

GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

PROTEST OF:)	
)	
BARCODE TECHNOLOGIES, INC.)	
)	CAB No. P-524
Under IFB No. 7324-AA-03-S-BS)	

For the Protester: Mr. Robert A. Williams, President, Barcode Technologies, Inc., *pro se*.
For the Intervenor Horton & Barber Professional Services: Robert J. Harlan, Jr., Esq. For the
Government: Edward J. Rich, Esq., and Warren J. Nash, Esq., Assistants Corporation Counsel.

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

OPINION AND ORDER

Barcode Technologies, Inc. ("Barcode or Protester") filed the subject protest alleging that award of a contract to Horton & Barber ("Horton"), the apparent low bidder, would violate the solicitation terms requiring that bidders be certified as small business enterprises ("SBE") in the procurement category of "Goods and Equipment" in order to be eligible to submit bids. Barcode also challenges the eligibility of Nu-Tech Cleaning Management, Inc. ("Nu-Tech"), the apparent second low bidder, on the same ground. The District seeks to dismiss the protest on the ground that Barcode has no standing. Horton joins the District in seeking the dismissal of Barcode on the basis of lack of standing and also raises a challenge to the timeliness of this protest. We find that the protest is timely, that the Protester does have standing, and that the protest should be sustained on its merits.

FACTS

On May 14, 1997, the Department of Administrative Services ("DAS") issued, in the small business set-aside market, Solicitation No. 7324-AA-03-S-BS for management of vending machines. (Agency Report ("AR"), Ex. 1). The solicitation limited bidder eligibility to SBEs certified in the procurement category of "Goods and Equipment." (*Id.*, § I.8.1).^{1/} By Addendum No. 1, the SBE

^{1/}The relevant provisions at Section I, "Contract Clauses" of the solicitation provide:

I.8 Clauses For Procurement Restricted to the SBE Set Aside Market

I.8.1 Designation of Solicitation for the Small Business Set-Aside Market Only

(continued...)

certification and eligibility requirements were deleted. (AR, Ex. 1). Addendum No. 3 re-inserted the SBE certification restricting eligibility to bidders certified in the "Goods and Equipment" procurement category. (*Id.*). We are told that bid opening was held on July 2, 1997, but it is un rebutted by the District that bid opening was not done publicly as required by 27 DCMR §1527. (AR, page 2). DAS received bids from five bidders.^{2/} Horton submitted the apparent low bid at a percentage fee of 16% of estimated gross commission. (AR, Ex. 2 and 7). Nu-Tech submitted the second low bid and Barcode was the third low bidder. (AR, Ex. 2). Among the three lowest bidders (Horton, Nu-Tech and Barcode), only Barcode possessed the MBOC certification in the prescribed SBE category of Goods and Equipment.

On September 30, 1997, the Chief Procurement Officer issued a Determination and Finding of contractor responsibility in favor of Horton. (AR, Ex. 5). On the same date as the Determination and Finding was issued, a memorandum of approval of award was issued by the Chief Financial Officer. (AR, Ex. 6).

By letter dated November 13, 1997, the Office of Contracting and Procurement notified Barcode of award to Horton. (AR, Ex. 7). Barcode received this letter on November 17, 1997. (Barcode Comments dated January 20, 1998).

On November 13, 1997, Barcode filed the subject protest alleging that award of a contract to Horton would be in violation of the solicitation terms. On December 16, 1997, the District filed a motion to dismiss the protest, or in the alternative, Agency Report. As grounds for the motion to dismiss, the District argues that Barcode is not an aggrieved party because it would not be in line for award of the contract even if its protest were upheld and that Barcode's bid was nonresponsive because it added an "aggregate" bid to the schedule that it submitted.

^{1/}(...continued)

I.8.1.1 This Invitation for Bid is designated for certified small business enterprise (SBE) offerors only under the provisions of "The Equal Opportunity for Local, Small, and Disadvantaged Business Enterprise Emergency Act of 1992" ("Act").

I.8.1.2 A SBE must be certified as small in the procurement category of Goods & Equipment in order to be eligible to submit a bid or proposal in response to this solicitation.

^{2/}One of the bids was designated "late." The percentage fee bid by each of the four timely bidders was as follows for the base year for B.1.1 (commission for canned sodas) and B.1.2 (commission for all other products and services):

	B.1.1	B.1.2
Horton & Barber	9.00%	7.00%
Nu-Tech Cleaning Mgmt, Inc.	8.50%	8.50%
Barcode Technologies	4.98%	14.98%
H.B.S., Inc.	42.00%	42.00%

(AR, p.4, and Ex.2).

On December 22, 1997, Barcode filed a response to the District's motion/Agency Report. Barcode argues that the District's challenge to its standing as an aggrieved party is a moot issue because both Horton and Nu-Tech lack certification in the prescribed SBE category of Goods and Equipment and it (Barcode) meets the eligibility category for submission of bids and is the low responsive bidder. In response to the District's allegation that Barcode's bid was nonresponsive, Barcode argues that its bid was responsive because it provided a price for each category, i.e., sodas and other products, and that the addition of the word "aggregate" on the Barcode bid did not have a negative or material impact on the calculations or the rankings of the bidders.

On January 15, 1998, in addition to joining the District in its challenge to Barcode's standing, Horton filed a motion to dismiss the protest as untimely on the ground that Barcode knew or should have known of the contract award to Horton by October 21, 1997. Barcode filed a response to Horton's motion on January 20, 1998. The District did not file a response to Horton's motion.

DISCUSSION

We exercise jurisdiction over the protest pursuant to D.C. Code § 1-1189.3(a)(1) (Supp. 1997).

Timeliness

Horton argues that Barcode knew or should have known of the award to Horton by October 21, 1997. Horton argues that this date would have been one week after the "probable" date of a conversation between Horton's representative, Mr. Barber, and the contracting official, Mr. Charles Jackson, wherein Mr. Barber requested Barcode's final accounting and Mr. Jackson promised to contact Barcode for that information. Horton alleges that Barcode should have filed its protest by November 4, 1997. In support of this contention, Horton offers the declaration of Mr. Barber which states that (1) Mr. Barber had contacted vendors advising them that Horton was the new vending management agent for the District; (2) that on October 30, 1997, Mr. Jackson informed Mr. Barber that he had already talked with Mr. Williams of Barcode about a final vending report; (3) that Mr. Barber contacted Mr. Williams regarding the final vending report on November 5, 1997; and (4) that Horton has been performing the contract since the date of its award.

It is a well established principle that a protest filed more than 10 days after the Protester knew, or should have known, the basis of the protest is untimely. This Board lacks jurisdiction over protests of awards that are not filed within the 10-working-day requirement. See *Budget Lock and Key*, CAB No. P-497, July 30, 1997, 44 D.C. Reg. 6856; *Good Food Service, Inc.* CAB No. P-457, Aug. 27, 1996, 44 D.C. Reg. 6492; *Eastern Shield*, CAB No. P-369, Mar. 2, 1993, 40 D.C. Reg. 5001; *Continental Flooring Co.*, CAB No. P-402, Apr. 11, 1994, 42 D.C. Reg. 4542.

It is undisputed that on September 30, 1997, the Chief Procurement Officer and the Chief Financial Officer approved award of the contract to Horton. (AR, Ex. 5, 6). It is also not disputed that Mr. Barber advised Barcode of contract award to Horton on November 5, 1997. By letter dated November 13, 1997, the District advised the unsuccessful bidders, including Barcode, of contract

award to Horton. The November 13 letter did not inform Barcode of its third placed ranking. (Protest; AR, Ex. 7). Barcode alleges that it did not receive the November 13 letter until November 17, 1997, and that it filed its protest based upon Mr. Barber's November 5, 1997 call. (Barcode's Reply filed January 20, 1998). The key issue is when did Barcode know or when should Barcode have known the SBE categories in which Horton was certified for purposes of this bid.

The MBOC letter to Barcode dated November 12, 1997, which states that Horton was not certified in the SBE category of "Goods and Equipment" and that Horton lacked eligibility to bid in response to a set aside solicitation in that category provides the only documentation of record for determining when Barcode was advised of the SBE categories in which Horton was certified. The District has not offered any evidence of an earlier notification to Barcode of the award or certification status of Horton. Even if Horton had notified Barcode of its SBE certification defect on November 5, 1998, Barcode's protest would still be timely, having been filed on November 13, 1997. The record does not reflect the exact date when Barcode became aware of the certification status of Nu-Tech, but it does reflect that Barcode was notified of its third place ranking upon the filing of the Agency Report on December 16, 1997.^{3/} We conclude that Barcode's specific challenge of Nu-Tech's eligibility was timely raised in its comments to the Agency Report filed on December 22, 1997.

Standing

To have standing to protest, a party must be aggrieved. In other words, the protester must have a direct economic interest in the procurement. See *Wayne Mid-Atlantic*, CAB No. P-227, August 12, 1993, 41 D.C. Reg. 3594, 3595. Accordingly, this Board has held that a protester lacks standing where it would not be in line for award, even if its protest were upheld. *Roy's Towing Corp.*, CAB No. P-468, June 13, 1997, 44 D.C. Reg. 6832, 6833; *Crawford/Edgewood Managers, Inc.*, CAB No. P-424, Mar. 22, 1995, 42 D.C. Reg. 4957; *Commando K-9 Detectives, Inc.*, CAB Nos. P-405 & 406, May 6, 1994, 42 D.C. Reg. 4597; *Unfoldment, Inc.*, CAB No. P-358, Sept. 17, 1993, 41 D.C. Reg. 3656.

Based on the bid tabulation, Barcode was third in line among the bidders. Nevertheless, since Barcode challenges the eligibility of both the first and second low bidders, Barcode, if successful, would be next in line for award. Therefore, Barcode has standing to protest.

^{3/}The Agency Report filed on December 16, 1997, provided Barcode notice of its third place ranking. (AR, p.4). Barcode's timely response to the Agency Report filed on December 22, 1998, references document attachments from the Department of Human Rights and Local Business Development (formerly MBOC) which state that "neither Horton and Barber nor Nu-Tech is certified in Goods and Equipment." However, only the MBOC attachment concerning Horton was filed at that time. During a telephone conference held on January 9, 1998, the Board requested a copy of MBOC documentation of the certification status of Nu-Tech at the time of bid opening. The District provided this information on January 13, 1998.

Responsiveness

The District argues that Barcode's bid is nonresponsive since it added the word "aggregate" with a corresponding sum of its unit fee items to the schedule submitted with its bid. In pertinent part, Barcode's bid appeared as follows:

BASE YEAR				
B.1	DESCRIPTION	UNIT	EST GROSS COMMISSION	PERCENTAGE FEE
B.1.1	Fee for canned sodas	YEAR	\$100,000	<u>4.98</u>
B.1.2	Fee for all other products and services	YEAR	\$100,000	<u>14.98</u>
			Aggregate	19.96

(AR, Ex. 8).

The District argues that the solicitation did not require bidders to submit "aggregate" bids and that Barcode submitted an ambiguous bid because Barcode did not clearly demonstrate how the aggregate bid percentage should be applied to calculate the fee for each item.

It is well established that a responsive bid must present an unequivocal offer to provide the exact item called for in the solicitation and that when the District accepts such a bid, it legally binds the offeror to perform in accordance with all the material terms of the solicitation. *Southern Maryland Restoration, Inc.*, CAB No. P-241, Aug. 7, 1991, 39 D.C. Reg. 4268.

We do not agree that Barcode's bid is ambiguous. Barcode's bid did not omit any items called for in the solicitation, but added the term "aggregate" to its bid along with a sum of its unit percentage fees. Barcode did not materially alter its bid in any way simply by those additions. It is also apparent that contracting officials did not determine Barcode's bid to be ambiguous for the purpose of evaluating and ranking the bidders. (AR, Ex.2). We find that Barcode's bid represents an unequivocal offer to provide the exact items called for in the solicitation. Barcode's bid is responsive.

Eligibility

Horton, the apparent low bidder was registered as a SBE in the categories of "Business Services" and "General Services" at the time of bid opening. (AR, Ex. 3). Nu-Tech, the apparent second low bidder, was registered as a SBE in the category of "Business Services" at the time of bid opening. (District's supplemental letter, MBOC Certificate of Registration attachment). Neither was certified in the SBE category of "Goods and Equipment." Barcode was certified as a Small Business Enterprise in the categories of "Business Services", "General Services", and "Goods and Equipment" at the time of bid opening. (AR, Ex. 4). Thus, Barcode was the low eligible and responsive bidder.


A party who is not properly certified under the SBE category required by the solicitation, is ineligible to bid on the solicitation. *J&K Distributors, Inc. of Wash., D.C. and Urban Service Systems Corp.*, CAB No. P-432 & 433, June 13, 1995, 42 D.C. Reg. 4986. Neither Horton nor Nu-Tech was

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eligible to bid on the subject solicitation. The award to Horton violates the procurement law and the terms of the solicitation. Therefore, the District shall cancel the award.


Accordingly, the protest is **SUSTAINED**.

DATE: February 11, 1998

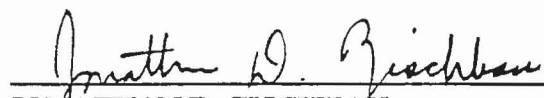


PHYLLIS W. JACKSON
Administrative Judge

CONCURRING:



LORILYN E. SIMKINS
Chief Administrative Judge



JONATHAN D. ZISCHKAU
Administrative Judge