had submitted the contract . . . to the Council for approval, on May 4, 2006, Urban filed a motion for preliminary injunction. . . ." According to the District, because Urban knew the grounds of protest no later than May 4, 2006, and received notice of an adverse action by an official in connection with the proposed award at the latest by May 4, 2006, Urban had until May 18, 2006, to file a protest. Since the protest was not actually filed until June 7, 2006, it was untimely. The District adds that the protest issues in P-0739 are substantially the same as those raised in P-0735 and thus both protests must be dismissed. Urban responds that it filed its motion for preliminary injunction on May 4, 2006, acting on information and belief, but not on actual knowledge, seeking to preclude the awarding of any additional contracts under the solicitation while the Superior Court case was pending. Urban states that it received no official notice that the District was awarding Award Group I to TAC and had only unsubstantiated comments from the contract specialist that Urban was "no longer in line for Award Group I." (Urban's July 21, 2006 Opposition Memorandum, at 5-6). Urban contends that it was not until May 23, 2006, that it finally was able to confirm with the Council that the Mayor's Office had transmitted to the Council for approval a proposed contract award to TAC. (*Id.* at 6).

With regard to timeliness of a protest in connection with an award, the 10-business day period stated in D.C. Code § 2-309.08 begins when the bidder or offeror knows or should have known the basis of its protest *and* the party has become aggrieved in connection with the award by an official action adverse to it. *See Sigal Construction Corp.*, CAB No. P-0690 et al., Nov. 24, 2004, 52 D.C. Reg. 4243, 4254 (and cases cited therein). In *Sigal*, we concluded that the protester knew the bases for its protest and became aware of an official action by the contracting officer adverse to it when it learned of the Mayor's submission to the Council for approval of a proposed award to another contractor. We held that *Sigal's* protest was untimely because it was filed more than 10 business days after its actual notice that a proposed award had been submitted to the Council. *Sigal* did not receive a formal notice of the proposed award being transmitted to the Council, but it discovered from Council sources about the submittal and actively lobbied the Council against approving the award. In the present matter, Urban did not receive any formal notice from the contracting officer of the transmittal to the Council of the proposed award to TAC. Nor did it acquire actual notice of the Council submittal. Urban's representative had communications by telephone with the contract specialist prior to the transmittal, but those oral communications merely indicated that Urban was not in line for award. There was no communication from the contracting officer or the contract specialist notifying Urban that the proposed award had been transmitted to the Council. Certainly, if the contracting officer had sent a written notice to all bidders that a proposed award to TAC had been submitted to the Council for approval, such a notice would constitute official action. Indeed, we recommend that contracting officers in the future always inform bidders promptly when a proposed award (requiring Council approval) has been transmitted to the Council. In the present matter, the first official notice sent to any of the bidders was sent by OCP after the Council review period had ended. Urban received actual notice of the transmittal

to the Council on or about May 23, 2006, and it filed its protest on June 7, 2006, which is within 10 business days. Accordingly, Urban timely filed its protest. Therefore, we properly exercise jurisdiction pursuant to D.C. Code § 2-309.03(a)(1) to reach the merits of the protest.

TAC's Entitlement to a 9 Percent Preference Reduction

In CAB No. P-0714, we held that TAC was entitled to the 9 percent preference reduction based on a provisional certification of TAC made by the DSLBD/OLBD on August 30, 2005, which was also the date of bid opening. The only factual differences between P-0714 and the current consolidated protests are that we now know that after bid opening the SLBOC denied recertifying TAC into the LSDBE program at its meeting on November 8, 2005, after considering the testimony from TAC's chief executive officer. In addition, the provisional certification expired in December 2005 by virtue of D.C. Code § 2-218.62(b) (Supp. 2006), which provides that a provisional certification "shall not last for more than 120 days." Given that 9 months elapsed from bid opening on August 30, 2005, until award on June 22, 2006, and the fact that the SLBOC denied TAC's recertification in November 2005, the contracting officer should have amended the solicitation to obtain new bids, and evaluate prices on the firms' then-current LSDBE status, but we conclude that the contracting officer did not violate the law, regulations, or the terms of the solicitation in deciding to award to TAC on the basis of the bids opened on August 30, 2005. Because bids are evaluated as of bid opening date, and August 30, 2005, is the bid opening date, TAC was properly certified through a provisional certification and entitled as of that date to a 9 percent reduction in its bid prices, as we previously held in CAB No. P-0714. Thus, for the only award group at issue, Award Group I, TAC has the lowest evaluated bid.

Urban understandably challenges the now-expired provisional certification and asks us again to independently review the certification of TAC to protect the integrity of the procurement. We declined to do so in CAB No. P-0714 because the exceptional circumstances provoking such a review were not present. *Urban Service Systems Corp.*, CAB No. P-0714, at 6, Nov. 15, 2005; *see also Capitol Paving of D.C., Inc.*, CAB No. P-0736, Oct. 12, 2006; *C&D Tree Service, Inc.*, CAB No. P-0440, Mar. 11, 1996, 44 D.C. Reg. 6426, 6433-6439. As of August 30, 2005, the DSLBD/OLBD made a provisional recertification of TAC which we held to entitle TAC to a 9 percent bid preference. Urban successfully challenged the recertification of TAC before the SLBOC, however, the denial of recertification occurred on November 8, 2005, well after bid opening. Because the law is clear that preferences are determined for price evaluation purposes at the time of bid opening, *C&D Tree Service, Inc.*, CAB No. P-0440, Mar. 11, 1996, 44 D.C. Reg. at 6435 (and cases cited therein), the subsequent denial cannot retroactively change the bid price evaluations as of August 30, 2005. We cannot give retroactive application to the SLBOC's denial of TAC's recertification for the same reason that we cannot give retroactive application to Urban's newly received 12 percent bid preference made effective October 20, 2005, because the bids at issue here were opened on August 30, 2005. While the Council has the power to amend the LSDBE program by requiring bidders to be certified not only at bid opening for evaluation purposes but also at the time of contract award, we cannot do so. The contracting officer had it in her power to resolve the dilemma caused by TAC's recertification denial by amending the solicitation and seeking new bids from the bidders. For reasons that are not apparent, she did not follow this course. Under our statutory scope of review, we determine whether the contracting officer's actions in awarding to TAC based on the original bids violated the law or the terms of the solicitation. We have carefully considered the facts but find that the contracting officer did not violate the law or the solicitation in awarding to TAC based on the original bids.

Subcontracting Plan with JLT Trucking

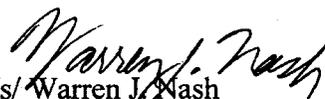
Urban reasserts its contention from CAB No. P-0714 that TAC's bid is nonresponsive since TAC failed to provide a valid subcontracting plan indicating that a minimum of 35 percent of the work would be performed by a LSDBE certified subcontractor. Urban also claims that Jerome L. Taylor Trucking is "in actuality the 'Roll-off Division' of LSI, that Mr. Taylor is the Operation [sic] Manager for LSI, that LSI is located in Maryland and that LSI is not a certified LSDBE firm in the District." (CAB No. P-0735 Protest, at 21). Finally, Urban claims that TAC is nonresponsive because JLT Trucking is not capable of performing 35 percent of the contract work.

We stated in our decision in CAB No. P-0714 that the subcontracting plan requirement is a matter of bidder responsibility and not responsiveness. Thus, the subcontracting plan was not required in the original bid. The contracting officer obtained an initial and revised subcontracting plan from TAC and a declaration confirming that JLT is currently operating and a validly certified LSDBE firm. The contracting officer analyzed the subcontracting data and concluded that JLT Trucking was validly certified, a minimum of 35 percent of the work was subcontracted to JLT, and JLT has the facilities and equipment making it capable of performing the subcontract work. (See AR Exs. 5, 8, 11, and 15). Under the record as supplemented through the consolidated protests, we conclude that there is no basis for determining TAC's bid to be nonresponsive or for TAC to be nonresponsive based on the revised subcontracting plan.

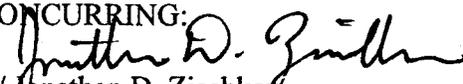
CONCLUSION

We have considered all of the contentions raised by Urban in its consolidated protests, but we conclude that the contracting officer did not violate the law or the terms of the solicitation in awarding a contract to TAC. Accordingly, we deny Urban's protests.

SO ORDERED.DATED: October 16, 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:

CAPITOL PAVING OF D.C., INC.)
) CAB No. P-0741
Under IFB No. POKA-2006-B-0090-LJ)

For the Protester: Douglas A. Datt, Esq. For the District of Columbia Government: Howard Schwartz, Esq., Senior Assistant Attorney General, and Talia S. Cohen, Esq., Assistant Attorney General.

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

OPINION

LexisNexis Filing ID 12877636

Capitol Paving of D.C., Inc., has protested the District's solicitation for joint seal, slurry seal, and bituminous surface treatment for various roadways in the District of Columbia, arguing that the solicitation contains inconsistencies regarding how bids will be evaluated under the small, local, and disadvantaged business enterprise ("SLDBE") preference program as authorized by the Small, Local, and Disadvantaged Business Enterprise Development and Assistance Act of 2005, D.C. Law 16-33 ("SLDBEDA Act"). Capitol Paving argues that while Section M of the solicitation defining the evaluation criteria refers to preferences for "longtime resident businesses" ("LRBs") and resident-owned business enterprises, the "LSDBE Certification Package" found in Attachment J.7 of the solicitation does not mention either preference. In addition, the preference percentage reductions found in section M and Attachment J.7 also differ. Capitol Paving further argues that no award may be made based on a LRB preference because (1) there are no regulations implementing the LRB certification preference authorized by the SLDBEDA Act, and (2) the LRB certification as a matter of law cannot be applicable to any contractor until the year 2012. Apparently because Capitol Paving currently does not qualify for the 10 percent LRB certification preference but one of its competitors has recently been certified as a LRB (Fort Myer Construction), Capitol Paving argues that employing the LRB preference absent any waiver provision would eliminate competition and thus cannot be used in bid evaluations.

We conclude that the first protest ground relating to the inconsistency between Solicitation Section M and Attachment J.7 has been rendered moot because the District issued an amendment removing Attachment J.7. Concerning the other protest grounds involving legal arguments challenging the use of any LRB preferences in District procurements, we have recently rejected essentially the same arguments in *Capitol Paving of D.C., Inc.*, CAB No. P-0736, Oct. 12, 2006. Accordingly, we dismiss the protest in part as moot and deny the remaining protest grounds.

BACKGROUND

On July 28, 2006, the Office of Contracting and Procurement ("OCP") issued in the open market IFB No. POKA-2006-B-0090-LJ with a bid opening date of August 31, 2006. OCP issued the IFB on

DISCUSSION

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

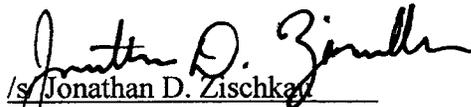
In response to Capitol Paving's first protest ground alleging inconsistencies between Section M and Attachment J.7, the District issued Amendment No. 2 deleting in its entirety Attachment J.7 which contained the outdated LSDBE preference program information package. Capitol Paving nevertheless urges that this amendment does not moot the first protest ground because removing Attachment J.7 means that the solicitation no longer provides preference program information and certification and waiver application forms to prospective bidders. Capitol Paving's argument is without merit. The package is no more than an informational aid to bidders and its elimination does not render the solicitation defective in any respect. Section M provides the evaluation criteria regarding the District's preference program and that content is derived directly from the SLDBEDA Act. Bidders can obtain information and forms from the Small, Local Business Opportunity Commission ("SLBOC") or its supporting Department of Small and Local Business Development. Accordingly, we dismiss as moot Capitol Paving's first protest ground.

Capitol Paving next argues that no award may be made under the challenged solicitation based on a LRB preference because (1) there are no regulations implementing the LRB certification preference authorized by the SLDBEDA Act, and (2) the LRB certification as a matter of law cannot be applicable to any contractor until the year 2012. Apparently because Capitol Paving currently does not qualify for the 10 percent LRB certification preference but one of its competitors has recently been certified as an LRB, Capitol Paving argues that applying the LRB preference absent any waiver provision would eliminate competition and thus cannot be used in this procurement.

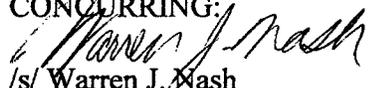
We recently rejected similar arguments in *Capitol Paving of D.C., Inc.*, CAB No. P-0736, Oct. 12, 2006, where Capitol Paving challenged OCP's applying a 10 percent preference to Fort Myer Construction based on a longtime resident business certification issued by the SLBOC to Fort Myer. We sustained the contracting officer's determination to evaluate Fort Myer's bid using the LRB preference. Although we certainly look forward to the Mayor's issuance of revised regulations to implement the SLDBEDA Act and to replace various regulations that are obsolete, we cannot conclude that the current solicitation, in providing preferences pursuant to the SLDBEDA Act, violates the law. Accordingly, we deny Capitol Paving's other grounds for protest.

SO ORDERED.

DATED: November 9, 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:

CNSI, Inc.)	
)	CAB No. P-0742
Under RFP No. POTO-2006-R-0077)	

For the Protester CNSI, Inc.: Matthew B. Hoffman, Vice President and Corporate Counsel. For the District of Columbia Government: Howard 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 13010061)

CNSI, Inc. protests the District's issuance of an RFP for a Medicaid Management Information System ("MMIS") that requires offerors to submit for evaluation a MMIS system that has been certified by the federal Centers for Medicare and Medicaid Systems ("CMS"). CNSI alleges that the RFP requirement unnecessarily restrains competition. CNSI also requests extending the date for proposals by an additional sixty days. In its Motion to Dismiss, or in the alternative, Agency Report, the District responds that Amendment No. 4 moots CNSI's allegation regarding the restraint of competition, and that Amendment No. 5, which gives the protester an additional month to respond to the RFP, moots CNSI's second protest ground. Because Amendment No. 4 deletes the strict MMIS certification requirement, and Amendment No. 5 extended the closing date by one month, we dismiss the protest as moot.

BACKGROUND

On June 30, 2006, the District of Columbia Office of Contracting and Procurement, ("OCP"), for the District Department of Health, Medical Assistance Administration ("DDOH"), issued RFP No. POTO-2006-R-0077, for a contractor to, among other things, provide, enhance, and implement a federally owned and certified MMIS. Section C.1.5 of the RFP states that "the District is seeking a contractor to provide an existing CMS¹ certified MMIS System with enhancements as specified by the District." The RFP established a closing date of August 11, 2006. Amendment Nos. 1 and 2 extended that date to September 25, 2006. In Amendment No. 4, issued September 13, 2006, the District deleted Section C.1.5 and substituted new language which reads as follows: "The District is seeking a contractor to provide an existing CMS certified or certifiable MMIS system with enhancements as specified by the District." Amendment No. 4 also defines a certifiable MMIS system as a system that has been identified by an independent third party MMIS expert as meeting the criteria of CMS certification and

¹ "CMS" is the acronym for the Centers for Medicare and Medicaid Services, formerly known as the Health Care Financing Administration, HCFA. See page 16 of the RFP.

accreditation. Amendment No. 5 also extended the closing date for submission of proposals to October 30, 2006.

CNSI filed this protest on September 19, 2006. In light of CNSI's failure to reply to the District's Motion to Dismiss, or, in the Alternative, Agency Report, the Board has accepted the District's uncontroverted statement of facts.

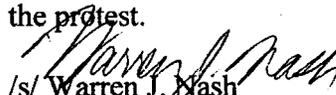
DISCUSSION

The District asserts that the protest is moot because (1) Amendment No. 4 removed the language that required offerors to submit proposals that provided an existing CMS certified MMIS system, and (2) the District extended the proposal due date to October 30, 2006. CNSI did not respond to the District's Motion to Dismiss. Accordingly, this Board may accept the District's factual assertions as uncontroverted, and agree that the protest grounds are now moot. See Board Rule 307.3, 49 D.C. Reg. 2079 (2002). Amendment No.5 was a substantial change to the solicitation, and the District asserts that Amendment No. 5 allows offerors to submit either certified or certifiable MMIS systems. Amendment No. 5 expands the range of MMIS systems that the District would evaluate, and it appears that Amendment No. 5 responds to CNSI's complaint. The District also extended the proposal due date. While the District did not extend the due date for the full sixty days requested by CNSI, the District did extend the date by more than thirty days. Again, with no response from CNSI, the due date extension appears to respond to CNSI's complaint. Therefore, we dismiss the protest as moot.

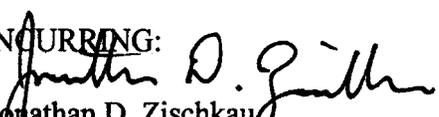
CONCLUSION

For the reasons discussed above, we dismiss the protest.

DATE: November 24, 2006


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

CONCURRING:


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

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GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

APPEALS OF:

DOXA, INC.)	
)	
Under Contracts regarding)	CAB Nos. D-1284 and D-1285
D.C. PSC Formal Case Nos. 766, 945,)	
982, 991, 1002, 1009, 1017, 1023, and 1026)	

For the Appellant DOXA, Inc.: Mr. Karl Richard Pavlovic, *pro se*. For the District of Columbia Office of People’s Counsel: Barbara L. Burton, Esq., Assistant People’s Counsel.

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

OPINION ON MOTION FOR RECONSIDERATION

LexisNexis Filing ID 13264100

Appellant DOXA, Inc., moves for reconsideration of the Board’s decision dismissing DOXA’s appeals seeking interest penalties for late contract payments pursuant to the Quick Payment Act (“QPA”), D.C. Code §§ 2-221.01 to 2-221.06 (2001), against the District of Columbia Office of People’s Counsel (“OPC”) which is statutorily within the District of Columbia Public Service Commission (“PSC”). In our decision, we held that the QPA and the Procurement Practices Act (“PPA”) do not apply to OPC because it enjoys the same exemption from the QPA and PPA as the PSC. DOXA argues that we incorrectly concluded that OPC remains exempt from the QPA and PPA after the Procurement Reform Amendment Act of 1996 expanded the scope of the QPA and PPA to include “independent agencies” of the District Government. DOXA also argues that our decision contradicts our earlier decision in *Curtis Chevrolet*, CAB No. D-1116, Jan. 25, 2001, where we held that the District of Columbia Housing Authority was subject to the QPA. As discussed below, we see no legal error in our holding that the OPC is not subject to the QPA. Accordingly, we deny the motion for reconsideration.

BACKGROUND

DOXA performed consulting services for the Office of People’s Counsel relating to Public Service Commission Formal Case Nos. 766, 945, 982, 991, 1002, 1009, 1017, 1023, and 1026 before the Public Service Commission from 1999 through 2005. DOXA payment invoices submitted to the Office of People’s Counsel were paid, although many payments were made more than 30 days after the invoice date. In September 2005, DOXA submitted claims to OPC for interest penalties pursuant to the Quick Payment Act on the invoices which were paid late. OPC made no decision respecting the QPA claims, and on December 23, 2005, DOXA filed notices of appeal with the Board based on OPC’s deemed denials of its claims. OPC moved to dismiss the appeals on the basis that OPC is not

subject to the QPA. We agreed and dismissed the appeals.

DISCUSSION

DOXA does not dispute that if the Public Service Commission is exempt from the QPA, then the Office of People's Counsel is also exempt. This conclusion follows from a review of Chapter 8 of Title 34 of the D.C. Code where OPC is created within the PSC:

There is hereby established within the Public Service Commission of the District of Columbia, established by § 34-801, an office to be known as the Office of the People's Counsel. The Office shall be a party, as of right, in any investigation, valuation, revaluation, or proceeding of any nature by the Public Service Commission of or concerning any public utility operating in the District of Columbia.

D.C. Code § 34-804(a).

DOXA argues in its motion for reconsideration that we incorrectly concluded that OPC remains exempt from the QPA and PPA after the Procurement Reform Amendment Act of 1996 ("PRAA"), D.C. Law 11-269, 44 D.C. Reg. 1423, expanded the scope of the QPA and PPA to include "independent agencies" of the District Government. DOXA cites the following language from the section-by-section analysis of the Council's Report on Bill 11-705, The Procurement Reform Amendment Act of 1996, dated September 24, 1996, at 9:

Title III – (j) Section 310 amends D.C. Code §§1-1171 and 1-1175 (Quick Payment Act) to make the quick payment provisions applicable to all District agencies and recognizes the Director's centralized role in the procurement system.

Section 310 of the PRAA replaced the phrase "other than an independent agency" with "including, unless otherwise provided, an independent agency" as shown in the current Definitions section of the QPA, D.C. Code § 2-221.01 (emphasis added):

(3) "District agency" means any office, department, division, board, commission, or other agency of the District government, *including, unless otherwise provided, an independent agency*, required by law or by the Mayor or the Council to administer any law or any rule adopted under the authority of a law. For the purposes of this definition, the term "independent agency" means any agency of government not subject to the administrative control of the Mayor and includes, but is not limited to, the Superior Court of the District of Columbia, District of Columbia Court of Appeals, Council of the District of Columbia, Board of Elections and Ethics, Armory Board, Zoning Commission, Convention Center Board of Directors, District of Columbia Board of Education, and Public Service Commission.

However, the PRAA did not amend any other relevant portions of the QPA. Thus, D.C. Code § 2-221.02, which identifies the District agencies required to pay QPA interest penalties, was left

unchanged by the PRAA, and provides in relevant part (emphasis added):

(a)(1) In accordance with rules and regulations issued by the Mayor of the District of Columbia ("Mayor"), each agency of the District of Columbia government ("District"), *under the direct control of the Mayor*, which acquires property or services from a business concern but which does not make payment for each complete delivered item of property or service by the required payment date shall pay an interest penalty to the business concern in accordance with this section on the amount of the payment which is due.

DOXA asserts that the phrase "under the direct control of the Mayor" remains in the QPA "due to an oversight in the task of conforming the QPA as amended by the PRAA." (Motion for Reconsideration, at 9). Subsection (b)(1A), added by Title IX, Section 902(a)(2) of D.C. Law 12-175, Mar. 26, 1999, 45 D.C. Reg. 7193, 7201-02, states that "[e]ach contract executed pursuant to Chapter 3 of Title 2 shall include in the solicitation a description of the contractor's rights and responsibilities under the chapter." Although subsection (a) contains the qualifying language ("under the direct control of the Mayor"), subsections (d) and (e) – relating to contractor-subcontractor payments – do not qualify the term "District agency." D.C. Code § 2-221.03 – relating to discount interest penalties – also refers to "District agencies" without the qualifying language found in section 2-221.02(a)(1). Section 2-221.04 provides for the filing of QPA claims and appeals to the Contract Appeals Board for "interest penalties which a District agency has failed to pay in accordance with the requirements of §§ 2-221.02 and 2-221.03"

Certainly the QPA legislation, as amended by the PRAA, is not a model of clarity. Nonetheless, the limited question before us is whether the changes effected by the PRAA in 1997 removed the QPA exemption for the Public Service Commission (and thus for the Office of People's Counsel). We concluded in our decision that the exemption was not removed, but in view of the motion for reconsideration, we elaborate on our rationale. First, DOXA cannot be correct that the PRAA expanded the QPA applicability to all "independent agencies" as that term is defined in D.C. Code § 2-221.01(3) because some of the "independent agencies" – such as the Superior Court and the Court of Appeals – cannot be covered absent Congressional authorization. The Council recognized such exceptions by including the phrase "unless otherwise provided" in the "District agency" definition. The case of the Public Service Commission is analogous to that of the courts because the Commission's plenary contracting authority was authorized by Congress, *see* Act of Mar. 4, 1913, 37 Stat. at 994, ch. 150, sec. 8, para. 95, and this authority has never been revoked by Congressional legislation. Second, the fact that the Council exempts the PSC from the PPA in D.C. Code § 2-303.20(l) supports the conclusion that the Council had no intention of questioning the PSC's plenary contracting authority as provided by Congress.

In its motion, DOXA mistakenly suggests that the Board held that OPC is exempt from the QPA *because* it is exempt from the PPA. As elaborated above, we held that OPC is exempt from the QPA because Congress has provided plenary contracting authority to the PSC and thereby to OPC. Elsewhere in its motion, DOXA argues that the Board erred in concluding that the PPA exemption for the PSC is a "blanket" exemption. Again, for the reasons already stated, the PSC is exempt

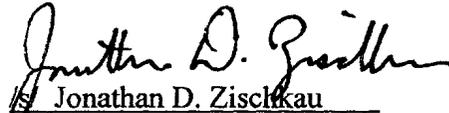
because Congress has provided it with independent contracting authority. In addition, DOXA incorrectly asserts that none of the exemptions in section 2-303.20 are complete exemptions from the PPA, as are found in section 2-301.04(a). Although some exemptions, such as the one for the District of Columbia Housing Authority, are partial exemptions, others are complete exemptions such as the one for the Sports Commission.

Finally, DOXA argues that our decision is inconsistent with our prior decision in *Curtis Chevrolet*, CAB No. D-1116, Jan. 25, 2001, where we held that the District of Columbia Housing Authority ("DCHA") was subject to the QPA. DCHA is quite different from the PSC and OPC because DCHA's contracting authority was not created by Congressional authorization. The contract between Curtis Chevrolet and DCHA was entered into at a time when DCHA was subject to the PPA, see D.C. Law 13-105, effective May 9, 2000, 47 D.C. Reg. 1325, 1352, and, as we held, also subject to the QPA. DCHA did not argue that it was exempt from the QPA under the Council's "as otherwise provided" qualification in D.C. Code § 2-221.01(3). Our other QPA decisions are consistent with this approach. See, e.g., *Owen E. Jackson*, CAB No. D-1114, Mar. 31, 2005, 2005 DCBCA Lexis 2 (QPA applicable to DCPS subsequent to PRAA); *HRGM Corp.*, CAB No. D-1201, Aug. 19, 2003, 52 D.C. Reg. 4131, (same); *Unfoldment, Inc.*, CAB No. D-1062, Mar. 20, 2002, 50 D.C. Reg. 7404, (QPA applicable to D.C. Child and Family Services Agency); cf. *Hood's International Foods, Inc.*, CAB No. D-0996, Feb. 20, 1998, 45 D.C. Reg. 8742 (QPA not applicable to DCPS prior to PRAA); *Lutheran Social Services*, CAB No. D-1030, July 8, 1998, 45 D.C. Reg. 8779 (QPA applicable to Commission on Mental Health).

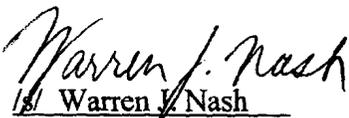
For the reasons discussed above, we deny DOXA's motion for reconsideration.

SO ORDERED.

DATED: December 22, 2006


Jonathan D. Zischkau
JONATHAN D. ZISCHKAU
Chief Administrative Judge

CONCURRING:


Warren J. Nash
WARREN J. NASH
Administrative Judge

GOVERNMENT OF THE DISTRICT OF COLUMBIA
 CONTRACT APPEALS BOARD

PROTESTS OF:

URBAN SERVICE SYSTEMS CORPORATION)
) CAB No. P-0735, P-0739
 Under Solicitation No. DCAM-2005-B-0027)

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

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

**OPINION ON MOTIONS FOR RECONSIDERATION
 AND CORRECTION OF THE RECORD**

LexisNexis Filing ID 13266966

The District has filed a motion to correct the opinion of the Board in CAB Nos. P-0735 and P-0739, issued on October 16, 2006, on the basis that the Board failed to state in its findings that the Small and Local Business Opportunity Commission ("SLBOC") had re-certified TAC Transport, LLC, as a local, disadvantaged, and development zone enterprise on February 16, 2006. Urban Service Systems Corporation has responded to the District's motion and additionally moves for reconsideration of the Board's decision on the related bases that the Board (1) failed to deem admitted certain facts raised by Urban in its motion for partial summary judgment dealing with TAC's eligibility for certification, and (2) failed to find exceptional circumstances warranting Board review of the provisional certification made by the Department of Small and Local Business Development ("DSLBD").

We deny Urban's motion for reconsideration because the Board concluded in its decision that it would not review the actions of the SLBOC and DSLBD because the facts did not show the exceptional circumstances warranting our review of certifications that are statutorily committed to the SLBOC and DSLBD. The facts raised by Urban in its motion for summary judgment are not relevant to our determination of exceptional circumstances because those facts go to the correctness of the DSLBD's provisional certification but do not imply a finding that either the DSLBD or the SLBOC abdicated their certification obligations. At most, Urban is complaining only about the *merits* of the provisional certification but we held in our decision, and reaffirm here, that we do not review the merits of a determination made by the SLBOC and DSLBD. Here, the DSLBD made a provisional certification. Unlike in the case of *C&D Tree Service, Inc.*, CAB No. P-0440, Mar. 11, 1996, 44 D.C. Reg. 6426, there is no basis for us to find that the SLBOC or DSLBD abdicated their responsibilities requiring us to protect the integrity of the procurement system. Because Urban simply disagrees with the certification determination of the DSLBD, its recourse was to seek judicial review of that administrative determination as provided by law.

We dispose of the District's motion for correction of our merits opinion by clarifying that although the SLBOC re-certified TAC on February 16, 2006, that re-certification was irrelevant to the

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Urban Service Systems Corp.,
CAB Nos. P-0735, P-0739

award decision based on bids opened on August 30, 2005, was not relied upon by the contracting officer, and thus has no effect on our substantive findings or conclusions.

The record is muddled concerning the SLBOC's re-certification of TAC on February 16, 2006. In Exhibit A to Intervenor's [TAC's] Discovery Opposition, filed on July 5, 2006, TAC attached a DSLBD website page indicating that as of February 19, 2006, TAC was entitled to 9 preference points (4 for LBE, 3 for DBE, and 2 for DZE). But in Urban's second protest (CAB No. P-0739) filed on July 10, 2006, Urban attached a DSLBD website page indicating that as of March 15, 2006, TAC was entitled to 6 preference points (2 for LBE, 2 for DBE, and 2 for DZE). (P-0739 Protest, Ex. L). The record does not contain the actual February 16, 2006 re-certification letter of TAC, however, it appears that the DSLBD corrected its website to reflect that the preferences to which TAC is entitled total 6 points, not 9 points. The website currently displays TAC's certification as 6 points. Unlike TAC's provisional certification of August 30, 2005, the re-certification of February 16, 2006 does not provide 3 preference points for small business enterprise certification. The contracting officer never mentions, let alone relies upon, the February 16, 2006 re-certification of TAC in her Business Clearance Memorandum dated May 5, 2006. (P-0735 AR Ex. 8). In addition, the contracting officer's chronology of events prepared on June 21, 2006, also omits reference to the February 16, 2006 re-certification. (P-0735 AR Ex. 5). Nor does the District mention or rely upon the February 16, 2006 re-certification in its Agency Reports in the protests.

The February 16, 2006 certification does not alter the Board's findings and conclusions because the provisional certification expired by operation of law no later than December 2005, and, according to the terms of the provisional certification letter, it expired when the SLBOC denied TAC's application for re-certification on November 8, 2005. Thus, the contracting officer could not rely on the February 16, 2006 re-certification for the award to TAC because bids were opened on August 30, 2005, and as we noted in our merits decision, the contracting officer never amended the solicitation to obtain bids at any later time. Also, because TAC's re-certification only provided for 6 preference points, it is clear from the record that Urban would have had the lower evaluated price for Award Group 1 if the contracting officer had solicited new bids after February 16, 2006. Thus, the District is wrong in implying in its motion for correction of the record that the February 16, 2006 re-certification of TAC somehow supports the contracting officer's award decision.

CONCLUSION

We have considered all of the contentions raised by Urban in its motion to reconsider our opinion, but we conclude that Urban fails to set forth any valid grounds requiring reconsideration. For the reasons discussed above, we see no reason to correct the opinion as requested by the District.

SO ORDERED.

DATED: December 22, 2006


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

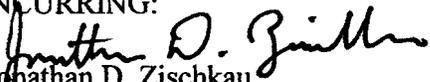
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MAR 2 2007

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Urban Service Systems Corp.,
CAB Nos. P-0735, P-0739

CONCURRING:


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

GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

PROTESTS OF:

TERRY MICHAEL BANKS, ESQ.,)	
TONY BUTLER-TRUESDALE, ESQ.,)	
CHARLES R. JONES, ESQ., COLES B.)	
RUFF, ESQ., DAVID R. SMITH, ESQ.,)	CAB Nos. P-0743, P-0744
FREDERICK E. WOODS, ESQ.)	
)	
Under Solicitation No. GAGA-2006-R-0270)	

For the Protesters: Terry Michael Banks, Esq., and Frederick E. Woods, Esq. For the District of Columbia Public Schools: Edward C. Dolan, Esq., and Michael D. McGill, Esq., Hogan & Hartson, L.L.P.

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

OPINION

LexisNexis Filing ID 13292608

Terry M. Banks, Esq., Tonya Butler-Truesdale, Esq., Charles R. Jones, Esq., Coles B. Ruff, Esq., David R. Smith, Esq., and Frederick E. Woods, Esq., the protesters, challenge the decision of the District of Columbia Public Schools ("DCPS") to issue Solicitation No. GAGA-2006-R-0270, to procure the services of independent hearing officers. The protesters are the incumbent contracted hearing officers engaged by DCPS since 2005 whose contracts will expire on December 31, 2006. The challenged procurement for hearing officers is part of DCPS's ongoing efforts to implement a consent decree entered on June 30, 2006 ("*Blackman* consent decree"), in the federal class action lawsuit *Blackman v. District of Columbia, et al.*, 97-CV-1629 (D.D.C.). Although the protesters recognize that they cannot compel DCPS to exercise an option to extend their existing contracts, they have leveled numerous attacks against the new solicitation with a recurring theme that awards under the new solicitation will not meet the needs of DCPS nor the special education program nearly as well as an extension of the existing contracts. Further, the protesters allege that awards under the new solicitation will be steered to other prospective contractors because DCPS is not satisfied with the decisions rendered by the protesters in special education cases under the current contracts. DCPS denies the allegations and urges that the Board lacks jurisdiction over these protests because the *Blackman* consent decree contains a waiver of District procurement law for procurements implementing its terms.

We conclude that we have jurisdiction over the protests because the solicitation expressly incorporates the Procurement Practices Act and provides resolution of protests by the Board. On the merits, we deny the protests. DCPS's decision not to exercise options on the current contracts is a matter of contract administration and not subject to protest review. DCPS has violated no law in issuing the solicitation, and we see no basis for finding that DCPS acted in bad faith. Because we must accord deference to DCPS's discretionary function of assessing its program needs, there is no basis for concluding that the specification and terms of the solicitation violates the law. Accordingly, we deny the protests.

BACKGROUND

On September 26, 2006, DCPS's Office of Contracts and Acquisitions issued Solicitation No. GAGA-2006-R-0270 to procure the services of independent special education hearing officers as part of DCPS's ongoing efforts to implement the *Blackman* consent decree entered on June 30, 2006. Under the terms of the consent decree, as well as the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 *et seq.*, as amended, and other applicable federal laws, DCPS is responsible for providing every disabled child with a "free appropriate public education" and procedural safeguards to ensure that DCPS is meeting this responsibility. A parent may initiate a complaint against DCPS if he or she believes that his or her child is not receiving "appropriate" special education services. Once a complaint is initiated, the parents are entitled to due process, including a hearing on the merits. These due process hearings are adjudicated by independent third-party hearing officers or examiners. DCPS is responsible for procuring the services of these independent hearing officers. The protestors are current independent hearing officers contracted by DCPS in 2005. On July 26, 2004, DCPS issued a solicitation to procure hearing officer services, Solicitation No. GAGA-2004-R-0271. DCPS did not receive as many responses to the 2004 solicitation as it expected. DCPS awarded individual contracts to each of the protestors on June 1, 2005, based on the 2004 solicitation. (Protest Ex. 2). The contracts were one year contracts which could be extended at the option of DCPS. All but one of the contracts were to expire by May 31, 2006. The remaining contract, that of Tonya Butler-Truesdale, is to expire on December 31, 2006.

In early 2006, counsel representing the plaintiff class in the *Blackman* litigation ("Class Counsel") approached DCPS and requested that DCPS examine the sufficiency of its efforts with respect to providing independent hearing officers. *Blackman* Class Counsel pointed out that they had not been involved with the 2004 procurement process, and they wanted to make sure that these hearing officers were selected in a manner that reflected the interests of the class. The DCPS contracting officer notified the individual protestors on May 1, 2006, of DCPS's decision to exercise its right to extend the contracts for seven months, through December 31, 2006. DCPS decided not to exercise the options on those contracts beyond December 31, 2006. DCPS chose instead to issue the new solicitation, under which protesters and other prospective contractors may compete for a new contract award.

The protestors filed these protests challenging the solicitation on October 10 and October 11, 2006, docketed as CAB Nos. P-0743 and P-0744 respectively. DCPS filed motions to dismiss the protests on October 31, 2006, and, by direction of the Board, DCPS filed Agency Reports on December 4, 2006, addressing the merits of the protests.

DISCUSSION

As a threshold matter, DCPS argues in its motions to dismiss that the Board has no jurisdiction over these protests because the solicitation clearly falls within the scope of an express procurement law waiver in the *Blackman* consent decree. The consent decree provides in relevant part:

The [District of Columbia Government is] not bound by the D.C. Procurement Practices Act, D.C. Code Section 2-301.01 *et seq.*, any other District or federal law relating to

procurement, and any regulation thereunder.

Blackman Consent Decree ¶ 139. The protesters raise a variety of arguments, including a challenge to the District Court's authority to include such a procurement law waiver in the consent decree, but these challenges are either not subject to our review or are without merit. The protesters do raise a single meritorious argument for jurisdiction, namely, that the solicitation expressly incorporates District procurement law and our own protest jurisdiction. Section I.1 of the solicitation provides:

The Standard Contract Provisions for use with District of Columbia Government Supply and Services Contracts dated Nov 2004, (Attachment J.1) the District of Columbia Procurement Practices Act of 1985, as amended, and Title 27 of the District of Columbia Municipal Regulations, as amended, are incorporated as part of the contract resulting from this solicitation.

In addition, other provisions also reference the Procurement Practices Act and District procurement regulations. Section L.7 ("Proposal Protests") provides:

Any actual or prospective bidder, Offeror, or contractor who is aggrieved in connection with the solicitation or award of a contract, must file with the D.C. Contract Appeals Board (Board) a protest no later than 10 business days after the basis of protest is known or should have been know, whichever is earlier. A protest based on alleged improprieties in a solicitation which are apparent prior to the time set for receipt of initial proposals shall be filed with the Board prior to bid opening or the time set for receipt of initial proposals. . . .

We conclude that we properly exercise jurisdiction pursuant to D.C. Code § 2-309.03(a)(1) only because DCPS voluntarily chose to make this solicitation subject to the PPA and our protest jurisdiction by the express terms of the solicitation. Although DCPS suggests that it could not waive the consent decree's procurement law waiver in the solicitation, we do not agree. The consent decree merely provides DCPS an election to waive District procurement law, not a mandate to do so. Indeed, consistent with other consent decrees involving the District, federal court decrees typically respect a District agency's election to adhere to District procurement law even if the decree incorporates an exemption for local procurement law that may be invoked where the interest of expeditious compliance with the consent decree requires such exemption. *Cf. Systems Assessment & Research, Inc.*, CAB No. P-0738, Sept. 21, 2006 (protest dismissed where there was no dispute that the agency invoked the procurement law waiver under *Blackman* consent decree).

Protest Count I – Predetermination

The protesters' first ground alleges that DCPS "has already decided that it will not select one or more of the Protestors under the new Solicitation." (Protest ¶ 21). They contend that DCPS has issued the new solicitation as a pretext for replacing them with other hearing officers because they have ruled too frequently against DCPS in the contested cases assigned to them. Responding to justifications advanced by DCPS for the new procurement, the protesters argue that no new solicitation is needed to correct perceived deficiencies in the existing contracts, that no current hearing officer has been notified

of poor performance, and that the DCPS budget and hearing room availability does not support expanding the number of hearing officers to hear cases. According to protesters, "the only plausible motivation for the agency's decision to pursue a new solicitation is unlawful and contrary to public policy: to replace the current Hearing Officers whose decisions have dissatisfied agency officials." (Protest ¶ 39). DCPS responds that this issue is premature because DCPS has not completed its evaluations or awarded contracts under the solicitation. DCPS denies that it has made any such predetermination and that all offerors will be fairly and equally considered based on the solicitation's evaluation criteria.

We agree with DCPS that the arguments made by the protesters are either premature or unsupported. With regard to the terms of the solicitation itself, there is nothing evincing a bias against the protesters. Nor is there any basis for the protesters' assertion that the solicitation "if not enjoined, interferes with the independence of the Hearing Officers and attempts to exact case outcomes contrary to the dictates of the law and evidence—the only basis on which Hearing Officers reach their decisions." (Protest ¶ 37). Nothing in the solicitation places a restriction on the outcome of the decisions that will be reached by the eventual contracted hearing officers. Although the protesters repeatedly urge that the solicitation, as amended, improperly diminishes the importance of their prior experience as hearing officers in the special education field, or undermines the required performance, we are not persuaded that the solicitation as amended unfairly favors other prospective offerors over the incumbent contracted hearing officers. The protesters have not met the very substantial burden of showing that DCPS has issued the new solicitation in bad faith. The record contains legitimate bases for the new solicitation, namely, the existing contracts are expiring on December 31, 2006, and the agency needs to issue a solicitation to competitively procure the required hearing officer services at the best value. Even if DCPS were dissatisfied with the performance of the protesters, which is denied by DCPS, we do not see why the protesters believe that DCPS must notify them of such performance deficiencies or default terminate them to support DCPS's decision to issue a new solicitation.

To the extent that the protesters argue that DCPS should have exercised the options to extend performance under the protesters' existing contracts rather than issuing a new solicitation with a view to awarding new contracts, we reject such an argument. The protesters cannot validly challenge DCPS's decision not to exercise the options under their existing contracts because the decision to exercise an option is committed to the discretion of the government and is a matter of contract administration. *See, e.g., Advanced Elevator Services, Inc.*, B-272340, Sept. 26, 1996, 96-2 CPD ¶ 125 (option exercisable at the sole discretion of the government, so the decision not to exercise the option is a matter of contract administration and not within the scope of GAO's bid protest function); *Wayne D. Josephson*, B-256243, May 12, 1994, 94-1 CPD ¶ 307.

Protest Count II – Violation of Procurement Regulations

The protesters allege that DCPS violated District procurement regulations, 27 D.C. Reg. §§ 1602.3, 1602.4, by disclosing information about the subject procurement to "attorneys who are not currently employees of DCPS" before issuing the solicitation. (Protest ¶¶ 40, 41). DCPS states that it only shared a draft of the solicitation with the Class Counsel and the Court Monitor in the *Blackman* litigation, prior to formal issuance of the solicitation to obtain their concurrence. According to DCPS, the new procurement grew out of the concern expressed by Class Counsel that they had been excluded

from the earlier procurement for hearing officers. Class Counsel and the Court Monitor were under the authority of the District Court in the *Blackman* litigation to participate in developing the solicitation. According to DCPS, it notified Class Counsel of the specific prohibitions in the D.C. Procurement Practices Act prior to disclosing a draft of the eventual solicitation, indicated that Class Counsel would be precluded from responding to the solicitation, and asked each to confirm that they were not interested in bidding on the contract. In addition, Class Counsel were specifically instructed not to share the solicitation with any one, including other attorneys in their office. On these facts, we conclude that DCPS did not violate the procurement regulations by disclosing a draft of the solicitation to the *Blackman* litigation personnel under the authority of the District Court.

Protest Count III – Violation of Federal Consent Decree

The protesters allege that DCPS has violated the *Blackman* consent decree by not including special education experience as a requirement under the solicitation, and by failing to budget sufficient funds to extend the protesters' existing contracts. The consent decree directs DCPS to adopt Standard Operating Procedures ("SOP") applicable to the due process hearings. The SOP adopted by DCPS includes certain minimum requirements for hearing officers, including a "background" in special education and special education law. (Protest Ex. 3, SOP § 600.2). Section C.4.1 of the solicitation's "Mandatory Qualifications for Special Education Hearing Officers" states that the mandatory qualifications required by the DCPS for special education hearing officers include the following:

- C.4.1.3 Shall have been engaged in the active practice of law for at least five (5) consecutive years prior to the date of responding to this RFP.
- a. Shall have a minimum of 2 years of practice in the areas of special education, disability law, administrative law, or civil rights.
 - b. Shall be selected based on their academic achievement, background in special education and special education law, professional experience, writing ability and personal qualities.
 - c. Shall have received special training in conducting administrative hearings.
 - d. Shall have received training in special education laws, regulations, procedures and programs.
-
- C.4.1.5 Shall possess good legal research skills and knowledge of the IDEA and its implementing regulations, Section 504 of the Rehabilitation Act of 1973, the Americans with Disabilities Act, and administrative law

(Protest Ex. 1; Nov. 8, 2006 Response to Motion to Dismiss, Ex. 5 (Amendment 2, Attachment A)). We cannot agree with the protesters' argument that the use of the disjunctive in C.4.1.3.a renders the solicitation's qualification requirements inconsistent with DCPS's SOP. The protesters' suggestion that DCPS eliminated the special education law background requirement in order to defeat the protesters' competitive advantage in the new procurement is equally unsupported by the terms of the solicitation.

Finally, we have little doubt that if the solicitation violated the *Blackman* consent decree, the *Blackman* Class Counsel and Court Monitor would have already raised the issue first with DCPS during the drafting stage, and if not resolved, then with the court.

Protest Count IV – Conflict of Interest

The protesters' final count charges that "[t]he involvement of the Board [of Education] members, the Office of the Superintendent, [and] the OGC [Office of General Counsel] in the decision to re-solicit bids for Hearing Officers is the result of a conflict of interests and undermines the statutorily protected independence and impartiality of the Hearing Officers." (Protest ¶ 60). In the response to the Agency Report, the protesters seem to change the thrust from a conflict in issuing the solicitation to a conflict in their involvement in the selection process. (Response to Agency Report, at 18-19). Regarding the solicitation process, we discern no legal impediment to having the named entities involved in the issuance of the solicitation. Regarding the selection process, the matter is premature because there has been no selection to date.

CONCLUSION

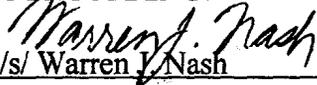
We have carefully considered each of the protesters' arguments, including their various requests for discovery and an evidentiary hearing, but we conclude that the challenges to the solicitation are not meritorious. DCPS has violated no law or regulation in issuing the solicitation. Accordingly, we deny the protests.

SO ORDERED.

DATED: December 27, 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:

Anchor Construction Corporation)	
)	CAB No. P-0737
Under Solicitation No. POAM-2006-B-003-AE)	

For the Protester Anchor Construction Corporation: Leonard A. White, Esq., White & Horton. For the District of Columbia Government: Howard Schwartz, Esq., Senior Assistant Attorney General, and Talia Cohen, Esq., Assistant Attorney General.

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

OPINION

(Lexis-Nexis Filing 13393125)

By letter to the Board dated June 16, 2006, protester Anchor Construction Corporation ("Anchor") protests the responsibility of Consys Engineering, Inc. ("Consys"), and the responsiveness of the bid of K.C. Home Improvement & Construction Company ("KC Home"), submitted to the District of Columbia on June 8, 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 District withdrew the motion to dismiss after the contracting officer determined Consys to be a responsible bidder and filed an Agency Report, urging us to deny the protest because the record supports the determination that Consys is a responsible bidder. Although Anchor contends that Consys is incapable of performing at least 50 percent of the contract work with its own forces as required by the solicitation, we agree with the District that the record supports finding Consys responsible. Accordingly, we deny the protest.

FACTS

Anchor, Consys, KC Home, and Civil Construction submitted bids to the Office of Contracting and Procurement ("OCP") on June 8, 2006, for the repaving of the parking lot at the District's Department of Motor Vehicles Headquarters at 95 M Street, S.W., in Washington, D.C. Consys submitted the lowest priced bid, followed by KC Home and Anchor. On June 19, 2006, Anchor filed its protest, alleging that Consys is not a responsible bidder, and that KC Home did not submit a responsive bid because its bid did not include a proper bid bond.

The District initially responded by filing a motion to dismiss the protest, asserting that the District had not completed its analysis of the bids as of June 16, 2006, the date of the filing of the protest. By Determination and Findings dated August 9, 2006, and

transmitted to the Board on August 21, 2006, the contracting officer determined that Consys is a responsible bidder. By Determination and Findings to Proceed with Award after Receipt of a Protest dated August 10, 2006, the Chief Procurement Officer determined that Consys' bid is responsive and that Consys is a responsible bidder, and recommended award to Consys. On August 18, 2006, the protester filed its Response to the District of Columbia's Motion to Dismiss, Opposition to the District's Request to Award and Motion to Reject All Bids and Readvertise. On August 21, 2006, the District issued to Consys a letter notifying Consys of its intent to award the contract. On the same date, the District filed with the Board its request to withdraw its earlier motion to dismiss. On September 11, 2006, the District filed its Agency Report.

DISCUSSION

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

We sustain the Chief Procurement Officer's ("CPO") determination to proceed with award to Consys. In the determination, the CPO sets forth an urgent need to proceed with award of the contract, namely that re-paving of the parking lot at the M Street facility was necessary to provide proper and safe movement of vehicles and access to the facility for citizens. Delay in completion of the parking lot also would disrupt the opening of an elementary school next to the lot. In its response, Anchor asserts that the District should not be allowed to use its own failure to timely procure the repaving services as a justification for proceeding during pendency of this protest. Anchor does not set forth any irreparable harm that would occur if the District proceeds with award and the Board retained the ability to make an effective remedy had we sustained the protest. See *Whitman-Walker Clinic, Inc.*, CAB Nos. P-0672, P-0674, July 25, 2003, 50 D.C. Reg. 7521.

On the merits, Anchor alleges that Consys is not a responsible bidder, and that KC Home did not submit a responsive bid because its bid did not include a proper bid bond. The latter protest ground is moot in light of our decision below sustaining the contracting officer's responsibility determination.

The contracting officer set forth in his determination for contractor responsibility that: (a) Consys has the necessary financial resources to adequately perform the contract; (b) Consys has the ability to comply with the required performance of the contract; (c) Consys has a satisfactory past performance record; (d) Consys has a satisfactory record of integrity and business ethics; (f) Consys is in compliance with the applicable District licensing and tax laws and regulations; (g) Consys has the necessary equipment or ability to obtain them; and (h) Consys meets the subcontracting requirements in Section M, including that Consys perform at least 50 percent of the on-site work with its own workforce. Although Anchor urges that Consys cannot perform at least 50 percent of the work with its own forces, there is no evidence in the record persuading us that the contracting officer erred in his determination. Anchor also implies that it was wrong for the contracting officer to consider responsibility data after bid opening, but the law is

clear that responsibility data may be obtained by the agency after bid opening but prior to contract award.

Because a responsibility determination requires the contracting officer to exercise business judgment, and we accord the contracting officer broad discretion in this determination, we will not reverse an affirmative determination of responsibility unless the protester shows that the determination was made in bad faith or lacked a reasonable basis, or that the bidder failed to adhere to definitive responsibility criteria. *C.P.F. Corporation*, CAB No. P-0413, Nov. 18, 1995, 42 D.C. Reg. 4902 (citing 27 DCMR §§ 2200, 2204; *Ideal Electrical Supply Corp.*, 41 D.C. Reg. 3603, 3606; *Dixon's Pest Control Services, Inc.*, CAB No. P-0401, Apr. 6, 1994, 42 D.C. Reg. 4528, 4529.

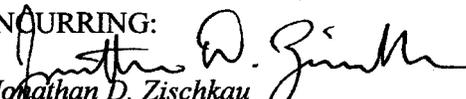
Anchor has not shown evidence of bad faith connected to the responsibility determination. Moreover, the record shows that the contracting officer had a reasonable basis for making the affirmative responsibility determination for Consys. Accordingly, we sustain the contracting officer's determination of responsibility and deny the protest.

SO ORDERED.

DATED: January 9, 2007


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

CONCURRING:


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

DISTRICT DEPARTMENT OF THE ENVIRONMENT**NOTICE OF FILING OF AN APPLICATION
TO PERFORM VOLUNTARY CLEANUP**

Pursuant to § 601 (b) of the Brownfield Revitalization Amendment Act of 2000, effective June 13, 2001 (D.C. Law 13-312; D.C. Official Code § 8-636.01(b) (Supp. 2006)) (Act), the Voluntary Cleanup Program (VCP) in the District Department of the Environment (DDOE) is hereby informing the public that it has received an application to participate in the Voluntary Cleanup Program (VCP). The application, case VCP2007-013, pertaining to certain real property located at 7035 Blair Road, N.W., was submitted by Loren A. Pope, Director of Development of L.G. Takoma Park L.P., 8280 Greensboro Drive, Suite 605 Mclean, Virginia 22102. The application identifies low levels petroleum products in soil and low to elevated levels of petroleum products in groundwater. The subject property is under contract for redevelopment as a 144 apartment complex.

Pursuant to § 601(b) of the Act, this notice will also be mailed to the Advisory Neighborhood Commission (ANC) for the area in which the property is located. The application is available for public review at the following location:

Voluntary Cleanup Program
District Department of the Environment (DDOE)
51 N Street, N.E., Room 3024
Washington, DC 20002

Interested parties may also request a copy of the application for a small charge to cover the cost of copying by contacting the Voluntary Cleanup Program at the above address or calling (202) 535-1337.

Written comments on the proposed approval of the application must be received by the VCP program at the address listed above within twenty one (21) days from the date of this publication. DDOE is required to consider all public comments it receives before acting on the application, the cleanup action plan, or a certificate of completion.

EXECUTIVE OFFICE OF THE MAYOR
Serve DC

PUBLIC NOTICE

NOTICE OF FUNDING AVAILABILITY

DISTRICT OF COLUMBIA
COMMISSION ON NATIONAL AND COMMUNITY SERVICE

K-12 Learn and Serve America School-Based Homeland Security Grants

Summary: Serve DC, the DC Commission on National and Community Service, announces the availability of K-12 Learn and Serve America School-Based Homeland Security funds for grants up to \$7,500. Applicants must provide a total of 25% match in cash or in-kind Federal or non-Federal sources. The actual number and dollar amount of the awards will depend upon the number of approved applications received.

Learn and Serve America is a program of the Corporation for National and Community Service that supports service-learning in K-12 schools, higher education institutions, and community-based organizations. Service-learning activities engage young people as change agents and civic learners through addressing community needs. Proposed programs will strengthen communities through partnership development, address specific community needs, and promote positive youth development. Awards will be made to K-12 public schools including charter schools in the District of Columbia to incorporate service-learning as an educational strategy in the classroom. This initiative will support program activities that focus on **homeland security issues and disaster preparedness**. Applicants will be required to develop service-learning programs in support of two national service days, One Day's Pay (September 11, 2007) and Martin Luther King, Jr. Day (January 21, 2008).

Criteria for eligible applicants: Eligible applicants are K-12 public schools including public charter schools in partnership with at least one additional community partner organization. Public school partners may include private/independent schools, for-profit businesses, institutions of higher education, and other non-profits including faith-based organizations. Schools and partnership organizations are responsible for implementation, replication, and/or expansion of service-learning activities in the school and local community. All projects must operate a service-learning program within the District of Columbia. Current Learn and Serve sub-grantees receiving funds during the program period of June 1, 2007 through January 31, 2007 are not eligible to apply.

An organization described in Section 501 (c) (4) of the Internal Revenue Code, 26 U.S.C. 501 (c) (4), that engages in lobbying activities is not eligible to apply, serve as a host site for youth participants, or act in any type of supervisory role in the program. **Individuals are not eligible to apply.**

All eligible applicants must meet all of the applicable requirements contained in the application guidelines and instructions. The Request for Application (RFA) will be released

on March 9, 2007 at 9:00 a.m. **The deadline for submission to Serve DC is April 27, 2007 at 5:00 p.m. There will be no exceptions made for late applications.**

Serve DC has scheduled three **optional, recommended** technical assistance sessions for mini-grant applicants. The schedule for technical assistance sessions is as follows: One Judiciary Square, 441 4th Street NW, Conference Room 1114 South, from 5:00-6:30 PM on March 21, 2007, March 26, 2007, and April 9, 2007. To RSVP for a training session, contact Kristen Henry, Serve DC Learn and Serve Coordinator, at (202)-727-8003 or kristen.henry@dc.gov. Frequently Asked Questions will be posted on the Serve DC website and updated throughout the application period.

Applications can be obtained starting at 9:00 AM on March 9, 2007 from the Serve DC office at 441 4th Street NW, Suite 1140N, Washington, DC 20001 or downloaded from the Serve DC website at www.serve.dc.gov. For additional information please call Kristen Henry, Learn and Serve Coordinator at (202) 727-8003.

EXECUTIVE OFFICE OF THE MAYOR
Serve DC

PUBLIC NOTICE

NOTICE OF FUNDING AVAILABILITY

DISTRICT OF COLUMBIA
COMMISSION ON NATIONAL AND COMMUNITY SERVICE

Learn and Serve America Community-Based Summer Mini-Grants

Summary: Serve DC, the DC Commission on National and Community Service, announces the availability of Learn and Serve America Community-Based Summer funds for **grants up to \$7,500**. Awards will be made to up to 20 non-profit organizations in the District of Columbia to incorporate service-learning into summer programming in June-August 2007. Applicants must provide a total of 25% match in cash or in-kind Federal or non-Federal sources. The actual number and dollar amount of the awards will depend upon the number of approved applications received.

Learn and Serve America is a program of the Corporation for National and Community Service that supports service-learning in K-12 schools, higher education institutions, and community-based organizations. Service-learning activities engage young people as change agents and civic learners through addressing community needs. Proposed programs will strengthen communities through partnership development, address specific community needs, and promote positive youth development.

Criteria for eligible applicants: Eligible applicants are 501 (c) (3) non-profit organizations or community-based organizations in partnership with at least one additional community organization. Service-learning programs must operate within the District of Columbia. Partners may include public/private/independent schools, for-profit businesses, institutions of higher education, and other non-profits including faith-based organizations. The lead applicant and partnership organizations are responsible for implementation, replication, and/or expansion of service-learning activities in the school and local community. Learn and Serve America Community-Based sub-grantees receiving Learn and Serve America funding during the mini-grant program period of May 29, 2007-August 31, 2007 are not eligible to apply.

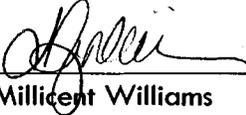
An organization described in Section 501 (c) (4) of the Internal Revenue Code, 26 U.S.C. 501 (c) (4), that engages in lobbying activities is not eligible to apply or act in any type of supervisory role in the program. Individuals are not eligible to apply.

All eligible applicants must meet all applicable requirements contained in the application guidelines and instructions. The Request for Application (RFA) will be released on March 9, 2007 at 9:00 a.m. **The deadline for submission to Serve DC is April 13, 2007 at 5:00 p.m. No late applications will be accepted.**

Serve DC has scheduled three **optional**, recommended technical assistance sessions for mini-grant applicants. The schedule for technical assistance sessions is as follows: One

Judiciary Square, 441 4th Street NW, Conference Room 1114 South, from 5:00-6:30 PM on March 21, 2007, March 26, 2007, and April 9, 2007. To RSVP for a training session, contact Kristen Henry, Serve DC Learn and Serve Coordinator, at (202)-727-8003 or kristen.henry@dc.gov. Frequently Asked Questions will be posted on the Serve DC website and updated throughout the application period.

Applications can be obtained starting at 9:00 AM on March 9, 2007 from the Serve DC office at 441 4th Street NW, Suite 1140N, Washington, DC 20001 or downloaded from the Serve DC website at www.serve.dc.gov. For additional information please call Kristen Henry, Learn and Serve Coordinator, at (202) 727-8003.



Millicent Williams
Executive Director
Serve DC

LIGHTHOUSE ACADEMIES, INC.

REQUEST FOR PROPOSALS

Lighthouse Academies, Inc. is seeking competitive proposals competitive proposals to provide **Pre-plated Meal Service** to Lighthouse Academies, Inc. charter schools in Cleveland, OH; Indianapolis, East Chicago & Gary, Indiana; and Washington, DC.

All sealed proposals shall be forwarded to the address listed below:

Attn: Kerri Charron
Lighthouse Academies, Inc.
1661 Worcester Road, Suite 207
Framingham, MA 01701
Phone: 508-626-0901 ext. 27
Fax: 508-626-0905
kcharron@lighthouse-academies.org

Sealed proposals shall be received no later than March 30, 2007, by 11:00 AM EST.

Sealed proposals shall be submitted according to the specifications enclosed herein. In addition all sealed proposals shall be submitted in a sealed envelope marked as:

“Lighthouse Academies, Inc. Pre-Plated Meals Proposal 2007-2008.”

Indicate the firm name on the envelope. Included with the hard-copy proposals shall be an electronic copy of the proposal.

Late proposals will not be accepted. Proposals submitted via facsimile (Fax) machine will not be accepted.

Lighthouse Academies, Inc., reserves the right to reject any and all proposals without limitation. Lighthouse Academies, Inc. reserves the right to award a contract as it determines to be in the best interest of Lighthouse Academies, Inc. and the schools in the Lighthouse Academies network. To acquire a copy of the proposal specification, please contact Kerri Charron at the above phone number or e-mail address.

**D.C. PREPARATORY ACADEMY
REQUEST FOR PROPOSALS**

D.C. Preparatory Academy, in accordance with section 2204(c)(XV)(A) of the District of Columbia School Reform Act of 1995, hereby solicits proposals to provide:

- Legal services
- Custodial services (including supplies)
- Office furniture, fixtures and equipment
- Classroom furniture, fixtures and equipment
- Furniture and equipment leasing
- Special education services
- Security equipment and monitoring services
- Insurance
- IT management services
- Marketing consulting
- Student uniforms
- Student transportation
- Trash/recycling removal
- Utilities consulting

Please call **David Leahy @ 202-223-8794** for more details about requirements.

Bids are due by noon on March 13, 2007.

STATE EDUCATION OFFICE

NOTICE OF RESCHEDULED MEETING

DISTRICT OF COLUMBIA PUBLIC CHARTER SCHOOL CREDIT ENHANCEMENT FUND COMMITTEE

This notice is to announce that the District of Columbia Public Charter School Credit Enhancement Fund Committee meeting scheduled for February 14, 2007, was cancelled due to inclement weather. The meeting has been rescheduled and will be held on March 5, 2007, at the State Education Office located at 441 4th Street, NW, Suite 350 North, Washington, DC 20001, at 12:30 p.m.

For further information, please contact:

Kendrinna Rodriguez
Director, Office of Public Charter School Financing and Support
(202) 727-6436

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Appeal No. 17468 of Advisory Neighborhood Commission 6A, pursuant to 11 DCMR §§ 3100 and 3101, from a decision of the Zoning Administrator to issue approvals for electrical, fire, mechanical, and plumbing disciplines (DCRA tracking No. 236 D5) with the intention of issuing building permits to allow the expansion of a nonconforming apartment building from 3 units to 6 units.¹ The subject property is located in the R-4 District at premises 1124 E Street, N.E. (Square 984, Lot 44).

HEARING DATE: May 16, 2006
DECISION DATE: May 16, 2006

ORDER

Advisory Neighborhood Commission 6A appealed the issuance of trade approvals needed to complete the interior renovation of an apartment house. The renovation would increase the number of the building's dwelling units from 3 to 6. The appeal alleges that the proposed increase in dwelling units did not comply with the lot area and parking requirements of the Zoning Regulations. The Board considered the appeal to be of the building permit that actually authorized the renovation. For the reasons stated below, the Board dismisses the appeal as untimely.

PRELIMINARY AND PROCEDURAL MATTERS

Parties. The parties to the proceeding are the Appellant Advisory Neighborhood Commission 6A ("ANC"), the appellee the District of Columbia's Department of Consumer and Regulatory Affairs ("DCRA"), and Endalkachew Tesfaye, the owner of the property that is the subject of the appeal.

Notice of Hearing. The Office of Zoning provided notice of the hearing on the appeal to the parties, including Mr. Tesfaye. The Office of Zoning advertised the hearing notice in the *D.C. Register* at 53 D.C. Reg. 2183 (March 24, 2006).

¹ This caption is based upon the original characterization of the appeal by the Appellant. The record reflects that the approvals described actually occurred *after* the issuance of a building permit that authorized the renovation of the apartment house in question. In addition, because the Board did not reach the merits of the appeal, it made no finding as to whether the apartment house was nonconforming or whether the additional dwelling units would expand it.

441 4th Street, N.W., Suite 200/210-S, Washington, D.C. 20001

Telephone: (202) 727-6311

Facsimile: (202) 727-6072

E-Mail: dcoz@dc.gov

Web Site: www.dcoz.dc.gov

FINDINGS OF FACT

1. The property that is the subject of the appeal is located at 1124 E Street, N.E. (Square 984, Lot 44).
2. The property is located in the R-4 zone district.
3. The property is improved with an apartment building that has an approved use for 3 units that pre-dates the Zoning Regulations.
4. On February 2, 2005, the Department of Consumer and Regulatory Affairs issued Building Permit B469531 for the property, which authorized “[i]nterior renovation and new electrical mechanical and plumbing” for an apartment house with 6 units and 2 parking spaces.
5. The Application for the Building Permit, but not the Building Permit itself, states the number of existing units as 3 and the number of proposed units as 6.
6. The renovated apartment house would have less than 900 square feet for each unit.
7. On February 25, 2005, the owner posted the building permit and began construction at the property
8. Signs of ongoing construction beginning on February 25, 2005, that were visible to the neighbors included the presence of a large dumpster, replacement of the roof and the gutting of the interior.
9. DCRA issued electrical permits on May 12, 2005, plumbing permits on June 15, 2005 and air conditioning permits on July 8, 2005.
10. At a date uncertain constituents of the Appellant who live near the building noticed from their windows construction, plumbing and appliances that indicated an expansion of the existing building. They brought their concerns regarding expansion of the building to Appellant’s attention in late October, 2005.
11. ANC 6A filed this appeal on December 15, 2005, alleging error in the issuance of the trade approval for electrical, fire, mechanical, and plumbing. Each of these approvals occurred after the issuance of the building permit, with the last approval being issued on July 8, 2005.

12. The appeal alleged that the approvals should not have been given because the property's lot size and the number of parking spaces to be provided were less than what is required for a six unit apartment house in an R-4 District.²
13. The decisions to issue the trade approvals did not authorize an increase in unit size and were not based in whole or in part upon an interpretation of the Zoning Regulations.

CONCLUSIONS OF LAW

Section 8 of the Zoning Act of 1938, approved June 20, 1938 (52 Stat. 797, 799); D.C. Official Code § 6-641.07(f) (2001), authorizes appeals to this Board of "any decision of the Inspector of Buildings [now DCRA] granting or refusing a building permit or granting or withholding a certificate of occupancy, or any other administrative decision based in whole or in part upon any zoning regulation or map adopted under" the Zoning Act of 1938.

The Appellant is appealing the issuance of electrical, fire, plumbing, and mechanical trade approvals. None of these approvals were based in whole or in part on the Zoning Regulations, but on the Building Code. Accordingly, the Board would not have subject matter jurisdiction over the decisions alleged to be the subject of this appeal.

However, the zoning issues raised in the appeal arise from the issuance of the building permit described in Finding of Fact No. 4. In essence, Appellant is challenging the expansion of the building from 3 units to 6 as a violation of the Zoning Regulations. That reconfiguration was allowed by the issuance of the building permit. Therefore, the Board determined that it had jurisdiction to consider the Intervenor's motion to dismiss this appeal on grounds of timeliness, with respect to the appeal of the building permit.

The Board's Rules of Practice and Procedure (11 DCMR, Chapter 31) require that all appeals be filed within 60 days from the date the person filing the appeal had notice or knew of the decision complained of, or reasonably should have had notice or known of the decision complained of, whichever is earlier. 11 DCMR § 3112.2 (a). This 60-day time limit may be extended only if the appellant shows that: (1) there were exceptional circumstances that are outside the Appellant's control and could not have been reasonably anticipated that substantially impaired the Appellant's ability to file an appeal to the Board; and (2) the extension of time will not prejudice the parties to the appeal. 11 DCMR § 3112.2 (d). The Board has no jurisdiction to hear an untimely appeal. *Waste Management of Maryland, Inc. v. BZA*, 775 A.2d 1117 (D.C. 2001).

² After the filing of this appeal, the Zoning Administrator denied the issuance of a certificate of occupancy for the renovated apartment house based on its lot size. The Board reversed that decision in *Appeal No. 17468A of Endalkachew Tesfaye* (Nov. 15, 2006).

In light of the Board's determination that the zoning issue over which it would have jurisdiction arose in the building permit, it needed to determine when the Appellant knew or should have known of that issue. It is undisputed that the building permit was issued February 2, 2005, and that ANC 6A filed its appeal December 13, 2005 - more than 10 months later. Accordingly, the appeal was filed more than 60 days after the issuance of the building permit.

However, the date for calculating when the time begins to run is not necessarily the date the permit is issued, but rather, the date when Appellant had notice or knowledge of the decision complained of or reasonably should have had notice of the decision complained of - in this case the authorization for the apartment building to reconfigure from 3 dwellings to 6 dwellings - whichever is earlier. While Appellant ANC 6A contends that it did not have actual notice of this decision until informed by its constituents in late October, 2005, the regulations require that the Board determine if there is an earlier date when the Appellant reasonably should have known of the authorization provided by the building permit.

The undisputed evidence in this case shows that there were a series of activities that should have put the ANC and its constituents on notice of the decision complained of dating back to February 25, 2005 when the owner posted the building permit on the property and when construction began. While the permit and the construction may not have put the ANC and its constituents on notice of the exact nature of the construction, the regulations contemplate an obligation within a reasonable period of time to undertake due diligence to determine such nature. The nature of the work was evident in the Application for the Building Permit, filed at DCRA and available for public viewing. That application clearly states on its face that the nature of the work was to reconfigure the apartment house from 3 units to 6 units.

However, assuming Appellant's argument that it was more difficult to notice the nature of the construction because it was internal, there were later public activities that should have put the Appellant on notice. In May, June and July of 2005, DCRA issued electrical, plumbing and air conditioning permits that in some instances listed appliances in multiples of six; i.e. 6 clothes dryers, 6 electric ranges, etc. These permits were posted on the building and these were in fact the subject of this appeal. While Appellant testified that the neighbors who lived around the building contacted him in late October, 2005, he also testified that they contacted him "because they saw the amount of plumbing and the appliances and the general construction and they could see from their windows that this was an expansion of the existing building." Tr. at 169. The Board finds it unlikely and unsubstantiated by the evidence in the record that the neighbors (and by extension the ANC) would not have viewed these activities until late October, in light of the fact that the permits authorized such activities in May, June and July.

BZA APPEAL NO. 17468

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MAR 2 2007

Without pinpointing at exactly which moment in time the Appellant should have known of the authorization to reconfigure the apartment building from 3 dwellings to 6 dwellings, the Board concludes that even the most liberal reading of the facts leads to a finding that Appellant should have known of the authorized reconfiguration in July 2005, when the last permit that is the subject of this appeal was issued. Sixty days from that point would be September, 2005. This appeal was filed on December 13, 2005, approximately 5 months after the issuance of that permit, well beyond the 60-day limit.

As Appellant did not claim that the building permit file was unavailable or that there were any other exceptional circumstances outside the Appellant's control that impaired its ability to file this appeal, this appeal was untimely filed and the Board lacks jurisdiction to consider it.

Accordingly, it is hereby **ORDERED** that the appeal is **DISMISSED**.

VOTE: 5-0-0 (Geoffrey H. Griffis, Ruthanne G. Miller, Curtis L. Etherly, Jr., John A. Mann II and Michael G. Turnbull to dismiss the appeal)

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT

Each concurring Board member approved the issuance of this order.

FINAL DATE OF ORDER: FEB 16 2007

PURSUANT TO 11 DCMR § 3125.6, THIS DECISION AND ORDER WILL BECOME FINAL UPON ITS FILING IN THE RECORD AND SERVICE UPON THE PARTIES. UNDER 11 DCMR § 3125.9, THIS ORDER WILL BECOME EFFECTIVE TEN DAYS AFTER IT BECOMES FINAL.

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT**

Application No. 17566 of A & M Investments, pursuant to 11 DCMR § 3103.2, for a variance from the lot width and lot area requirements under section 401, to allow the subdivision of one lot into two lots in the R-1-B District at premises 3546 Alton Place, N.W. (Square 1970, Lot 897).

HEARING DATE: February 13, 2007
DECISION DATE: February 13, 2007 (Bench Decision)

SUMMARY ORDER

SELF-CERTIFIED

The zoning relief requested in this case was self-certified, pursuant to 11 DCMR § 3113.2.

The Board provided proper and timely notice of the public hearing on this application by publication in the D.C. Register, and by mail to Advisory Neighborhood Commission (ANC) 3F and to owners of property within 200 feet of the site. The site of this application is located within the jurisdiction of ANC 3F, which is automatically a party to this application. ANC 3F did not submit an official report related to the application. The Office of Planning (OP) submitted a report in opposition to this application.

As directed by 11 DCMR § 3119.2, the Board has required the Applicant to satisfy the burden of proving the elements that are necessary to establish the case pursuant to § 3102.2, for a variance variances from § 401. No parties appeared at the public hearing in opposition to this application. Accordingly a decision by the Board to grant this application would not be adverse to any party.

Based upon the record before the Board and having given great weight to the Office of Planning report filed in this case, the Board concludes that the applicant has met the burden of proving under 11 DCMR §§ 3103.2, (401) that there exists an exceptional or extraordinary situation or condition related to the property that creates a practical difficulty for the owner in complying with the Zoning Regulations, and that the relief can be granted without substantial detriment to the public good and without substantially impairing the intent, purpose, and integrity of the zone plan as embodied in the Zoning Regulations and Map.

BZA APPLICATION NO. 17566
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Pursuant to 11 DCMR § 3101.6, the Board has determined to waive the requirement of 11 DCMR § 3125.3, that the order of the Board be accompanied by findings of fact and conclusions of law. It is therefore **ORDERED** that this application be **GRANTED** per attached Exhibit 27 (Sketch of Proposed Lots).

VOTE: 4-0-1 (Geoffrey H. Griffis, John A. Mann II, Ruthanne G. Miller and Michael G. Turnbull to approve; Curtis L. Etherly, Jr. not present, not voting)

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT

Each concurring member approved the issuance of this order.

FINAL DATE OF ORDER: FEB 16 2007

UNDER 11 DCMR 3125.9, "NO DECISION OR ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN DAYS AFTER HAVING BECOME FINAL PURSUANT TO THE SUPPLEMENTAL RULES OF PRACTICE AND PROCEDURE FOR THE BOARD OF ZONING ADJUSTMENT."

PURSUANT TO 11 DCMR § 3130, THIS ORDER SHALL NOT BE VALID FOR MORE THAN TWO YEARS AFTER IT BECOMES EFFECTIVE UNLESS, WITHIN SUCH TWO-YEAR PERIOD, THE APPLICANT FILES PLANS FOR THE PROPOSED STRUCTURE WITH THE DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS FOR THE PURPOSES OF SECURING A BUILDING PERMIT.

PURSUANT TO 11 DCMR § 3125 APPROVAL OF AN APPLICATION SHALL INCLUDE APPROVAL OF THE PLANS SUBMITTED WITH THE APPLICATION FOR THE CONSTRUCTION OF A BUILDING OR STRUCTURE (OR ADDITION THERETO) OR THE RENOVATION OR ALTERATION OF AN EXISTING BUILDING OR STRUCTURE, UNLESS THE BOARD ORDERS OTHERWISE. AN APPLICANT SHALL CARRY OUT THE CONSTRUCTION, RENOVATION, OR ALTERATION ONLY IN ACCORDANCE WITH THE PLANS APPROVED BY THE BOARD.

IN ACCORDANCE WITH THE D.C. HUMAN RIGHTS ACT OF 1977, AS AMENDED, D.C. OFFICIAL CODE §§ 2-1401.01 *ET SEQ.* (ACT), THE DISTRICT OF COLUMBIA DOES NOT DISCRIMINATE ON THE BASIS OF ACTUAL OR PERCEIVED: RACE, COLOR, RELIGION, NATIONAL ORIGIN, SEX, AGE, MARITAL STATUS, PERSONAL APPEARANCE, SEXUAL ORIENTATION,

BZA APPLICATION NO. 17566

PAGE NO. 3

GENDER IDENTITY OR EXPRESSION, FAMILIAL STATUS, FAMILY RESPONSIBILITIES, MATRICULATION, POLITICAL AFFILIATION, GENETIC INFORMATION, DISABILITY, SOURCE OF INCOME, OR PLACE OF RESIDENCE OR BUSINESS. SEXUAL HARASSMENT IS A FORM OF SEX DISCRIMINATION WHICH IS PROHIBITED BY THE ACT. IN ADDITION, HARASSMENT BASED ON ANY OF THE ABOVE PROTECTED CATEGORIES IS PROHIBITED BY THE ACT. DISCRIMINATION IN VIOLATION OF THE ACT WILL NOT BE TOLERATED. VIOLATORS WILL BE SUBJECT TO DISCIPLINARY ACTION.

TWR

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