

Urban's main challenge is that TAC should not have received a 9 percent preference because it is a multi-million dollar business located in Maryland and thus does not qualify as a local or disadvantaged District business enterprise. TAC had been previously certified by the District's Local Business Opportunity Commission ("LBOC") but that certification was to expire shortly before the bid opening date. TAC timely applied for recertification, but during the recertification process, the City Council substantially revised the certification process and standards when it enacted the Small, Local, and Disadvantaged Business Enterprise Development and Assistance Emergency Act of 2005 ("2005 Act"), D.C. Act 16-168. On the day of bid opening, TAC was granted a temporary certification in an acknowledgment letter issued by the Office of Local Business Development ("OLBD"), renamed the Department of Small and Local Business Development ("DSLBD") by the 2005 Act. The contracting officer applied a 9 percent preference to TAC's bid based on that letter. Although there are no implementing regulations for the 2005 Act to guide us, we conclude that the temporary certification constitutes a provisional certification under section 2362 of the 2005 Act and thus the contracting officer did not violate law or regulation in applying the 9 percent evaluation reduction to TAC's bid prices. Urban also claims that TAC did not submit a proper subcontracting plan in its bid to comply with the solicitation's 35 percent set-aside requirement and that TAC lacks requisite experience in trash collection and recycling services. We conclude that the former is a matter of responsibility that may be corrected up to the time of award and that the latter is premature because there has been no responsibility determination made. Accordingly, Urban's protest is denied in part and dismissed in

part.

BACKGROUND

On June 3, 2005, OCP issued in the open market Solicitation No. DCAM-2005-B-0027 (“IFB”) on behalf of the Office of Property Management, Facility Management Division, 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”), at 2; AR Ex. 1). The IFB contains seven aggregate award groups based on different locations. Bidders could bid on one or more award groups. The IFB provides for aggregate awards to one or more bidders, which will result in a requirements contract or contracts with payment based on unit prices for the pay items. The initial bid opening date was June 20, 2005. Between June 6, 2005, and August 16, 2005, OCP issued eleven amendments, which, among other things, extended the closing date to August 30, 2005. (AR, at 2-3; AR Ex.1).

The “Solicitation, Offer, and Award” page indicates that OCP issued the IFB as an “Open Market with Set-Aside 35% - set-aside for subcontracting.” Section M.C. of the IFB captioned “Clause Applicable Only to Open Market Solicitations With LBE, DBE, or RBO Subcontracting Set-Aside” provides that the contractor must subcontract 35 percent of the dollar value of the contract to LBE, DBE, or Resident Business Ownerships (“RBOs”). Section M.1.a. provides preference points for any certified prime contractor that is an LBE, DBE, RBO, or DZE certified by the Local Business Opportunity Commission (“LBOC”). Section M.1.a. of the IFB also provides that an LBE will receive a 4 percent reduction in bid price, a DBE will receive a 3 percent reduction in bid price, an RBO will receive a 3 percent reduction in bid price, and a DZE will receive a 2 percent reduction in bid price. (AR, at 3; AR Ex.1). Section M.C. requires that the contractor “shall submit with its bid or proposal a notarized statement detailing its subcontracting plan.” Section M.C. further provides that “[o]nce the plan is approved by the Contracting Officer, changes will only occur with the prior written approval of the Contracting Officer.” Section M.2 of the IFB entitled “Liquidated Damages” states that if during the performance of the contract, the contractor fails to comply with the subcontracting plan submitted, the contractor shall pay the District \$250.00 per day for each day of noncompliance. (AR, at 3; AR Ex.1).

The Small, Local, and Disadvantaged Business Enterprise Development and Assistance Act of 2005, in its emergency (D.C. Act 16-168) and temporary (D.C. Law 16-14) versions, became effective on July 22, 2005. It repealed the Equal Opportunity for Local, Small, and Disadvantaged Business Enterprises Act of 1998, D.C. Law 12-268, but contains the following savings clause: “An order, rule, or regulation in effect under a law repealed by this section shall remain in effect under the corresponding provision enacted by this subtitle until repealed, amended or superseded.” Section 2382(c) of the 2005 Act.

On August 30, 2005, the following six bidders submitted bids: BFI/Allied Waste (“BFI”), Century Disposal (“Century”), TAC, EJays Environmental Services (“EJays”), Urban Service Systems Corporation (“Urban” or “protester”), and F&L Construction (“F&L”). (AR, at 4; AR Ex.5). 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 Jacquelyn A. Flowers, Director

of the Office of Local Business Development (“OLBD”), acknowledging TAC’s eligibility for preferences as follows:

[OLBD] received your application for certification into the Local, Small and Disadvantaged Business Enterprise Program. OLBD acknowledges that your business qualifies for participation in the Set-Aside and/or Preference Program established pursuant to the Equal Opportunity for Local, Small, and Disadvantaged Business Enterprises Act of 1998.

Pursuant to the self-certification procedures outlined in the rules promulgated in accordance with this Act, please attach a copy of this letter along with the Self-Certification Affidavit to bids and proposals acknowledging your eligibility for preference in the following industry classifications:

Business Services (Consulting & Management Services)
Transportation & Hauling Services
Local Business Enterprise (LBE)
Small Business Enterprise (SBE)
Disadvantage Business Enterprise (DBE) and
Development Zone Enterprise (DZE)

Your application has been assigned to a certification specialist who will conduct a thorough review of its contents and, if necessary, request additional information. Upon completion of this review, your application will be presented to the Local Business Opportunity Commission (LBOC) for a decision.

Your Temp. Cert. Letter is good until February 26, 2006 or upon the issuance of a certification letter; or denial of certification from the LBOC, which ever occurs first.

(AR, at 4; AR Ex. 6). TAC had submitted the self-certification affidavit to OLBD as part of its initial submission. Ms. Flowers, in an October 7, 2005 affidavit states that:

1. I am the Interim Director for the Department of Small and Local Business Development, District of Columbia Government (“DSLBD”).
2. As Interim Director, pursuant to 27 DCMR 818.4(a), I followed the proper procedures when on August 30, 2005, I issued an acknowledgement letter to TAC Transport, LLC (“TAC”) acknowledging TAC’s eligibility for preferences for Local, Business Enterprise, Disadvantage Business Enterprise, and Development Zone Enterprise.
 - OLDB received the LSDBE application for TAC Transport on May 17, 2005.
 - TAC Transport’s application was assigned to Corey Beasley, Certification Specialist on May 18, 2005.
 - OLDB sent an application deficiency letter to TAC Transport on June 16, 2005.

- TAC Transport turned in their application deficiencies and requested a temporary certification on August 5, 2005.
- TAC Transport's LSDBE certification expired on August 12, 2005. The Local Business Opportunity Commission's August meeting was cancelled for the month of August.
- OLBD determined that the TAC Transport application was complete and issued a self-acknowledgment letter on August 30, 2005.

(AR Ex. 7).

In addition, TAC's bid contained a Subcontract Summary Form (AR Ex. 2) in which TAC indicates an intention to subcontract to a firm named WM of MD, Inc., and 9 percent to a firm called LSI. On the "Subcontract Summary Form", TAC indicates that LSI is a minority subcontractor.

On September 13, 2005, Urban filed the instant protest. In its protest, Urban alleges that (1) OCP should reject TAC's bid as nonresponsive for failing to provide a subcontracting plan at bid opening, (2) OLBD improperly issued to TAC the acknowledgement letter qualifying TAC to participate in the preference program, and (3) TAC should not be found responsible and awarded a contract as TAC has no experience in trash collection and recycling and therefore is not a responsible bidder.

On September 21, 2005, OCP applied a 9 percent LSDBE preference reduction to TAC's, Urban's, and F&L's bids, and a 6 percent LSDBE reduction to Ejays' bid. As tabulated, TAC is the apparent lowest bidder for Award Groups I, III, VI, and VII. Urban is the apparent lowest bidder for Award Groups IV and V. Century (with no preference points) is the apparent lowest bidder for Award Group II. (AR, at 4-5; AR Ex.3). The District has not completed its responsibility determinations nor has it made any awards.

DISCUSSION

We exercise jurisdiction pursuant to D.C. Code § 2-309.03(a)(1).

TAC's Entitlement to a 9 Percent Preference Reduction

Urban contends that the contracting officer should not have provided a 9 percent LSDBE preference reduction in evaluating TAC's bid because, at the time of bid opening on August 30, 2005, OLBD improperly determined that TAC was entitled to temporary certification as an LBE, DBE, and DZE. Although TAC had been previously certified as an LBE, DBE, and DZE, Urban argues that TAC "was a multi-million dollar business with the majority of its assets located in Maryland" as of bid opening. According to Urban, re-certification was improper under the prior law, the Equal Opportunity for Local, Small, and Disadvantaged Business Enterprises Act of 1998, and the 2005 Act which became effective as emergency and temporary legislation on July 22, 2005 – a month before bid opening – and made permanent on October 20, 2005, D.C. Law 16-33. TAC submitted its re-certification application on May 17, 2005, while the prior LSDBE law was still in effect. The parties dispute how the new law applies to the facts here.

Urban states that the 2005 Act applies and that under its provisions TAC is not entitled to any bid price reduction. Urban quotes the language of section 2362 of the 2005 Act which provides:

Provisional certification; self-certification prohibited.

(a) The Department may authorize a business enterprise to participate in a program established under this part without receiving a certificate of registration under section 2361; provided, that such authorization shall be granted only when:

(1) A business enterprise is applying for certification in order to bid on a contract or procurement for which responses are due within the next 45 days;

(2) The business enterprise has submitted a majority of the information required under section 2361; and

(3) The Department reasonably believes that the Commission will certify the business enterprise after the business enterprise has submitted all of the information required under this subtitle or regulation promulgated pursuant to this subtitle.

(b) An authorization granted under this section shall not last for more than 120 days.

(c) The Department shall make authorizations under subsection (a) of this section pursuant to rules promulgated pursuant to this subtitle.

(d) A business entity may not self-certify or self-authorize to participate in a program established under sections 2343 through 2349.

Urban claims that under this section, the DSLBD must have a reasonable belief that the LBOC will certify the entity after all required information is provided before it can issue a provisional certification. According to Urban, the District has provided no testamentary or documentary evidence to show that the Department “reasonably believed” that TAC would qualify as an LBE, DBE or DZE under the 2005 Act’s new definitions. Finally, Urban urges that subpart (d) of section 2362 of the 2005 Act prohibits TAC from relying solely on its self-certification to obtain a bid price reduction for this solicitation. Urban has raised the issue of TAC’s lack of entitlement to certification as an LBE, DBE, or DZE in a complaint it filed with the LBOC (see Urban’s Reply Memorandum, Attachment 3). According to Urban, “the LBOC now is considering whether TAC is entitled to certification as an LBE, DBE and DZE. The LBOC may soon very well decide, independently, that OCP was not entitled to rely on the August 30, 2005-acknowledgment letter, as Urban argues in this protest.” (Urban Reply Memorandum, at 6, n.6).

The District counters that the 2005 Act, while effective before bid opening, was not “implemented” because the Mayor has not yet promulgated implementing regulations. Alternatively, the District argues that the self-certification was validly done and is not inconsistent with section 2362(d). Although there are ambiguities in the 2005 Act, we need not address them in this protest

because we conclude that the August 30, 2005 acknowledgment letter, issued by the agency during its transition from the OLBD under the 1998 Act to the DSLBD under the 2005 Act, properly constituted a provisional certification under section 2362 of the 2005 Act. The thrust of section 2362 is to replace the self-certification procedures by the applicant with a new procedure for provisional certification determined by the DSLBD. Urban does not challenge that subparts (a)(1)-(2) of section 2362 were satisfied. TAC submitted its recertification well in advance of its prior certification's August 12, 2005 expiration date, requesting temporary certification on August 5, 2005. OLBD/DSLBD determined that the application was complete. The LBOC would have been able to approve or reject the application for re-certification but for its decision not to conduct an August 2005 meeting. In view of LBOC's inaction, the transitional DSLBD issued its acknowledgement letter on August 30, 2005, to grant the provisional certification. Urban focuses on subpart (a)(3) of section 2362 which requires that "the Department reasonably believes that the [LBOC] will certify the business enterprise after the business enterprise has submitted all of the information required under this subtitle or regulations promulgated pursuant to this subtitle." We conclude that the August 30, 2005 acknowledgment letter, as well as the facts articulated by the Interim Director of the DSLBD in her affidavit, demonstrate that the DSLBD reasonably believed that the LBOC will re-certify TAC as an LBE, DBE, and DZE.

Although Urban urges us to review the determination made by the DSLBD, we decline to do so. Urban requested discovery from the Board on the documentation that the DSLBD relied upon in its August 30 determination. In our status conference with the parties on November 2, 2005, Urban stated that it had not sought such documents from the DSLBD because of the belief that a FOIA request would be denied based on an exemption. We ruled that we would not require the District to produce documents from the DSLBD/OLBD beyond what was already in the record because the circumstances do not justify reviewing the validity of the agency's provisional certification determination. Only in exceptional circumstances will we consider such a review, such as where the certifying agency has abdicated its function and we are left with no choice but to decide on the certification so as to protect the integrity of the procurement process and fulfill our statutory obligation under D.C. Code 2-309.08(d) of deciding whether an award complies with applicable law, regulations, and terms and conditions of the solicitation. *Cf. C&D Tree Service, Inc.*, CAB No. P-0440, Mar. 11, 1996, 44 D.C. Reg. 6426, 6433-6439 (Board concluded that bidder was not entitled to LBE or DBE preferences for bid evaluation purposes). In the present matter, Urban is challenging the determination made by DSLBD in a complaint filed with that agency pursuant to the 2005 Act. For purposes of this protest, however, we are satisfied from the record that DSLBD made a determination for provisional certification on August 30, which means that as of bid opening, the contracting officer properly relied on that determination in granting TAC the bid preferences for LBE, DBE, and DZE.

Subcontracting Plan

Urban contends that TAC's bid is nonresponsive since TAC failed to indicate in its bid its intent to subcontract the required 35 percent to LBOC certified entities. The District responds that the submission of a subcontracting plan is a matter of contractor responsibility and not a matter of bid responsiveness. We agree with the District. By signing the bid without reservation, TAC committed itself unequivocally to the terms of the contract, including the 35 percent set-aside subcontracting requirement. *Fort Myer Construction Corp.*, CAB No. P-0685, May 5, 2004, 52 D.C. Reg. 4173, 4175; *C&D Tree Service, Inc.*, CAB No. P-0295, Nov. 2, 1993, 41 D.C. Reg. 3691, 3696-97. The Board concludes that TAC's bid was responsive and that the District could properly receive the subcontracting

plan after receipt of bids and prior to award in order to determine TAC's responsibility.

Lack of Requisite Experience and Bidder Responsibility

Finally, Urban alleges that TAC lacks experience in trash collection and recycling services, and therefore should be found a non-responsible bidder. The District states that this ground of the protest is premature because the contracting officer has not yet made any responsibility determination. Although Urban alternatively requests that we stay decision on this issue pending a responsibility determination, we believe the better course is to dismiss the protest ground at this time. If Urban is not satisfied with any forthcoming responsibility determination, it may file a new protest.

For the reasons discussed above, Urban Service's protest is denied in part and dismissed in part.

SO ORDERED.

DATED: November 15, 2005

/s/ Jonathan D. Zischkau
JONATHAN D. ZISCHKAU
Chief Administrative Judge

CONCURRING:

/s/ Warren J. Nash
WARREN J. NASH
Administrative Judge