

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