

GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

PROTEST OF:

M.C. DEAN, INC.)

) CAB No. P-528

Under IFB No. 98-0026-AA-4-0-CC)

For the Protester: Joel S. Rubenstein, Esq., and Andrew N. Cook, Esq., Bell, Boyd, & Lloyd.
For the Government: Warren Nash, Esq., and Howard Schwartz, Esq., Assistants Corporation
Counsel, for the District of Columbia.

Opinion by Administrative Judge Phyllis W. Jackson, with Administrative Judge Jonathan D.
Zischkau, concurring.

OPINION

M.C. Dean, Inc., ("M.C. Dean") has filed a protest based upon alleged improprieties in the above-referenced Invitation for Bids ("IFB"). M.C. Dean states that the invitation is improperly structured and does not allow for full, fair, or open competition because the solicitation may be read as providing for the application of preferences pursuant to the Equal Opportunity for Local, Small, and Disadvantaged Business Enterprise Act ("LSDBE Act"), D.C. Code §1-1152, et seq. (Supp. 1997), on eight line items for which the IFB itself provides the prices, i.e., fixed pre-determined bid costs, in addition to line items on the IFB's unit price schedule calling for bid prices. The District has filed a motion to dismiss challenging M.C. Dean's standing to bring protest and, in the alternative, an Agency Report contending that the LSDBE Act requires the District to apply a preference percentage to the total bid price as set forth in the IFB, not just to the portion of the total price representing the bidder's line item prices. We conclude that the Protester does have standing and that the protest should be sustained.

BACKGROUND

On November 10, 1997, DPW issued IFB No. 98-0026-AA-4-0-CC, in the open market for the Annual Maintenance Contract for Electrical Controls Equipment at Various Water and Sewer Authority Facilities for a base year and three option years. As amended, the IFB established a bid opening date of December 17, 1997.

The IFB's Unit Price Schedule required bidders to insert line item prices for an "Initial Period" and three option years. The Schedule's "Initial Period" reads as follows:

"ALL OF THE ABOVE (Initial Year, First Year, Second Year, Third Year Options) separately." It also stated that award would be made to one bidder "based on the total lowest price of the Initial period and Option Years." (Agency Report, ("AR"), Exhibit 1).

Section 1.4 of the IFB, "Special Conditions", Paragraph T provides:

T. "Open Market" Procurement Application of D.C. Act 9-152:

- (1) Preferences for Local Businesses, Disadvantaged Businesses or Businesses Operating in an Enterprise Zone:

- A. General Preferences

Under the provisions of D.C. Act 9-152, "Equal Opportunity for Local, Small and Disadvantaged Business Enterprises Act of 1992" ("Act"), the District shall apply preferences in evaluating bids or proposals from businesses that are local, disadvantaged or located in an enterprise zone of the District of Columbia.

For evaluation purposes, the allowable preferences under the "Act" for this procurement are as follows:

- 1) Five percent reduction in bid price or the addition of the equivalent of five points on a 100-point scale for a local business enterprise ("LBE") certified by the Local Business Opportunity Commission ("LBOC").

Any prime contractor that is a LBE certified by the LBOC will receive a five percent (5%) reduction in the bid price for a bid submitted by the LBE in response to an Invitation for Bids ("IFB") ...

The total amount of the line items fixed by the agency in the solicitation is \$810,000. Therefore, if the 5% reduction is applied to the pre-determined line items, the recipient of the preference would receive a price reduction of \$40,500 in addition to the reduction on any line items actually bid by the bidders.

On December 16, 1997, one day before bid opening, M.C. Dean filed its protest. On December 17, 1997, DPW received bids from three bidders. The contract specialist added each bidder's line item bid prices and the pre-determined line item prices for a total "bid price". The contract specialist then applied a five percent reduction to Ideal's total price because Ideal was certified as an LBE. (AR, Ex. No. 3). The evaluation results were as follows:

806 CONTRACT AWARD PREFERENCES

806.1 Agencies shall accord a preference in awarding procurements to LBEs and DBEs and certified joint ventures with participating LBEs and DBEs as follows:

- (a) An LBE qualifies for the equivalent of five points on a 100 point basis in the case of proposals or five percent reduction in price for bids in the open market;

....

806.3 An agency shall reduce the bid price or increase the points on a proposal based upon the LBEs or DBEs percentage of the bid or proposal.

27 DCMR §§ 806, 806.1 and 806.3.

The contracting agency conducting the procurement is responsible for awarding the preferences. *Id.* § 1-1152.3(b). The contracting officer has not made any determinations on the issue in this procurement, as far as the record presented to us indicates. A bid tabulation prepared by a contract specialist applies the preference to the total of the line item prices bid by the bidders and the DPW pre-determined line item amounts fixed in the IFB.


We conclude that the LSDBE Act, the implementing regulations, and the PPA require that preferences apply to the total prices actually bid by bidders. Since the pre-determined line item prices are not "bid" by bidders, they cannot be considered a part of the "bid price" as that term is used in 27 DCMR § 806.3. Including non-bid line item prices (fixed by the agency) in the total bid price, when applying the preference reduction, would effectively increase the percentage reduction rates defined in the LSDBE Act.² Our conclusion is consistent with GAO precedent. The GAO has upheld the agency's limitation of the application of the small disadvantaged business evaluation preference to portions of the contract which are actually priced by the offerors, and for which the amount paid does not fluctuate. In such cases, the agency did not apply the percentage preference

²Considering that the LSDBE Act provides a maximum percentage reduction of 12 percent (where an entity qualifies as an LBE (5%), DBE(5%), and enterprise zone entity (2%)), a solicitation containing large pre-determined line item prices would produce absurd evaluation results if the preference reduction were applied to bid and non-bid (pre-determined) line items. The Council could not have intended such an implementation of the LSDBE Act for PPA procurements. In the present case, if a five percent preference were applied to fixed pre-determined costs of \$810,000, or 25% of the total contract price, the effect would be to provide a preference advantage in excess of the 5% statutory rate since non-preference bidders could only adjust their prices over items actually bid, or 75% of the total contract price in order to be competitive. Therefore, preferences should not be applied to pre-determined costs fixed by the agency. Thus, the agency's pre-determined costs should also be excluded from the total bid price for evaluation purposes. Because the preference reduction is applied only to bidders' actual bid prices, and not to pre-determined or estimated line item costs inserted by the agency, the agency must have a reasonable basis for inserting such pre-determined costs in a solicitation.

to index pricing or similar pricing for which the amount paid was subject to fluctuate. The court determined that in such cases, the method employed by the agency constituted a reasonable application of the preference called for under its regulations. *Hudson Bay Natural Gas Corporation*, 69 Comp. Gen. 188, B-237264, 90-1 CPD ¶ 151, Feb. 5, 1990; *see also Commercial Energies, Inc.*, B-237572, 90-1 CPD ¶ 160, Feb. 7, 1990.

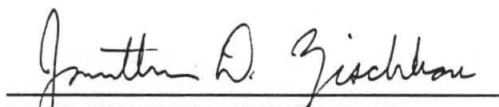
We find that the most reasonable interpretation of the LSDBE Act, the regulations, and the PPA is to apply preferences to the total prices actually bid by qualified LSDBE bidders and to exclude any pre-determined costs of the agency from the total bid price for evaluation purposes. Therefore, to the extent the agency intended to evaluate in a different manner, the protest is **SUSTAINED**. Because Ideal remains the low bidder even when bid prices are properly evaluated, Ideal may receive award if it is otherwise responsible.

DATE: April 16, 1998



PHYLLIS W. JACKSON
Administrative Judge

CONCURRING:



JONATHAN D. ZISCHKAU
Administrative Judge