

GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

PROTEST OF:

C&D TREE SERVICE, INC.)	
)	CAB No. P-440
Under IFB No. OMS-4336-AA-NJ)	

For the Protester: Richard L. Moorhouse, Esquire, Holland & Knight. For the Government: Howard S. Schwartz and Warren J. Nash, Assistants Corporation Counsel. For the Interested Party: James L. Thorne, Esq., Alexander, Aponte & Marks.

Opinion by Administrative Judge Jonathan D. Zischkau, with Administrative Judges Lorilyn E. Simkins and Phyllis W. Jackson, concurring.

OPINION AND ORDER

C&D Tree Service, Inc. ("C&D") has protested the award decision by the District's Department of Public Works ("DPW") under IFB No. OMS-4336-AA-NJ. Although C&D had the lowest actual bid, DPW determined that the third low actual bid of Prisma Construction and Management Corporation ("Prisma") was entitled to a ten percent preference in calculating Prisma's evaluated bid price, the effect of which was to make Prisma the low evaluated bidder. C&D claims that DPW, and by extension, the Minority Business Opportunity Commission ("MBOC"), violated law and regulation in concluding that Prisma was entitled to a ten percent preference as a local business enterprise and a disadvantaged business enterprise pursuant to the Equal Opportunity for Local, Small, and Disadvantaged Business Enterprises Act of 1992, D.C. Code §§ 1-1152 to 1-1152.5 (Supp. 1995), and 27 DCMR Chapter 8. The District and Prisma contend that the Board does not have jurisdiction to review a certification determination by the MBOC. We conclude that our protest jurisdiction embraces reviewing a contracting agency's application of a preference in making an award decision, and that on the record established by the parties, an award to Prisma is not in accordance with applicable law, regulation, and the terms and conditions of the solicitation. Accordingly, we sustain the protest.

BACKGROUND

On August 21, 1995, DPW issued IFB No. OMS-4336-AA-NJ in order to obtain tree and stump removal services. (District Motion to Dismiss, Exhibit 1). The IFB required bidders to submit bids for a base year and four option years. Special Condition 1 of the IFB limits those eligible to bid under the IFB to entities certified by the MBOC as small business enterprises ("SBE's") in the procurement category of "General Services" pursuant to the Equal Opportunity for Local, Small and Disadvantaged Business Enterprises Act of 1992 ("LSDBE Act"), D.C. Code §§ 1-1152 to 1-1152.5 (Supp. 1995). The MBOC was originally established by the Minority Contracting Act of 1976, D.C. Code §§ 1-1141 to 1-1151, and consisted of the Commission members, a staff director, and other staff. See D.C. Code § 1-1143. Its initial mission was to implement minority contracting programs established

under the Minority Contracting Act. By Reorganization Order No. 1 of 1989 and Mayor's Order 89-247, the Mayor established the Department of Human Rights and Minority Business Development ("DHRMBD") for the purposes of *inter alia* ending illegal discriminatory practices in District government contracting and promoting equal opportunity and equal access to District contracting. All of the functions of the MBOC staff director and other staff were transferred to DHRMBD. Under the LSDBE Act, which generally supplanted the Minority Contracting Act, the Mayor was directed to establish through regulations LSDBE programs, including a bid preference mechanism for local business enterprises ("LBE's") and disadvantaged business enterprises ("DBE's") and a set-aside program for SBE's. The LSDBE Act authorized the MBOC to issue, suspend, and revoke certifications of contractors under the LSDBE programs.

IFB Special Condition 3 requires each bidder to submit required evidence of certification or self-certification at the time of, and as part of, its bid in the form of either a copy of the certification letter from the MBOC, or, a sworn, notarized self-certification form prepared by the bidder along with an acknowledgment letter issued by the Director of DHRMBD. Special Condition 3 references and Special Condition 26 incorporates an Attachment "D" to the IFB, entitled "Application for Certification" issued by DHRMBD. It consists of a self-certification package as well as a discussion of the requirements necessary for a business to be certified or recertified as a SBE, LBE, and DBE. Special Condition 5, entitled "Preferences in the SBE Set-Aside Market (For Evaluation Purposes Only)," provides that the contracting officer will apply preferences for purposes of evaluating the bids as follows: an SBE that also is certified by the MBOC as a DBE will receive a five percent reduction in its actual bid price; an SBE that also is certified as an LBE will receive a five percent bid price reduction; and an SBE that is located in an enterprise zone will receive a two percent reduction in bid price.

The IFB's Special Conditions and the incorporated Attachment D, as they relate to SBE eligibility and DBE, LBE, and enterprise zone preferences, are consistent with the requirements of the LSDBE Act and its implementing regulations. We find that the terms and conditions of the IFB require that bidders meet the requirements of the LSDBE Act, its implementing regulations, and the additional application requirements of the MBOC in order to receive the benefits of SBE eligibility and LBE and DBE preferences.

DPW opened the bids on September 22, 1995, and received bids from Prisma, C&D, JARCO Paving, Inc. ("JARCO"), Prince Construction Company, Inc. ("Prince"), and Capitol Paving of D.C., Inc. ("Capitol"). To determine the low bidder, the contracting officer had to identify the bidders' actual bid prices, determine the preferences, if any, to which each bidder was entitled, and then calculate each bidder's evaluated bid price by reducing the actual bid price by any applicable percentage reductions.

The record indicates that DPW had difficulty determining from the multiple and conflicting certifications (and acknowledgment letter) which accompanied Prisma's bid whether Prisma was a certified SBE in the category of "General Services" (and thus eligible to bid) and was properly certified as a LBE and DBE in order to qualify for those bid preferences. (District Motion to Dismiss, Exhibit 2, at 2-3). In Attachment "A" of its bid, Prisma referenced a July 19, 1994 MBOC Certificate of Registration No. S94-11-9021.

Apparently, a copy of that certificate was not included with the bid. Instead, Prisma attached a July 11, 1995 Recertification Certificate No. DLS97-07-9021 which states that Prisma is registered by the MBOC as a DBE, LBE, and SBE (in two SBE procurement categories other than the "General Services" category required by this IFB). Prisma also attached a copy of an acknowledgement letter from DHRMBD acknowledging receipt of Prisma's application for Recertification as a DBE, LBE, and SBE (in four categories including "General Services"). Under another DPW IFB, apparently with a bid opening of September 27, 1995, Prisma enclosed a copy of Recertification Certificate No. DLS97-07-9021 and Certification No. S94-11-9021. (*Id.*, Exhibit 2).

On October 5, 1995, the DPW Administrator requested clarification from DHRMBD regarding Prisma's eligibility to bid as a qualified SBE and receive LBE and DBE preferences: "Which of these certificates and/or acknowledgement letter is the prevailing document in determining the preference points and eligibility of the bidder." (*Id.* at 3). In an October 11, 1995 response, DHRMBD replied in relevant part:

It is apparent that administrative errors are responsible for the confusion in certification categories. The applicant is entitled to the following categories and should be given the appropriate preferences: Local Business Enterprise (LBE); Small Business Enterprise (SBE) (Building Construction/Specialty Trade Contractor/Goods and Equipment/General Services); and Disadvantaged Business Enterprise (DBE). An updated recertification letter will be issued by the Commission at the November, 1995 meeting.

(*Id.* at 1). Based on the October 11, 1995 DHRMBD response, DPW's contracting officer determined that Prisma was a certified SBE and entitled to the DBE and LBE preferences. The District reports the results of the bid tabulation and evaluation of bids as shown below:

<u>Bidder</u>	<u>Actual Bid</u>	<u>Evaluation Preference</u>	<u>Evaluated Price</u>
Prisma	\$1,817,235.00	10% (5% DBE + 5% LBE)	\$1,635,511.00
C&D Tree	\$1,652,500.00	NONE	\$1,652,500.00
JARCO	\$1,798,500.00	7% (5% LBE + 2% EDZ)	\$1,672,651.00
Prince	\$2,275,835.00	12% (5% LBE + 5% DBE + 2% EDZ)	\$2,002,734.00
Capitol	\$2,232,990.00	10% (5% LBE + 5% DEB)	\$2,009,691.00

By receiving a ten percent preference reduction to its bid, Prisma's third-low actual bid became the lowest evaluated bid. A DPW contract specialist advised C&D on September 26, 1995, that Prisma might be in line for award under the IFB's preference factors if Prisma were otherwise determined to be a responsible bidder.

On October 4, 1995, C&D filed its protest of the presumptive award to Prisma. In the protest, C&D advances three challenges to DPW's determination that Prisma was entitled to a ten percent preference reduction to its actual bid: (1) Prisma was not entitled to receive the five percent preference as an LBE because LBE certification requires the company to possess a current "Certificate of Good Standing" and Prisma was not entitled to a Certificate of Good Standing because it had never filed its 1995 annual report as a District corporation; (2) Prisma was not entitled to a five percent preference as a DBE because the owners of Prisma are not economically or socially disadvantaged and have not

demonstrated that they were subjected to prejudice or bias; and (3) as prime contractor, Prisma does not have the ability to perform 50 percent of the work which is required by regulation and the IFB.

In its Agency Report of November 30, 1995, the District responded that: (1) Prisma's failure to file with the District its 1995 annual corporate report, and the lack of a Certificate of Good Standing are minor informalities because they do not affect Prisma's corporate status or its status as an LBE; (2) C&D's allegations regarding MBOC's certification of Prisma as a DBE or LBE are matters exclusively under MBOC's jurisdiction, not the Board's, and C&D could have filed a complaint with the MBOC challenging Prisma's certifications; and (3) allegations regarding the ability of Prisma to perform 50 percent of the contract work are matters of contract performance which are not valid matters for protest. The District attached as Exhibit 1 to the Agency Report a certificate issued by the District's Department of Consumer and Regulatory Affairs, dated November 28, 1995, which certifies that Prisma "was not in good standing having failed or refused to file the 1995 annual report due on or before April 15, 1995" Exhibit 2 to the Agency Report, Prisma's "Washington Area Regional Committee on Minority Business Enterprise Certification (WARCOMBEC)" application, dated July 7, 1994, was signed by Prisma's principal owner. In the application, Prisma's principal owner claims socially disadvantaged status as an Hispanic individual. In the application documents, the owner states her personal net worth as \$75,000, Prisma's bonding limit as \$3,000,000, and Prisma's credit line as \$150,000. In the section of the application requiring information concerning credit rejections and discrimination, the owner indicates two instances -- the denial of an automobile loan in the amount of \$17,830.18 on May 13, 1994, and the denial of a "bonding line" in June 1993. No credit rejection letters are attached. Where the form asks for the reason the applicant believes she was rejected, the owner lists "insufficient capital" for the credit rejection and "insufficient working capital" for the denial of the bonding line. Neither the application documentation nor any other evidence in the record suggests or demonstrates that her Hispanic affiliation was the proximate cause of being denied the automobile loan or the bonding line.

On December 6, 1995, C&D responded to the Agency Report, arguing that Exhibit 2 to the Agency Report, containing the application materials submitted to the MBOC, did not support the determination by the MBOC to recertify Prisma as a DBE and LBE on July 11, 1995. Prisma, as an interested party, filed a response in support of the Agency Report. Prisma concedes that it did not possess a certificate of good standing as of bid opening on September 22, 1995, but it attached as Exhibit 1 a document which indicates that it received a certificate of good standing on November 28, 1995 (issued, apparently, some time later in the day than the November 28 "no good standing" certificate attached as Exhibit 1 of the Agency Report).

On December 7, 1995, the Board held a telephone conference with the parties, including Prisma, to discuss the issues raised by the protest, the Agency Report, and the responses to the Agency Report. Based on C&D's challenge to Prisma's right to receive the ten percent bid preference based on DBE and LBE status, and the District's position that the MBOC is the proper agency to review certification challenges, the Board referred to the MBOC three issues: (1) did the controlling owner of Prisma, as of bid opening,

constitute an "economically disadvantaged individual" and "socially disadvantaged" individual pursuant to D.C. Code § 1-1152.1(9) and 27 DCMR § 814 (the Board asked the MBOC to attach copies of supporting documentation with its response); (2) was Prisma properly certified as a DBE pursuant to 27 DCMR § 814.3 and an LBE pursuant to 27 DCMR § 811.2 in light of the fact that Prisma was not a corporation in good standing as of bid opening; and (3) based on the MBOC's responses to issues (1) and (2), was Prisma entitled to receive either DBE or LBE preferences. See Order and Report on Telephone Conference, dated December 7, 1995. The Board provided that the parties would have an opportunity to comment on the MBOC's response to the referral. Thereafter, the Board granted two time extensions, at MBOC's request communicated through District counsel, so that the MBOC could respond to the Board's referral.

By letter filed with the Board on February 6, 1996, the MBOC stated that it would not respond to the issues referred to it by the Board because the Board "has no jurisdiction to review MBOC certification determinations," and that because the MBOC is not a party to the protest, no further MBOC response was warranted. The MBOC stated that "MBOC certification determinations in a collateral proceeding and forum is particularly inappropriate where the complaining party did not avail itself of the statutory mechanism for such review." The MBOC has not provided any supporting documentation requested by the Board in its referral.

On February 7, 1996, the Board scheduled supplemental briefs and set a closing date of February 15, 1996 for the factual record. In their supplemental briefs, the parties have addressed Board jurisdiction, the merits of the protest, and the proper remedy should the Board determine that the proposed award is not in accordance with law, regulation, and the terms of the solicitation. The contracting officer filed an affidavit stating that he awarded the DBE preference based on the MBOC's certification of Prisma as a DBE. The contracting officer also states that the proposed award to Prisma was forwarded to the District of Columbia Financial Responsibility and Management Assistance Authority ("Authority") for pre-execution approval on January 31, 1996, and that because a delay in award would adversely affect "various programs within DPW," he will award the contract to Prisma upon approval by the Authority. The District has not advised the Board that the contracting officer has awarded a contract to Prisma.

DISCUSSION

I. Jurisdiction

In this case, the District is not arguing that the Board lacks jurisdiction over the three protest grounds on the basis that the proposed award is entirely outside of our subject matter jurisdiction. Rather, it argues that the Board does not have jurisdiction to resolve the type of protest challenges made by the protester here. The District frames C&D's challenge of the award of DBE and LBE preferences as whether the Board has jurisdiction to review a certification determination by the MBOC under the LSDBE Act and its implementing regulations. Although in its Agency Report the District seemed to accept our prior decisions in *Prince Construction Co.*, CAB No. P-375A, Aug. 20, 1993, 41 D.C. Reg. 3610 (decision denying motion to dismiss), CAB No. P-375B, June 10, 1994, 41 D.C. Reg.

3706 (merits decision), and *Southern Maryland Restoration, Inc.*, CAB No. P-329, Dec. 16, 1992, 40 D.C. Reg. 4872, in which we held that we had protest jurisdiction to review whether the MBOC complied with statute and regulations where a protester asserted that an MBOC determination materially impaired the protested procurement, the District in its supplemental briefs argue that our holdings in those cases were wrong. The District points out that the LSDBE Act and the implementing regulations governing certification of small, local, and disadvantaged businesses, have a mechanism by which either the MBOC may revoke or suspend certifications, or, any person may initiate a proceeding before the MBOC against an applicant or registered contractor. D.C. Code § 1-1152.4(d)-(e). According to the District, for the Board to entertain challenges to a bidder's certification would intrude into the MBOC's deliberative process and place the Board in the position of second-guessing the MBOC. Finally, noting precedent of federal protest tribunals such as the GAO and GSBCA, the District argues that even if the Board follows the holdings on jurisdiction delineated in *Southern Maryland Restoration* and *Prince Construction*, the Board should not further expand its jurisdiction to embrace the deliberative or discretionary functions of the MBOC.

C&D states that it is not asking the Board to make a certification determination. C&D frames the issue as whether the MBOC properly exercised the authority afforded it by the LSDBE Act with respect to recertifying Prisma as a LBE and DBE for purposes of this specific procurement, and whether the MBOC's failure to exercise that authority in a lawful manner materially compromised the outcome of this procurement's evaluation and award process. C&D argues that MBOC unlawfully recertified Prisma and by violating the LSDBE Act's certification requirements, MBOC directly affected C&D's status as a bidder. If either preference is unavailable to Prisma, C&D becomes the low bidder. C&D states that its challenges come squarely within the Board's jurisdictional holding in *Southern Maryland Restoration*, and the Board thus has jurisdiction to hear the protest.

We begin by reviewing our statutory grant of jurisdiction. Section 903 of the D.C. Procurement Practices Act ("PPA"), D.C. Code § 1-1189.3 (1992), establishes the Board's protest jurisdiction and provides in pertinent part:

The Board shall be the exclusive hearing tribunal for, and shall have jurisdiction to review and determine de novo:

(1) Any protest of a solicitation or award of a contract addressed to the Board by any actual or prospective bidder or offeror, or a contractor who is aggrieved in connection with the solicitation or award of a contract

Section 908(c) of the PPA, D.C. Code § 1-1189.8(c), establishes the Board's standard of review:

(c) On any direct protest . . . , the Board shall promptly decide whether the solicitation or award was in accordance with the applicable law, regulations, and terms and conditions of the solicitation. The proceeding shall be de novo. Any prior determinations by administrative officials shall not be final or conclusive.

For contracting agencies covered by the PPA, the Board's protest jurisdiction embraces "any protest of a solicitation or award of a contract" by "any contractor who is aggrieved in connection with the solicitation or award of a contract." By the terms of D.C. Code § 1-1189.3, the Board is the exclusive hearing tribunal for protests. See *District of Columbia v. Group Insurance Administration*, 633 A.2d 2, 15-16 (D.C. 1993). By providing the Board a broad grant of protest jurisdiction in the PPA, the Council of the District of Columbia meant to ensure that the District's procurement law would be applied uniformly and that the integrity of the procurement process would be maintained. D.C. Code § 1-1181.1(b). The PPA vested in the Mayor the power to issue procurement regulations to implement the PPA. D.C. Code § 1-1182.2(a)(1) (1992). By vesting regulatory authority in the Mayor and directing that comprehensive procurement regulations be issued promptly, the Council intended to promote uniform procurement procedures District-wide. *Id.* §§ 1-1181.1(b)(10), 1-1182.2.

The LSDBE Act is directed to the procurement process and necessarily intersects with the PPA. By their nature, programs established under the LSDBE Act are uniquely directed to, and are an integral part of, the procurement process. The very first finding of the Council in the LSDBE Act states that it is a policy of the District government "to ensure full and equitable opportunities for small and disadvantaged business enterprises to participate as prime contractors, subcontractors, and joint venture partners in the award of contracts for construction, supplies, and services by the government of the District." D.C. Code § 1-1152(1). The Council enacted the LSDBE Act, codified at Title 1, Chapter 11, Subchapter IIA, of the D.C. Code, to fill the void left after key provisions of the Minority Contracting Act of 1976 (codified at Title 1, Chapter 11, Subchapter II of the D.C. Code) were invalidated as unconstitutional in 1992. See *O'Donnell Construction Co. v. District of Columbia*, 815 F.Supp. 473 (D.D.C. 1992), *on remand from* 963 F.2d 420 (D.C. Cir. 1992).

The LSDBE Act directed the Mayor promptly to establish through regulations issued by the Mayor "programs designed to assist contractors who are certified as local business enterprises, disadvantaged business enterprises, or small business enterprises" D.C. Code § 1-1152.3(a). The Council found that a "preference mechanism for bids submitted by local business enterprises and disadvantaged businesses will further the public policy of the District by facilitating the participation of such businesses in the District's procurement process." *Id.* § 1-1152(5). The Act defines the terms SBE, LBE, and DBE, *id.* § 1-1152.1, and requires the Mayor to institute through regulation a bid preference mechanism for LBE's and DBE's, and a set-aside program for SBE's. *Id.* § 1-1152.3(b). To be eligible for certification as an SBE, LBE, or DBE, the Act *mandates* that applicants meet eligibility criteria, including: (1) written evidence that the applicant is a bona fide LBE, DBE, or SBE; (2) compliance with regulations; and (3) fulfillment of such other criteria as the MBOC may require by regulation. *Id.* § 1-1152.4. The Act authorizes the Mayor to issue regulations establishing procedures to certify, self-certify, or to challenge the certifications that a business enterprise is a SBE, LBE, or DBE. See note 1 *infra*. The Act provides that the contracting agency conducting the procurement awards the preferences. *Id.* § 1-1152.3(b).

Unlike in the Minority Contracting Act, which authorized the MBOC to issue regulations implementing the Minority Contracting Act, the LSDBE Act vested the Mayor

with regulatory authority to implement the Act. See, e.g., D.C. Act 9-223 (emergency legislation), §§ 5, 8, June 9, 1992, 39 D.C. Reg. 4523, 4526-30; D.C. Law 9-152 (D.C. Act 9-234) (temporary legislation), §§ 5 (codified as D.C. Code § 1-1152.3), 8 (not codified), June 26, 1992, 39 D.C. Reg. 5023, 5026-30; D.C. Law 9-217 (D.C. Act 9-347) ("final" legislation), §§ 5, 8, Dec. 29, 1992, 40 D.C. Reg. 143, 146-50.¹ The Mayor, in turn, delegated regulatory authority to the Director of DHRMBD. See Mayor's Order No. 92-93, July 20, 1992, 39 D.C. Reg. 6143. Pursuant to that delegation, the Director of DHRMBD issued regulations implementing the LSDBE Act, 39 D.C. Reg. 9052-89, which are codified in Chapter 8 of the District-wide procurement regulations in Title 27 ("Contracts and Procurements") of the District of Columbia Municipal Regulations ("DCMR"). For the most part, Chapter 8 replaces 27 DCMR Chapters 6 and 7, which contain the implementing regulations for the Minority Contracting Act. See 27 DCMR § 800.2.

The LSDBE Act mandates that the MBOC follow the requirements of the LSDBE Act, the Mayor's implementing regulations, and its own procedures and guidelines, with specific reference to those requirements governing the bid preference mechanism for LBE's and DBE's, SBE set-aside programs, and certificates of registration. D.C. Code §§ 1-1152.3(a)-(b); 1-1152.4(a); 1-1152.5(1). Therefore, in the context of a bid protest, the LSDBE Act, the Mayor's implementing regulations at 27 DCMR Chapter 8, and any additional MBOC requirements are part of the applicable body of law covered by D.C. Code §§ 1-1189.3 and 1-1189.8 against which the Board assesses whether an award was "in accordance with the applicable law, regulations, and terms and conditions of the solicitation."

We have recognized that the MBOC has been granted specific authority by D.C. Code § 1-1152.4 to issue certifications of contractors as small, local, and disadvantaged business enterprises. In *Prince Construction* and *Southern Maryland Restoration*, we held that we have jurisdiction to review a protest alleging that the MBOC violated applicable law relating to the certification process, which, *in the particular procurement subject to protest, had adversely affected the status of bidders*. This conclusion follows from a plain reading of our statutory responsibility pursuant to the PPA to ensure that the integrity of the procurement process is maintained and is not adversely affected, regardless of whether the procurement is an open-market competition or a small business set-aside, *Southern Maryland Restoration*, 40 D.C. Reg. at 4876, and from the fact that the regulations governing certifications under the LSDBE Act are inextricably intertwined with the remainder of the District-wide procurement regulations, *Prince Construction*, 41 D.C. Reg. at 3711 n.3. Because only LBE's, SBE's, and DBE's certified by the MBOC are able to participate in set-aside or preference programs established pursuant to the LSDBE Act and

¹ Section 8, identical in each version of the Act, states: "The Mayor shall issue regulations to implement this act, including rules that establish a procedure to provisionally certify, self-certify, or to challenge the certifications that a business enterprise is a small, local, or disadvantaged business enterprise." 39 D.C. Reg. 4530; 39 D.C. Reg. 5030; 40 D.C. Reg. 150.

27 DCMR Chapter 8, the MBOC performs an important gatekeeper function through its certification process which may under a particular procurement have a crucial affect on the fundamental fairness and integrity of that procurement process. See 27 DCMR § 801.4.

The LSDBE Act authorizes the MBOC to conduct a compliance review of an entity's certification, either on MBOC's own initiative or as a result of a complaint by "any person" alleging a violation. D.C. Code § 1-1152.4(d)-(e). A pertinent regulation states: "The Commission may on its own, or upon receipt of a sworn complaint from any person, or report of an alleged violation by any agency official, conduct periodic compliance reviews of certified LBEs, SBEs, DBEs and joint ventures to assure their continued compliance with the eligibility requirements of the Act and these rules." 27 DCMR § 823.1. In the normal course, then, the MBOC will fulfill its statutory and regulatory duties by conducting compliance reviews and proceedings consistent with the Act and the Mayor's implementing regulations. Precisely because of this mechanism, consistent with intragovernmental comity, and at the request of the District's counsel, the Board brought the relevant issues of compliance raised by the protest to the MBOC's attention through the Board's December 7, 1995 referral. Counsel for the District, Prisma, and C&D agreed with this referral procedure. The Board twice extended the schedule in this protest's proceedings to accommodate the MBOC in responding to the referral. The MBOC's response, filed February 6, 1996, is part of the record and has been considered by the Board. By exercising jurisdiction over a protest which challenges DPW's award of preferences based on a recertification by the MBOC, the Board does not usurp MBOC's certification function. The Board does not and cannot make certification determinations pursuant to the LSDBE Act. On the other hand, the Board must exercise its jurisdiction to review whether a contracting agency's award of a contract, including the underlying evaluation of bids and application of preferences, complied with applicable law and regulation.² In addition, the IFB here, through the Special Conditions and Attachment D, incorporate the applicable LBE and DBE requirements of the LSDBE Act, 27 DCMR Chapter 8, and the MBOC's additional

² The parties have disputed the standard applied by the U.S. General Accounting Office under its statutory bid protest review authority with respect to procurement matters involving determinations by the Small Business Administration ("SBA") under the Small Business Act, 15 U.S.C § 637 *et seq.* We note that even under the SBA's independent statutory and regulatory scheme, the GAO engages in some limited review of SBA determinations where the protester makes a prima facie showing of fraud or bad faith, willful disregard of the facts, or that the SBA has violated specific laws or regulations. *Grace Industries, Inc.*, B-261020, July 10, 1995, 95-2 CPD ¶ 9; *Reliable Cleaning and Maintenance Corp.*, B-258331, Jan. 9, 1995, 95-1 CPD ¶ 13; 4 C.F.R. § 21.5(b).

requirements. By their terms, D.C. Code §§ 1-1189.3 and 1-1189.8 direct us to review whether a protested award was made in accordance with the terms and conditions of the solicitation.

The District has cited our decisions in *Potomac Capital Investment Corp.*, CAB No. P-383, Feb. 23, 1994, 41 D.C. Reg. 3944, and *Metropolitan Service & Maintenance Corp.*, CAB No. P-388, Feb. 7, 1995, 42 D.C. Reg. 4918, for the proposition that the Board has declined jurisdiction over protests involving other statutory schemes outside the scope of the PPA. The distinguishing feature of those cases is that the Board lacked jurisdiction because the solicitation for disposal of real property in *Potomac Capital* and the renewal of a bus shelter franchise in *Metropolitan* were carried out under statutory and regulatory schemes entirely independent of the PPA and the District-wide procurement regulations in Title 27 of the DCMR. That is not the case here. For the reasons discussed above, the LSDBE Act, the LSDBE programs, the implementing regulations at 27 DCMR Chapter 8, and the MBOC's additional requirements are an integral part of the procurement process governed by the PPA. In another line of argument, the District suggests that by exercising jurisdiction in the present case, the Board will necessarily have to exercise jurisdiction over any challenge to the validity of every type of certification, permit, or license requirement found in a solicitation. We believe the District's fears are misplaced. First, the vast majority of certifications and licenses required by a solicitation are generally matters of the bidder's responsibility and may be corrected after bid opening up until contract award. *Modern Electric, Inc.*, CAB No. P-341, Apr. 5, 1993, 40 D.C. Reg. 5068, 5069; *J&L Contract Services, Inc.*, CAB No. P-313, Oct. 2, 1992, 40 D.C. Reg. 4565, 4567. That is not the case for MBOC certifications. The bidder must be validly certified by the MBOC (or be validly self-certified) as of bid opening. *Capitol Paving of D.C., Inc.*, CAB No. P-280, Mar. 11, 1992, 39 D.C. Reg. 4476, 4477-78. Although the validity of a certification may be verified after bid opening, see *M&T Electrical Contractors, Inc.*, CAB No. P-397, Feb. 22, 1994, 41 D.C. Reg. 3941; *Sheladia Construction Corp.*, CAB No. P-326, 40 D.C. Reg. 4735, 4736; 27 DCMR § 1535.3, an invalid certification cannot be cured after the time of bid opening. *Keystone Plus Construction Corp.*, CAB No. P-345, Jan. 14, 1993, 40 D.C. Reg. 4906, 4911-12. SBE certification for SBE set-aside procurements is a mandatory prerequisite to bid for the contract. See *J&K Distributors, Inc. of Washington, D.C.*, CAB No. P-432, June 13, 1995, 42 D.C. Reg. 4986; *Prince Construction Co.*, CAB No. P-385, Dec. 21, 1993, 41 D.C. Reg. 3874. Similarly, LBE and DBE certifications cannot be cured after bid opening because the application of the preference directly affects the evaluated bid price, a material term of the offer. Second, none of the examples cited by the District (tax certificate, dumping permit, health care professional license) represent statutory or regulatory schemes that are an integral part of the PPA's procurement process. Third, our exercise of jurisdiction in the present protest is no broader than that exercised in *Southern Maryland Restoration* and *Prince Construction* and protests challenging MBOC certifications have been rare.

Based on the record presented, C&D has made a prima facie showing that Prisma is not entitled to preferences for DBE and LBE status, that the MBOC violated the LSDBE Act and the Mayor's implementing regulations, and that the violations have materially compromised the integrity of the procurement. Therefore, the Board concludes that it has jurisdiction under D.C. Code §§ 1-1189.3 and 1-1189.8(c) to determine whether the award

decision was in accord with applicable law, regulation, and the terms and conditions of the solicitation.

II. Merits

A. Lack of a Certificate of Good Standing

C&D argues that Prisma's failure to possess a certificate of good standing rendered invalid the MBOC's recertification of Prisma as a DBE and LBE, thereby disqualifying Prisma from receiving a five percent preference for each of these preference categories. The LSDBE Act defines a DBE as a LBE owned, operated, and controlled by "economically disadvantaged individuals." LBE's are defined as business enterprises with their principal office located physically in the District of Columbia and licensed pursuant to Chapter 28 of Title 47 or subject to the tax levied under Subchapter X of Chapter 18 of Title 47. D.C. Code § 1-1152.1(1), (3).

C&D argues, and we agree, that the Mayor's Chapter 8 regulations require a certificate of good standing to be eligible for certification as a DBE. The regulations require that an applicant seeking DBE certification "shall provide the Commission" with *inter alia* business documentation, including "certificates of good standing." 27 DCMR § 814.3.b. The record demonstrates, and Prisma concedes, that it did not possess a current certificate of good standing, either at the time of recertification in July 1995 or by the time of bid opening on September 22, 1995. Prisma could not receive a certificate of good standing because it had not filed its 1995 corporate annual report with the District, which was due April 15, 1995. Prisma did not file its annual report and obtain a certificate of good standing until November 28, 1995, well after bid opening. Although the District and Prisma have had ample opportunity to place evidence in the record that Prisma possessed a certificate of good standing entitling it to certification or recertification as a DBE, they have not done so.

C&D argues that 27 DCMR § 811.2, which sets forth the evidence needed by an applicant to establish LBE status, requires by implication that an applicant furnish a certificate of good standing. Even assuming C&D were correct that a certificate of good standing would be "compelling evidence" that a firm is a bona fide LBE, it does not follow that the certificate of good standing is evidence required to establish it as a LBE. Nevertheless, we find that furnishing a certificate of good standing was made a specific and mandatory requirement for LBE certification by the MBOC in its application process for certification and recertification. In addition to the requirements contained in the uniform regional certification application, the "Washington Area Regional Committee on Minority Business Certification" (WARCOMBEC), the MBOC requires, in the application, four specified exhibits, one of which is a "Certificate of Good Standing issued by the District of Columbia (and Annual Report for foreign or domestic corporations) less than one year old." (IFB Attachment D). The record contains no evidence of a current certificate of good standing that could support recertification of Prisma as a LBE.

The District argues that the Board would be exalting form over substance if it were to deny LBE or DBE preferences simply because one document (of many) was omitted. The District urges that because the LSDBE Act is remedial in nature, it should be construed

liberally to effectuate its purposes. We do agree that the Act is remedial in nature. However, the LSDBE Act is clear on how it should be construed, at least with regard to an applicant's obligation to satisfy the requirements for qualifying it for MBOC certification and bid preferences. A careful reading of the statutory requirements for certification and preferences show that the Council placed great importance on making sure that certifications as LBE's, SBE's, and DBE's were bona fide. The LSDBE Act mandates that applicants meet the Act's requirements, the Mayor's implementing regulations, and any other criteria established by the MBOC. D.C. Code § 1-1152.4(a). Nowhere in the Act is the MBOC authorized to ignore the mandatory statutory and regulatory requirements. The pertinent section specifically requires "written evidence" that the applicant is a bona fide LBE and a bona fide DBE. *Id.* § 1-1152.4(a)(1)(A). The Mayor's regulations show the same emphasis, by requiring that initial or renewal applications for certification be accompanied by documentation as prescribed in the application and in compliance with "the requirements of the [LSDBE] Act, this chapter [8], and other District of Columbia laws that are applicable to the applicant's business . . . ;" and "[e]vidence of authority to do business in the District of Columbia, including D.C. business licenses, occupancy permits, tax numbers, worker's compensation forms, lease agreements, and other information requested by the Commission." 27 DCMR § 811.1. Thus, the LSDBE Act emphasizes the very sound policy of requiring applicants, who seek preferences, to demonstrate bona fide status through written documentation required by regulation. It would create havoc in the procurement process if some bidders were able to obtain substantial preferences without being required to verifiably demonstrate their entitlement. It would also be unfair to all bidders who were bona fide LBE's, DBE's, and SBE's, and fully supported their right to certification.

Finally, we note that Prisma's lack of a certificate of good standing is not a minor informality but rather a material prerequisite to enjoying the preference benefits accorded under the LSDBE Act and regulations.³ This is not a case where the bidder was properly certified at the time of bid opening but merely required post-bid opening verification of its status to be eligible to bid or earn preferences.⁴

³ Citing D.C. Code § 29-586, the District argues that Prisma's failure to file its 1995 annual report had no effect on its corporate status -- unless it had failed to file its annual report for two consecutive years. The District's point is similar to the corporate viability issue raised in *SEEMA, Inc.*, B-255884, April 13, 1994, 94-1 CPD ¶ 256, where the protester challenged the awardee's corporate identity because it lacked good standing under Maryland law. The issue is not Prisma's corporate status, but whether Prisma was required to possess a certificate of good standing as a prerequisite to obtaining MBOC certification as a DBE and the price evaluation preference.

⁴ Earlier in these proceedings the District had moved to dismiss C&D's protest on the ground that C&D was not eligible to bid because it was not a certified SBE in the category of "General Services." We denied the motion to dismiss on the ground that C&D had properly self-certified. Two weeks prior to bid opening, C&D submitted the MBOC prescribed self-certification form to DHRMBD, as required by IFB. C&D repeatedly called DHRMBD personnel to secure issuance of the letter of acknowledgement to attach to C&D's bid. Apparently due to administrative problems within DHRMBD, C&D was advised that a signed letter could not be furnished immediately; DHRMBD instructed C&D to advise the contracting officer to confirm the certification telephonically with DHRMBD. C&D then confirmed these events and representations in a letter submitted with its bid, along with an entire copy of its completed self-certification form. On these facts, C&D properly self-certified.

We conclude that the MBOC violated the provisions of the LSDBE Act, the Mayor's implementing regulations, and its own application requirements when it recertified Prisma as a DBE and LBE where Prisma did not and could not furnish a current certificate of good standing. Accordingly, the contracting officer erred in applying a ten percent preference to Prisma's bid.

B. The "Socially Disadvantaged" and "Economically Disadvantaged" Requirements for DBE Status

To be a DBE, the LSDBE Act requires that the entity be owned, operated, and controlled by "economically disadvantaged individuals." The Act defines an "economically disadvantaged individual" as one "whose ability to compete in the free enterprise system is impaired due to diminished opportunities to obtain capital and credit as compared to others in the same line of business where such impairment is related to the individual's status as 'socially disadvantaged.'" An individual is 'socially disadvantaged' if the individual has reason to believe the individual has been subjected to prejudice or bias because of his or her identity as a member of a group without regard to his or her qualities as an individual." D.C. Code § 1-1152.1(9). The Mayor's implementing regulations require that an applicant for DBE certification "shall demonstrate" to the MBOC that the individuals representing at least 51 percent of the controlling interests in the firm are:

Socially disadvantaged because the individuals have faced chronic, not fleeting, instances of prejudice or bias without regard to their qualities as individuals over which they have no control due to their identity as members of a group as evidenced by the following:

1. Documentation proving that the individuals seeking socially disadvantaged status as members of a group hold themselves out as members of the group;
2. Documentation proving that the individuals . . . have been isolated from the mainstream of American society not common to business persons not socially disadvantaged;
3. Documentation proving that the individuals . . . have personally suffered social disadvantage through treatment they have experienced.

27 DCMR § 814.2(a). Prisma's application attached as an exhibit to the Agency Report contains a declaration that the owner identifies herself as Hispanic. Thus, there is some documented evidence supporting the first item. Because there is at least some evidence in the record, we will go no further and assume that the evidence was satisfactory for the MBOC. As to the second and third items, the record is devoid of any documentation submitted by Prisma's owner to the MBOC even minimally addressing these items. Further, there is no evidence in the owner's application that she had reason to believe that she had been subjected to prejudice or bias on account of her identity as an Hispanic

without regard to her qualities as an individual. See D.C. Code § 1-1152.1(9). The District and Prisma have had ample opportunity to submit into the record supporting documentation, but have not done so. Because there is no evidence on specific elements required by the statute and regulation to satisfy the "socially disadvantaged" component for DBE status, we must conclude that the MBOC violated the LSDBE Act and the regulations in recertifying Prisma as a DBE.

In addition to proof of socially disadvantaged status, the applicant must show that, by reason of being socially disadvantaged, its controlling owner is also "economically disadvantaged." The regulation requires the controlling owner to demonstrate economically disadvantaged status as evidenced by documentation on the following:

1. The personal financial condition of the individuals seeking economically disadvantaged status;
2. The financial condition of the business enterprise; and
3. The applicant's lack of access to credit, capital and the open market which is not common to business persons in general.

27 DCMR § 814.2(b). C&D argues that the evidence in the record -- the owner's \$75,000 personal net worth, Prisma's \$3,000,000 bonding limit, and a \$150,000 credit line -- "call into material question" any claim for economically disadvantaged status. Because there is some evidence in the record to support the requirements, we will go no further and assume that the evidence was satisfactory for the MBOC. Thus, we cannot conclude from the record that the MBOC violated law or regulation with respect to the "economically disadvantaged" component for DBE status. Nevertheless, since the Act and regulations require both components to be established, Prisma is not entitled to a preference based on DBE status.

In sum, we conclude that the MBOC violated the LSDBE Act and regulations by recertifying Prisma as a DBE and LBE. Accordingly, the contracting officer erred in applying DBE and LBE preferences to Prisma's bid.⁵

III. Remedy

If no contract has been awarded, then the contracting officer shall correct the evaluated price of Prisma and award the contract to the low responsive and responsible bidder. If the contracting officer has awarded a contract to Prisma during these protest proceedings, then we must determine an appropriate remedy. The District has not argued that termination of Prisma's contract followed by award to the low responsive and responsible bidder is not the proper remedy if we were to sustain the protest. D.C. Code § 1-1189.8(e)(1) identifies criteria to be considered in determining whether an improperly-awarded contract should be terminated for the convenience of the District. Based on those

⁵ In light of our resolution of the preference challenges, we do not reach C&D's so-called "50 percent" challenge.

criteria, we conclude that termination is appropriate here if a contract has been awarded. It is in the best interest of the District to award the contract to the low bidder. If the District were to continue under a contract with Prisma, the District will be paying over \$160,000 more for the services than if it were to contract with C&D (assuming C&D is determined responsible). Here, the procurement deficiency is both serious and material because the record demonstrates that Prisma was not entitled to a price evaluation preference of ten percent based on DBE and LBE status, the effect of which is that Prisma was determined to be the low evaluated bidder rather than, in reality, the third-low bidder. The other bidders have been materially prejudiced, particularly the low and second low bidders, who are potentially in line for award depending on the results of a responsibility determination. The integrity of the procurement system, not to mention the LSDBE programs, depends on bidders receiving lawful evaluations of their bids and lawful application of preferences. Fairness demands that preferences be awarded only to bidders entitled to receive them. The District has not advised the Board of any contract award. We do not know whether Prisma has commenced performance. Even if a contract has been awarded, performance could not be more than one month along. Finally, the District has not submitted any evidence that termination followed by a proper award would adversely affect DPW's activities or mission.

Accordingly, if no contract has been awarded as of the date of this decision, the contracting officer shall make award to the low responsive and responsible bidder consistent with this opinion. If a contract has been awarded to Prisma, the contracting officer shall terminate the contract pursuant to D.C. Code § 1-1189.8(e)(1) and shall award the contract to the low responsive and responsible bidder.

SO ORDERED.

DATE: March 11, 1996

/s/ Jonathan D. Zischkau
Jonathan D. Zischkau
Administrative Judge

CONCURRING:

/s/ Lorilyn E. Simkins
LORILYN E. SIMKINS
Chief Administrative Judge

/s/ Phyllis W. Jackson
PHYLLIS W. JACKSON
Administrative Judge