

GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

PROTESTS OF:

CAPITOL ENGINEERS/TCBA JOINT VENTURE))	CAB Nos. P-625, P-629
Under Solicitation No. 9063-AA-03-1-DD)	(Consolidated)

For Capitol Engineers/TCBA Joint Venture: James H. Roberts, III, Esq., Manatt, Phelps & Phillips, LLP. For the Government: Howard Schwartz, Esq., Warren J. Nash, Esq., Assistants Corporation Counsel.

Opinion by Administrative Judge Jonathan D. Zischkau, with Administrative Judges Phyllis W. Jackson and Matthew S. Watson, concurring.

OPINION

Capitol Engineers/TCBA Joint Venture (“Capitol JV”) protests the contracting officer’s determination that it was not eligible for award under a small business set-aside procurement on the basis that Capitol JV was not certified as a small business enterprise (“SBE”) by the Local Business Opportunity Commission (LBOC”) and its related Office of Local Business Development (“OLBD”). Capitol JV argues that because each joint venture entity was certified as a SBE, it was not necessary for the joint venture to be certified. In its supplemental protest, Capitol JV argues that even though the LBOC had not certified it by the time of initial proposals, the LBOC certified it on July 11, 2000, which was prior to the closing date for the second round of best and final offers. Finally, Capitol JV contends that it properly self-certified, pursuant to 27 DCMR § 818, as a SBE at the time of initial proposals. We conclude that Capitol JV failed to properly self-certify by the closing date for initial proposals, and did not otherwise meet the statutory and regulatory requirements for certification as a joint venture by the closing date for initial proposals. The eventual certification which occurred after the first BAFO but before the second BAFO did not cure its ineligibility as of the closing date of initial proposals. Thus, the District did not violate law, regulation, or the terms of the solicitation in its determination that Capitol JV was ineligible to participate in the solicitation and award. Accordingly, we deny the consolidated protests.

BACKGROUND

On September 20, 1999, the Office of Contracting and Procurement (“OCP”) issued Solicitation No. 9063-AA-03-1-DD, for “Facility Condition Assessment, Inventory & Spatial Design Services,” in the small business set-aside market. (Agency Report (“AR”) Ex. 1).

The original closing date for proposals was October 19, 1999. Various solicitation amendments through Amendment No. 6 had the effect of extending the closing date for proposals from October 19, 1999, to December 8, 1999. At the closing date and time, 9 proposals were received on time and 5 proposals, including that of Capitol JV, were received late. The contracting officer executed

Amendment No. 7 on December 27, 1999, to extend the closing date from December 8 to December 9 “to allow acceptance of the 5 proposals that would otherwise be late in order to enhance competition.” (AR, Ex. 2). As a result of Amendment No. 7, OCP received 14 proposals by the revised closing date of December 9, 1999. (AR, Ex. 2).

The solicitation informed offerors that the District intended to award up to five indefinite quantity contracts with payments based on fixed unit prices. The solicitation provided that it was “designated for certified small business enterprise (SBE) bidders or offerors only under the provisions of ‘The Equal Opportunity for Local, Small and Disadvantaged Business Enterprises Act of 1992’” (AR, Ex. 1, Section I.12.1). Section I.12.1.2 provided that a SBE “must be certified as small in the procurement category of “General Services” in order to be eligible to submit a proposal in response to this solicitation.” Section I.12.3.1 provided:

Any vendor seeking to submit a proposal as a . . . [SBE] in response to this solicitation must submit one of the following at the time of, and as part of its proposal:

- I.12.3.2 A copy of the SBE letter of certification from the [LBOC];
- I.12.3.3 A copy of the sworn notarized Self-Certification Form prescribed by the [LBOC] along with an acknowledgement letter issued by the Director of the [Office of Local Business Development]
- I.12.3.4 Proposals from vendors that are not certified as small business enterprises through one of the means described in subparagraphs I.12.3.2 or I.12.3.3 of this clause will not be considered.

(AR, Ex. 1). Section I.12.4.1 further provides:

A joint venture between a small business enterprise (as defined under section 3(2) of the Act and implementing regulations) and another entity shall be eligible to submit a proposal in response to this SBE set-aside solicitation if the joint venture is certified by the [LBOC] . . . under the provisions of 27 DCMR § 817 . . . , or is self-certified under 27 DCMR § 818

(AR, Ex. 1).

Capitol Engineers and TCBA entered into a joint venture agreement on December 8, 1999, for the purpose of making a proposal in response to the solicitation. (Protest, Attachment F). The Capitol JV proposal, which was received by OCP on December 9, 1999, contained a document entitled “Capitol Engineers/TCBA JV Self Certification” which states:

Capitol Engineers, PC and Thompson, Cobb, Bazilio, and Associates, PC (TCBA) have entered into a joint venture arrangement to propose facility condition assessment, inventory, and spa[t]ial design services to the D.C. Government under Solicitation # 9063-AA-03-1-DD. The Joint Venture, Capitol Engineers/TCBA JV hereby self-certify under the provisions of 27 DCMR 818, 39 DCR 9075-9076 that the

Joint Venture is a small business enterprise. LSDBE Certifications for Capitol Engineers and TCBA are attached.

(Protest, Attachment C). The document was signed but not sworn by Larry Wilson of TCBA and dated December 8, 1999. Capitol JV did not submit a sworn notarized LBOC self-certification form with its proposal. (*See* 27 DCMR § 818.2). Capitol JV also did not submit an acknowledgement letter from the OLBD Director, which would verify that Capitol JV had timely filed with the OLBD a proper application for joint venture certification. In its Agency Report, the District states that at the time of the closing date for proposals on December 9, 1999, Capitol JV had not submitted to OLBD its application for joint venture certification as a SBE. (AR at 3). Capitol JV has not rebutted this fact and we take it as conceded. *See* Board Rule 307.4, 45 D.C. Reg. 1419.

A technical evaluation panel evaluated the initial proposals, and prepared evaluation scores, an evaluation report, and recommendations which were submitted to the contracting officer on February 26, 2000. (AR, Ex. 3, at CSP-22). Determining that 9 offerors (including Capitol JV) were within the competitive range, the contracting officer conducted discussions with these offerors on June 21, 2000. (*Id.* at CSP-14). By letter of June 23, 2000, the contracting officer solicited BAFOs from the 9 offerors. (Protest, Attachment A; AR, Ex. 3, at CSP-15). The BAFO request letter to Capitol JV requested information to address various deficiencies in the proposal, including:

Is there an SBE Joint Venture arrangement between Capitol Engineering and . . . [TCBA] for this RFP? If there is, when was it established? Was the venture certified by the Office of Local Business Development? If so, when? Provide a copy of the SBE Joint Venture certification document received from the Office of Local Business Development.

(Protest, Attachment A). In its June 29, 2000 BAFO, Capitol JV responded to these questions as follows:

An SBE Joint Venture Agreement was established between Capitol Engineering and . . . [TCBA] on December 8, 1999. We have included a copy of the agreement with this response. The certification of the Joint Venture is still pending with the Office of Local Business Development. During our most recent conversation with Ms. Evelyn Ross of said office, on June 29, 2000, we were informed that our agreement conformed to all of the requirements, she has all of the necessary documentation and the certification is in process. . . .

The technical evaluation panel evaluated the proposals and BAFOs in July 2000, and submitted an evaluation report and narratives to the contracting officer on July 28, 2000. (AR, Ex. 3, at CSP-15). In July or August, the contracting officer determined that Capitol JV and one other joint venture offeror were ineligible for award because they had failed to obtain SBE certification by the initial proposal closing date of December 9, 1999. (*Id.* at CSP-17).

By letter dated August 23, 2000, the contracting officer informed Capitol JV that its joint venture proposal was not eligible for award because as of December 9, 1999, Capitol JV lacked certification by the LBOC and that LBOC's certification of Capitol JV was effective on July 11, 2000.

(Protest, Attachment B).

The contracting officer issued Amendment No. 10 on August 23, 2000, and reopened discussions with the 7 remaining offerors, allowing one offeror to correct certain conditions which were attached to the pricing in its BAFO. The contracting officer requested second BAFOs by August 25. After reviewing the proposals as revised by the first and second BAFOs, the contracting officer made a source selection, followed by awards of letter contracts to three offerors on September 6, 2000. A letter contract to a fourth offeror was pending subject to that offeror's adherence to a deadline to comply with the tax requirements of the District government. (District's Determination and Findings to Proceed With Contract Performance).

Capitol JV filed its initial protest on September 8, 2000. On September 28, 2000, the District filed its Agency Report. Capitol JV filed a supplemental protest on October 11, 2000. The District responded to the supplemental protest on December 12, 2000, and Capitol JV replied on December 19, 2000.

DISCUSSION

We exercise protest jurisdiction pursuant to D.C. Code § 1-1189.3(a)(1).

The relevant provisions of the Equal Opportunity for Local, Small and Disadvantaged Business Enterprises Act of 1992, as amended, provide:

(a) To achieve the goals set forth in § 1-1153.2, programs designed to assist contractors who are certified as local business enterprises, disadvantaged business enterprises, or small business enterprises shall be established by rules issued by the Mayor pursuant to § 1-1153.6. Such programs shall be implemented by each agency within 10 days of March 17, 1993. Local, small, or disadvantaged business enterprises shall not be limited to bidding only on contracts within these programs.

(b)(1) The Mayor shall include among these programs . . . a two-tier small business set-aside program at the contract level, which shall include a separate set-aside program for small business enterprises with gross revenues of \$1,000,000 or less, which shall provide that a business becomes ineligible for participation in this set-aside program when the business has gross revenues in excess of \$1,000,000 for 2 consecutive years, and a separate set-aside program for all small business enterprises

D.C. Code § 1-1153.3.

The pertinent implementing regulations, contained at 27 DCMR § 804, require that the solicitation notify prospective offerors that the solicitation "is designated for certified small business enterprise offerors only" and that "responses include a copy of the SBEs' letter of certification or self-certification form." The application process for certification of a business as a SBE is set forth at 27 DCMR §§ 812 and 813 and a special provision governs certification of joint ventures, 27 DCMR § 817. A qualified but uncertified entity may be eligible to submit a proposal where the offeror submits with its proposal an acknowledgement letter from the OLBD Director attesting to the submission of an

application for certification and a sworn notarized self-certification form prescribed by the LBOC. 27 DCMR § 818.2.

For purposes of awarding preferences under D.C. Code § 1-1153.3(b), we have held that the certification requirements for preferences by their nature are to be ascertained at the closing date for proposals or bids. *E.g.*, *Dental Benefit Providers, Inc.*, CAB No. P-623, Dec. 1, 2000, 12 P.D. 8021, 8029; *Trifax Corp.*, CAB No. P-539, Sept. 25, 1998, 45 D.C. Reg. 8842, 8849. We conclude that the same rule applies to the determination of eligibility under the set-aside programs for certified small business enterprises. Although not questioning this rule as applied to sealed bids, Capitol JV argues that in procurements conducted through competitive sealed proposals, revised proposals including BAFOs should be regarded as extending the proposal closing date and thus certification should be determined as of the last closing date. It is true that offerors may revise their proposals during the course of a negotiated procurement, even correcting deficiencies that in the context of sealed bidding would be matters of responsiveness. Nevertheless, we believe that the question of certification, and eligibility, differ from responsiveness issues. By its nature, certification goes to the eligibility of the offeror to participate in the competition. It thus addresses the threshold question of whether an entity is even authorized to submit an initial proposal. The language of the statute, the implementing regulations, and the solicitation terms concerning certification all point to eligibility as of the closing date of initial proposals. A prospective contractor could not ignore the closing date for initial proposals in a procurement and expect to enter the competition at some later time such as when BAFOs are requested. Similarly, if the contracting officer had promptly determined Capitol JV's ineligibility shortly after the December 9, 1999, closing date for proposals, Capitol JV would hardly have been in a position to complain. If we allowed certification to be determined at any time other than the closing date for initial proposals, there could be unwarranted disruptions to the orderly evaluation and selection process, not to mention possibilities for abusing the certification system. In an analogous context, the GAO has held that an extended period of negotiation that includes the submission of revised proposals cannot legally cure an initial proposal that was submitted late. *Hausted, Inc.*, B-257087, July 28, 1994, 94-2 CPD ¶ 49; *G.D. Searle & Co.*, B-247146, Apr. 30, 1992, 92-1 CPD ¶ 406. As the District points out, the contracting officer could have further extended the closing date for initial proposals to overcome the late certification of Capitol JV for the purpose of enhancing competition. *Fort Biscuit Co.*, 71 Comp. Gen. 392, 92-1 CPD ¶ 440. The record does not demonstrate that the contracting officer erred in failing to extend the closing date.

To avoid the dilemma for contractors who want to participate in a set-aside procurement, are qualified but not yet LBOC certified, and face a relatively short proposal response period, the statute and regulations provide for the relatively prompt self-certification procedure which provides a temporary certification status effective until the LBOC completes its certification approval process. 27 DCMR § 818.5. *See Trifax Corp.*, 45 D.C. Reg. at 8849. In the present case, Capitol JV did not meet the requirements for a valid self-certification because it failed to submit with its proposal both the sworn notarized self-certification affidavit specified by the LBOC and the OLBD Director's acknowledgement letter attesting that Capitol JV filed its application for certification with the OLBD.

Finally, we do not agree with Capitol JV's argument that the joint venture was not required to be certified as a SBE because each joint venture entity individually was certified as a SBE. Under the certification regulations, a joint venture differs from the entities comprising the joint venture. Although the joint venture regulations generally anticipate a non-SBE party to the joint venture, the regulations

make no exception to the requirement that every SBE joint venture be certified. It may well be that if either Capitol Engineers or TCBA had been named as the prime contractor on the proposal, rather than a joint venture, there would have been no eligibility problem.

CONCLUSION

Having concluded that Capitol JV has not shown that the District violated law, regulation, or the terms of the solicitation in determining the joint venture to be ineligible for award, we deny these consolidated protests.

SO ORDERED.

DATED: January 16, 2001

/s/
JONATHAN D. ZISCHKAU
Administrative Judge

CONCURRING:

/s/
PHYLLIS W. JACKSON
Administrative Judge

/s/
MATTHEW S. WATSON
Administrative Judge