

GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

PROTESTS OF:

J&K DISTRIBUTORS, INC. OF WASHINGTON, D.C.)	
and URBAN SERVICE SYSTEMS CORPORATION)	CAB Nos. P-432, P-433
Under IFB No. OMS-5056-AA-AC)	(Consolidated) ¹

For J&K Distributors, Inc. of Washington, D.C.: Kay F. Price, President. For Urban Service Systems Corporation: Stuart C. Law, Esquire, Law & Murphey. For the Government: Nancy Hapeman, Warren J. Nash, Howard Schwartz, and Anne Cauman, Assistants Corporation Counsel.

Opinion by Administrative Judge Jonathan D. Zischkau, with Administrative Judges Lorilyn E. Simkins and Cynthia G. Hawkins-León, concurring.

OPINION

J&K Distributors, Inc. of Washington, D.C. ("J&K") has filed a protest of Department of Public Works ("DPW") Invitation No. OMS 5056-AA-AC on the ground that the solicitation, placed in the small business enterprise ("SBE") market, improperly includes a bonding requirement. Urban Service Systems Corporation ("Urban") has filed a protest of the same solicitation, asserting that because of erroneous District qualification testing of chemical compounds to be furnished under the contemplated contract, it has been precluded from competitively bidding. The District has moved to dismiss both protests on the ground that the protesters were not properly certified for the SBE category required by the solicitation, and thus neither was eligible to bid on the solicitation. Because neither protester timely challenged the solicitation's restriction of bid eligibility to those SBE's certified in the single SBE category of "Goods and Equipment", we dismiss the consolidated protests.

FACTS

On April 7, 1995, DPW issued IFB No. OMS-5056-AA-AC to obtain centrifuge polymers for use by the Water and Sewer Utility Administration ("WASUA") in dewatering sludge at the District's Blue Plains Treatment Facility. DPW placed the solicitation in the small business enterprise market. In addition, only small business enterprises certified in the category

¹ The Board *sua sponte* has consolidated these solicitation protests for purposes of decision because they arise under the same solicitation.

of "Goods and Equipment" were eligible to bid. The relevant portion of the solicitation reads:

When designated as a small business enterprise procurement, this invitation for bids is designated for small business enterprise bidders only, under the provisions of "The Equal Opportunity for Local, Small and Disadvantaged Business Enterprises Act of 1992." Small business enterprises must be certified in the following category(s) in order to be eligible to bid: Goods and Equipment.

(District's Motion to Dismiss, Exhibit 1, at 2 (emphasis in original)). Paragraph 1 of the Special Conditions states: "An SBE must be certified as small in the procurement category of Goods and Equipment in order to be eligible to submit a bid or proposal in response to this solicitation." (*Id.* at 12 (emphasis in original)). Although the IFB set bid opening for May 12, 1995, Addendum No. 1 extended the bid opening date to May 22, 1995. J&K filed its protest of the solicitation on May 9, 1995, challenging the solicitation's bonding requirements, and Urban filed its protest on May 15, 1995, challenging the qualification testing that had previously been conducted on the product it intended to supply under its bid. Neither protester challenged the solicitation's restriction of bid eligibility to SBE's certified in the single SBE category of "Goods and Equipment."

Four bidders, J&K, Urban, Tricon of Washington, D.C., and B&B Services, submitted bids which were opened on May 22, 1995. As of the time of bid opening, neither protester was certified in the SBE category of "Goods and Equipment." (District's Motion to Dismiss, Exhibits 3-4).

On June 6, 1995, the District filed its motion to dismiss the protests on the ground that neither protester is an "aggrieved party" under D.C. Code § 1-1189.3(1) because neither protester was certified in the SBE category of "Goods and Equipment" and therefore neither was eligible to submit a bid. Pursuant to a request from the Board, the District filed on June 9, 1995, the SBE certifications for Tricon and B&B Services.

The District also submitted on June 9 a Determination and Findings ("D&F") executed by the DPW Director on June 5, rejecting all bids received and cancelling the solicitation. The D&F states that the bids of J&K and Urban are nonresponsive because those bidders were not properly certified in the SBE "Goods and Equipment" category, and that the bids of B&B and Tricon contained defective bid bonds. The D&F indicates that DPW intends to issue a new solicitation without a bonding requirement. The Board has not received notice from the District concerning whether the Director of the Department of Administrative Services has approved the cancellation.

On June 12, 1995, Urban responded to the District's June 6 motion, arguing that (1) Urban is certified in the category of "Transportation (Chemicals)", (2) Urban is currently furnishing other chemical compounds to Blue Plains, and (3) it would be clearly arbitrary to exclude Urban from bidding simply because it is not certified under the SBE "Goods and Equipment" category. J&K has not responded.

DISCUSSION

Section 6 of the Equal Opportunity for Local, Small and Disadvantaged Business Enterprises Act of 1992, D.C. Code § 1-1152.5 (Supp. 1994), states in pertinent part:

Notwithstanding any other provisions of law, no enterprise shall be permitted to participate in the [local, disadvantaged, and small business assistance] program established under § 1-1152.3 unless it has been issued a certificate of registration under the provisions of this subchapter or has self-certified pursuant to regulations issued pursuant to this subchapter. . . .

In its implementing regulations, the Minority Business Opportunity Commission ("MBOC") provides:

A small business enterprise certified in any of the categories listed in the Act or these rules; [sic] is eligible to participate only on set-aside solicitations in those categories.

27 DCMR § 813.3 (1992).

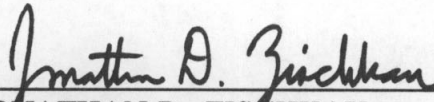
We have previously held, in the context of a protest of an award in an SBE set-aside procurement, that if a contractor is not a properly certified SBE at the time of bid opening then the contractor is not eligible either to bid or protest an award. *C&E Services, Inc.*, CAB No. P-356, Feb. 10, 1993, 40 D.C.Reg. 4942, 4944-45; *M&T Electrical Contractors, Inc.*, CAB No. P-397, Feb. 22, 1994, 41 D.C.Reg. 3941. It is uncontested here that neither protester was certified in the SBE category of "Goods and Equipment." Because neither protester was properly certified under the SBE "Goods and Equipment" category required by the solicitation, neither was eligible to bid on the solicitation. In addition, we do not reach the merits of Urban's argument that the solicitation's "Goods and Equipment" limitation is arbitrary, because Urban did not timely challenge the solicitation on that ground.

The challenged solicitation is in the process of being cancelled, and, if it is cancelled, no award will be made based upon it. From our reading of the D&F, the agency intends to issue a new solicitation. In its D&F, the agency states that it intends to issue a new solicitation whose "specification will be revised to delete all bonding requirements to ensure maximum competition." That seems to address the substantive concern raised by J&K in its protest. Because fostering effective and equitably broad-based competition and maximizing the purchasing power of the government, to the fullest extent allowed by law, are key statutory purposes for District procurement, *see* D.C. Code § 1-1181.1(b), we have no doubt that the agency also will consider carefully whether to conduct a new qualification trial for the Citi-Chem polymer bid by Urban. Considering those same statutory purposes, and consistent with the

specifications of any new solicitation, the agency may want to consider whether bid eligibility should be expanded to include other SBE categories in addition to "Goods and Equipment." See *generally Urban Service Systems Corp.*, CAB No. P-400, Apr. 7, 1994, 7 P.D. 5796.

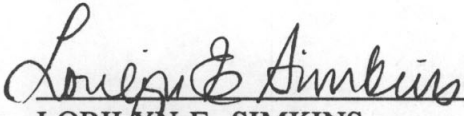
The protests are dismissed.

DATE: June 13, 1995

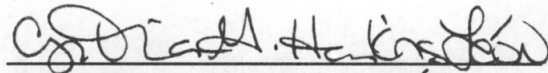


JONATHAN D. ZISCHKAU
Administrative Judge

CONCURRING:



LORILYN E. SIMKINS
Chief Administrative Judge



CYNTHIA G. HAWKINS-LEÓN
Administrative Judge