

The District has moved to dismiss the current protests on the grounds that the new protests are untimely and that the Board previously considered and decided against Urban on the same issues raised here. We conclude that the protests are timely. The factual differences are that we now know that the preference certifying authority, the Small, Local Business Opportunity Commission (“SLBOC”) denied recertifying TAC into the LSDBE program at its meeting in November 2005, and that the provisional certification expired in December 2005. Given the nearly 9-month period from bid opening to award, and the fact that the SLBOC denied TAC’s recertification approximately 2 months after bid opening, we question the contracting officer’s decision not to seek new bids, and evaluate on the firms’ current LSDBE status. Nevertheless, we conclude that the contracting officer did not violate the law, regulations, or the terms of the solicitation in deciding to award to TAC on the basis of the bids opened on August 30, 2005. Because bids are evaluated as of bid opening date, in this case August 30, 2005, TAC was properly certified through a provisional certification and entitled to a 9 percent reduction in its bid prices as we previously held in CAB No. P-0714. We also conclude that there is no legal infirmity in the contracting officer’s determination that TAC satisfied the 35 percent LSDBE subcontracting requirement. Having carefully considered each of Urban’s arguments, we deny the consolidated protests.

BACKGROUND

We summarize from our findings made in CAB No. P-0714 and supplement them as relevant to our resolution of the current protests. On June 3, 2005, OCP issued Solicitation No. DCAM-2005-B-0027 (“IFB”) on behalf of the Office of Property Management for a contractor to provide all containers, equipment, personnel, management, recordkeeping, and other reporting services necessary to perform pick-up services for the collection of trash and recyclables from District Government owned and leased buildings and non-residential housing units located in the District and the State of Maryland. (Agency Report (“AR”) Ex. 1). The IFB provided for seven separate award groups, numbered I through VII. Through amendment, bid opening was extended to August 30, 2005. (AR Ex.1).

Section M.1.a. of the solicitation provides preference points for a prime contractor that is a local business enterprise (“LBE”), disadvantaged business enterprise (“DBE”), resident business ownership enterprise (“RBO”), or development zone enterprise (“DZE”) certified by the SLBOC. Although the solicitation refers to the Local Business Opportunity Commission and its supporting Office of Local Business Development, the City Council enacted the Small, Local, and Disadvantaged Business Enterprise Development and Assistance Act of 2005 (“SLDBEDA Act”) effective as temporary legislation on July 22, 2005, which made substantial changes to the preference program, renamed the certifying agency from the Local Business Opportunity Commission (“LBOC”) to the SLBOC, and renamed the SLBOC’s supporting agency from the Office of Local Business Development (“OLBD”), to the Department of Small and Local Business Development (“DSLBD”).

Section M.1.c (AR Ex. 1) provides as follows:

Under the provisions of 27 DCMR 801.2(b), 39 DCR 5571 (July 24, 1992), thirty-five percent (35%) of the total dollar value of this contract has been set aside for performance through subcontracting with local business enterprises, disadvantaged business enterprises, or resident business ownerships. Any Prime Contractor responding to this solicitation shall submit with its bid or proposal a notarized statement detailing its subcontracting plan (See Clause C.1, Subcontracting Plan and Clause C.2, Liquidated Damages). Once the plan is approved by the Contracting Officer, changes will only occur with the prior written approval of the Contracting Officer.

On August 30, 2005, bids were opened from six bidders including Urban and TAC. Both TAC and Urban submitted bids for all seven award groups. TAC’s bid contained a temporary certification acknowledgement letter dated August 30, 2005, issued by the DSLBD/OLBD, because the SLBOC had not met during August 2005 to consider TAC’s pending application for its LSDBE recertification (it had previously been certified but that certification expired on August 12, 2005). OCP applied a 9 percent LSDBE preference reduction to the bids of TAC and Urban. As tabulated, TAC was the apparent low bidder for Award Groups I, III, VI, and VII, while Urban was the apparent low bidder for Award Groups IV and V. If TAC had not received the 9 percent LSDBE preferences, Urban would have been the low bidder additionally on Award Groups I and VII. Because Award Group VII was ultimately cancelled from the solicitation, the only award at issue here is Award Group I.

On September 13, 2005, Urban filed a protest, docketed as CAB No. P-0714, challenging any

proposed award to TAC on the ground that TAC was not a responsible bidder, TAC did not provide with its bid a proper subcontracting plan, and TAC was not entitled to a 9 percent LSDBE preference because it was a multi-million dollar firm located principally in Maryland rather than the District. While the protest was pending, OCP conducted a pre-award survey of TAC and Urban on October 5-7, 2005. OCP also examined the responsibility of TAC's subcontractor, Jerome L. Taylor Trucking, Inc. ("JLT Trucking").

On November 8, 2005, the SLBOC held one of its regular monthly meetings to consider pending applications for certification and recertification, including TAC's recertification application. According to the transcript of the hearing provided by Urban in the current protest proceedings, the SLBOC denied recertifying TAC under the LSDBE program because it found the preponderance of business functions occurring outside of the District. The transcript seems to indicate that TAC's recertification had come to the SLBOC at its October 20, 2005 meeting but the matter was deferred to the subsequent November 2005 meeting. We were not aware of the SLBOC's November 8 denial of recertification when we issued our decision in CAB No. P-0714 on November 15, 2005. In our decision, we held that the August 30, 2005 temporary certification letter constituted a provisional certification under the SLDBEDA Act and that the contracting officer properly relied on the provisional certification in applying a 9 percent preference reduction to TAC's bid. We also held that the issue of TAC's subcontracting plan was a matter of responsibility that may be addressed up to the time of award and that Urban's challenge of TAC's responsibility was premature because the contracting officer had not made a responsibility determination.

After our decision, OCP continued its responsibility investigation of TAC. Based on revisions to TAC's subcontracting plan during December 2005, the contracting officer determined that TAC's revised subcontracting plan met the 35 percent subcontracting requirements. (AR Ex. 8). A proposed contract award to TAC was submitted in February 2006 to the Council for approval, but it was subsequently withdrawn by the Mayor on March 7, 2006. (AR Ex. 8). Additional responsibility data was obtained by OCP relating to TAC and its subcontractor, JLT Trucking, including that JLT Trucking would perform approximately 37 percent of the work under Award Groups I, III, and VI. After Award Group VII was cancelled from the solicitation on March 16, 2006, the contracting officer concluded that TAC was a responsible bidder for Award Groups I, III, and VI. (AR Ex. 8, 11).

On May 2, 2006, Urban filed a motion for a preliminary injunction with the Superior Court to prevent the award of any proposed contract to TAC of Aggregate Award Groups I, III, and VI. (AR Ex. 12). On May 12, 2006, the Office of the Mayor submitted to the Council a new proposed contract for awarding Award Groups I, III, and VI to TAC. On May 24, 2006, Urban filed a temporary restraining order with the Superior Court to enjoin the Council from approving the proposed contract but the Court denied Urban's motion. (AR Exs. 12, 14). On May 25, 2006, the proposed contract to TAC was deemed approved by the Council. (AR Ex. 8). On June 7, 2006, Urban filed the first of its two protests docketed as CAB No. P-0735. On June 22, 2006, the Chief Procurement Officer determined to proceed with performance during the protest proceedings. On June 22, 2006, the District awarded the contract to TAC for Award Groups I, III, and VI. (AR Ex. 13). On July 10, 2006, Urban filed a second protest, docketed as CAB No. P-0739, challenging TAC's receiving a 9 percent LSDBE preference reduction for bid evaluation purposes, and asserting that Urban was entitled to a 12 percent LSDBE preference, that TAC's bid was nonresponsive for failing to include a valid subcontracting plan, and that TAC was not a responsible bidder because JLT Trucking is not capable of performing 35 percent of the contract

work.

DISCUSSION

Timeliness

The District argues that we should dismiss the consolidated protests because Urban failed to file the protest in CAB No. P-0735 within 10 business days of the time that it knew or should have known of the basis of the protest. The District relies on the statement in Urban's protest that "[u]pon learning that the Mayor's Office had submitted the contract . . . to the Council for approval, on May 4, 2006, Urban filed a motion for preliminary injunction. . . ." According to the District, because Urban knew the grounds of protest no later than May 4, 2006, and received notice of an adverse action by an official in connection with the proposed award at the latest by May 4, 2006, Urban had until May 18, 2006, to file a protest. Since the protest was not actually filed until June 7, 2006, it was untimely. The District adds that the protest issues in P-0739 are substantially the same as those raised in P-0735 and thus both protests must be dismissed. Urban responds that it filed its motion for preliminary injunction on May 4, 2006, acting on information and belief, but not on actual knowledge, seeking to preclude the awarding of any additional contracts under the solicitation while the Superior Court case was pending. Urban states that it received no official notice that the District was awarding Award Group I to TAC and had only unsubstantiated comments from the contract specialist that Urban was "no longer in line for Award Group I." (Urban's July 21, 2006 Opposition Memorandum, at 5-6). Urban contends that it was not until May 23, 2006, that it finally was able to confirm with the Council that the Mayor's Office had transmitted to the Council for approval a proposed contract award to TAC. (*Id.* at 6).

With regard to timeliness of a protest in connection with an award, the 10-business day period stated in D.C. Code § 2-309.08 begins when the bidder or offeror knows or should have known the basis of its protest *and* the party has become aggrieved in connection with the award by an official action adverse to it. *See Sigal Construction Corp.*, CAB No. P-0690 et al., Nov. 24, 2004, 52 D.C. Reg. 4243, 4254 (and cases cited therein). In *Sigal*, we concluded that the protester knew the bases for its protest and became aware of an official action by the contracting officer adverse to it when it learned of the Mayor's submission to the Council for approval of a proposed award to another contractor. We held that *Sigal*'s protest was untimely because it was filed more than 10 business days after its actual notice that a proposed award had been submitted to the Council. *Sigal* did not receive a formal notice of the proposed award being transmitted to the Council, but it discovered from Council sources about the submittal and actively lobbied the Council against approving the award. In the present matter, Urban did not receive any formal notice from the contracting officer of the transmittal to the Council of the proposed award to TAC. Nor did it acquire actual notice of the Council submittal. Urban's representative had communications by telephone with the contract specialist prior to the transmittal, but those oral communications merely indicated that Urban was not in line for award. There was no communication from the contracting officer or the contract specialist notifying Urban that the proposed award had been transmitted to the Council. Certainly, if the contracting officer had sent a written notice to all bidders that a proposed award to TAC had been submitted to the Council for approval, such a notice would constitute official action. Indeed, we recommend that contracting officers in the future always inform bidders promptly when a proposed award (requiring Council approval) has been transmitted to the Council. In the present matter, the first official notice sent to any of the bidders was sent by OCP after the Council review period had ended. Urban received actual notice of the transmittal

to the Council on or about May 23, 2006, and it filed its protest on June 7, 2006, which is within 10 business days. Accordingly, Urban timely filed its protest. Therefore, we properly exercise jurisdiction pursuant to D.C. Code § 2-309.03(a)(1) to reach the merits of the protest.

TAC's Entitlement to a 9 Percent Preference Reduction

In CAB No. P-0714, we held that TAC was entitled to the 9 percent preference reduction based on a provisional certification of TAC made by the DSLBD/OLBD on August 30, 2005, which was also the date of bid opening. The only factual differences between P-0714 and the current consolidated protests are that we now know that after bid opening the SLBOC denied recertifying TAC into the LSDBE program at its meeting on November 8, 2005, after considering the testimony from TAC's chief executive officer. In addition, the provisional certification expired in December 2005 by virtue of D.C. Code § 2-218.62(b) (Supp. 2006), which provides that a provisional certification "shall not last for more than 120 days." Given that 9 months elapsed from bid opening on August 30, 2005, until award on June 22, 2006, and the fact that the SLBOC denied TAC's recertification in November 2005, the contracting officer should have amended the solicitation to obtain new bids, and evaluate prices on the firms' then-current LSDBE status, but we conclude that the contracting officer did not violate the law, regulations, or the terms of the solicitation in deciding to award to TAC on the basis of the bids opened on August 30, 2005. Because bids are evaluated as of bid opening date, and August 30, 2005, is the bid opening date, TAC was properly certified through a provisional certification and entitled as of that date to a 9 percent reduction in its bid prices, as we previously held in CAB No. P-0714. Thus, for the only award group at issue, Award Group I, TAC has the lowest evaluated bid.

Urban understandably challenges the now-expired provisional certification and asks us again to independently review the certification of TAC to protect the integrity of the procurement. We declined to do so in CAB No. P-0714 because the exceptional circumstances provoking such a review were not present. *Urban Service Systems Corp.*, CAB No. P-0714, at 6, Nov. 15, 2005; *see also Capitol Paving of D.C., Inc.*, CAB No. P-0736, Oct. 12, 2006; *C&D Tree Service, Inc.*, CAB No. P-0440, Mar. 11, 1996, 44 D.C. Reg. 6426, 6433-6439. As of August 30, 2005, the DSLBD/OLBD made a provisional recertification of TAC which we held to entitle TAC to a 9 percent bid preference. Urban successfully challenged the recertification of TAC before the SLBOC, however, the denial of recertification occurred on November 8, 2005, well after bid opening. Because the law is clear that preferences are determined for price evaluation purposes at the time of bid opening, *C&D Tree Service, Inc.*, CAB No. P-0440, Mar. 11, 1996, 44 D.C. Reg. at 6435 (and cases cited therein), the subsequent denial cannot retroactively changed the bid price evaluations as of August 30, 2005. We cannot give retroactive application to the SLBOC's denial of TAC's recertification for the same reason that we cannot give retroactive application to Urban's newly received 12 percent bid preference made effective October 20, 2005, because the bids at issue here were opened on August 30, 2005. While the Council has the power to amend the LSDBE program by requiring bidders to be certified not only at bid opening for evaluation purposes but also at the time of contract award, we cannot do so. The contracting officer had it in her power to resolve the dilemma caused by TAC's recertification denial by amending the solicitation and seeking new bids from the bidders. For reasons that are not apparent, she did not follow this course. Under our statutory scope of review, we determine whether the contracting officer's actions in awarding to TAC based on the original bids violated the law or the terms of the solicitation. We have carefully considered the facts but find that the contracting officer did not violate the law or the solicitation in awarding to TAC based on the original bids.

Subcontracting Plan with JLT Trucking

Urban reasserts its contention from CAB No. P-0714 that TAC's bid is nonresponsive since TAC failed to provide a valid subcontracting plan indicating that a minimum of 35 percent of the work would be performed by a LSDBE certified subcontractor. Urban also claims that Jerome L. Taylor Trucking is "in actuality the 'Roll-off Division' of LSI, that Mr. Taylor is the Operation [sic] Manager for LSI, that LSI is located in Maryland and that LSI is not a certified LSDBE firm in the District." (CAB No. P-0735 Protest, at 21). Finally, Urban claims that TAC is nonresponsive because JLT Trucking is not capable of performing 35 percent of the contract work.

We stated in our decision in CAB No. P-0714 that the subcontracting plan requirement is a matter of bidder responsibility and not responsiveness. Thus, the subcontracting plan was not required in the original bid. The contracting officer obtained an initial and revised subcontracting plan from TAC and a declaration confirming that JLT is currently operating and a validly certified LSDBE firm. The contracting officer analyzed the subcontracting data and concluded that JLT Trucking was validly certified, a minimum of 35 percent of the work was subcontracted to JLT, and JLT has the facilities and equipment making it capable of performing the subcontract work. (See AR Exs. 5, 8, 11, and 15). Under the record as supplemented through the consolidated protests, we conclude that there is no basis for determining TAC's bid to be nonresponsive or for TAC to be nonresponsive based on the revised subcontracting plan.

CONCLUSION

We have considered all of the contentions raised by Urban in its consolidated protests, but we conclude that the contracting officer did not violate the law or the terms of the solicitation in awarding a contract to TAC. Accordingly, we deny Urban's protests.

SO ORDERED.

DATED: October 16, 2006

/s/ Warren J. Nash

WARREN J. NASH

Administrative Judge

CONCURRING:

/s/ Jonathan D. Zischkau

JONATHAN D. ZISCHKAU

Chief Administrative Judge