

GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

PROTESTS OF:

SIGAL CONSTRUCTION CORPORATION)	
)	CAB No. P-0690, P-0693, P-0694
Under Contract No. POAM-2004-B-0014-BS)	(Consolidated)

For the Protester, Sigal Construction Corporation: Daniel J. Donohue, Esq., Wickwire Gavin, P.C. For the Intervenor, Jair Lynch/Tompkins Joint Venture: Andrew Stephenson, Esq., Holland & Knight LLP. For the District of Columbia Government: Howard Schwartz, Esq., Assistant Attorney General.

Opinion by Chief Administrative Judge Jonathan D. Zischkau, with Administrative Judge Matthew S. Watson, concurring.

OPINION

LexisNexis Filing ID 4674934

Sigal Construction Corporation (“Sigal”) has protested a contract award by the District of Columbia Office of Contracting and Procurement (“OCP”) to the Jair Lynch/Tompkins Joint Venture (“JLTJV”). Sigal asserts that JLTJV was not entitled to a 12 percent bid reduction preference pursuant to the Equal Opportunity for Local, Small, or Disadvantaged Business Enterprises Act of 1998, D.C. Law 12-268, D.C. Code § 2-217.01 to 217.07 (“LSDBE Act”), because Jair Lynch Companies did not control 51 percent of the joint venture which was necessary for the joint venture to qualify for the 12 percent preference. Sigal had the lowest actual bid price of \$41,965,977 and JLTJV had the third lowest actual bid of \$42,890,236. After evaluation of preferences – 9 percent for Sigal and the contested 12 percent for JLTJV – JLTJV had the lowest evaluated bid of \$37,743,408.52, followed by Sigal at \$38,189,039.07. Sigal also claims that JLTJV’s bid was nonresponsive because the identity of one of the joint venture partners – “Jair Lynch Companies” -- was ambiguous. JLTJV argues that the protests are untimely because Sigal failed to file its protests within 10 business days of when it learned the bases of its protests. On the merits, the District and JLTJV argue that the Local Business Opportunity Commission (“LBOC”) properly certified JLTJV as entitled to a 12 percent preference and that the JLTJV bid was not ambiguous because the name “Jair Lynch Companies” was a trade name under which JLC Construction, LLC, did business.

We conclude that Sigal was aware of the grounds for its protests long before it filed the protests with the Board and that once Sigal learned that the OCP contracting officer had submitted to the Council of the District of Columbia a proposed contract award to JLTJV, Sigal had notice of the contracting officer’s intent to award to JLTJV and thus had to file its protest within 10 business days of learning of the submission to the Council. Because Sigal’s protests were not filed within 10 business days of learning of the proposed contract award, the consolidated protests are untimely.

BACKGROUND

On December 19, 2003, the District of Columbia's Office of Contracting and Procurement issued Solicitation No. POAM-2004-B-0014-BS, requesting bids for the construction of a new Unified Communications Center ("UCC") to consolidate the District's 911 and various non-emergency call centers, emergency communications, and traffic management functions. (Agency Report ("AR"), Ex. 1). The state-of-the-art UCC will serve as the District's Emergency Operations Center and the Regional Incident Communications and Command Center.

The Solicitation

Article 10 of the solicitation provided for bidders to receive a preference in the evaluation of their bids pursuant to the LSDBE Act. Thus, a bidder certified by the LBOC as a local business enterprise ("LBE") would receive a 4 percent reduction in its bid price in the evaluation of bids. A bidder certified as a disadvantaged business enterprise ("DBE") would receive a 3 percent reduction in the evaluation of its price. A bidder certified as a resident business ownership entity ("RBO") would receive a 3 percent reduction in its price in the evaluation of bids. Finally, a bidder located in an enterprise zone would receive a 2 percent price reduction for evaluation purposes. Article 10 of the solicitation stated in relevant part:

10.1 Preference for Local Businesses (LBE), Disadvantage Businesses (DBE), Resident Business Ownerships (RBO) or Businesses Operating in an Enterprise Zone

10.1.1 General Preferences: Under the provisions of DC Law 13-169, "Equal Opportunity for Local, Small, or Disadvantaged Business Enterprises Amendment Act of 2000" (the Act), The District shall apply preferences in evaluating bids from businesses that are local, disadvantaged, resident business ownership 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:

- 10.1.1.1 Four percent reduction in the bid price for a local business enterprise (LBE) certified by the Local Business Opportunity Commission (LBOC);
- 10.1.1.2 Three percent reduction in the bid price for a disadvantaged business enterprise (DBE) certified by the LBOC;
- 10.1.1.3 Three percent reduction in the bid price for a resident business ownership (RBO), as defined in Section 2(a)(8A) of the Act, and certified by the LBOC; and
- 10.1.1.4 Two percent reduction in the bid price for a resident business ownership (RBO), as defined in Section 2(5) of DC Law 12-268 and in 27 DCMR § 899, 39 DCR § 9087-9088 (December 4, 1992).

The solicitation stated that bidders must be certified by the LBOC, or they must submit a self-certification as an LBE, DBE or RBO firm, in order to receive preferences as an LBE, DBE or RBO firm. It also stated that preferences would not be given simply for subcontracting with such firms and that a maximum of 12 preference points would be allowed. (Solicitation ¶ 10.2.2, AR Ex. 1).

The solicitation also contained specific provisions regarding requirements for preferences for bidders who are joint ventures. It required that joint ventures be certified by the LBOC and that the joint venture meet the requirements for status as an LBE, DBE, or RBO firm in order to receive preferences in the evaluation of its bid. Under the solicitation, a joint venture would receive the same number of preference points as the firm that “owns and controls at least 51 percent of the venture.” Solicitation ¶¶ 10.3 - 10.6 state:

- 10.3 Preferences for Certified Joint Ventures Including Local or Disadvantaged Businesses or Resident Business Ownerships: When an LBOC-certified joint venture includes a LBE, DBE or a RBO, and the LBE, DBE or RBO owns and controls at least 51 percent of the venture, the joint venture will receive the preferences as if it was a certified LBE, DBE or RBO.
- 10.4 Preferences for Joint Ventures including Businesses Located in an Enterprise Zone: When a joint venture includes a business located in an enterprise zone, and such business located in an enterprise zone owns and controls at least 51 percent of the venture, the joint venture will receive the preference as if it were a business located in an enterprise zone.
- 10.5 Bidder Submission for Preferences: Any Bidder seeking to receive preferences must submit as a part of the Subcontracting Plan the following documentation, as applicable to the preference being sought:
 - 10.5.1 Evidence of Bidder’s, subcontractor’s, or joint venture partner’s certification or self-certification as a LBE, DBE, or RBO, to include either:
 - 10.5.1.1 A copy of relevant letters of certification from the LBOC; or
 - 10.5.1.2 A copy of any sworn notarized Self-Certification Form prescribed by the LBOC along with an acknowledgement letter issued by the Director of the LBOC. Businesses with principal offices located outside of the District of Columbia must first be certified as LBEs before qualifying for self-certification.
 - All Bidders are encouraged to contact the Local, Small and Disadvantaged Business Enterprises Certification Program at the Office of Local Business Development (OLBD), 441 Fourth Street, NW, Suite 970N, Washington, DC 20001, (202) 727-3900 if additional information is required on certification procedures and requirements.
 - 10.5.2 Evidence that the Bidder or any subcontractor is located in an enterprise zone.
- 10.6 Penalties for Misrepresentation: Any material misrepresentation on the sworn notarized self-certification form could result in termination of the

Contract, the Bidder's liability for civil and criminal action in accordance with the Act, DC Law 12-268, and other District laws, including debarment.

The solicitation also required the successful contractor to perform at least 50 percent of the contract work with its own forces. Article 10.7.1 provided in relevant part:

When a prime Bidder is certified by the OLBD as a LBE, DBE, or RBO, the prime Bidder shall perform at least 50 percent of the contracting effort, excluding the cost of materials, goods, and supplies with its own resources

Jair Lynch/Tompkins Joint Venture Formation and LBOC Certification

On February 12, 2004, a joint venture was formed between "The Jair Lynch Companies" and Tompkins Builders, Inc. Intervenor JLTJV asserts that the reference to Jair Lynch Companies is simply a trade name for JLC Construction, LLC. JLC Construction, LLC, was originally incorporated in 1999 as Jair Lynch Consulting, LLC. Jair Lynch Consulting received initial LBOC certification as an LSDBE. On January 1, 2002, the Articles of Organization of Jair Lynch Consulting, LLC, were amended to state that the entity "will also do business as 'The Jair Lynch Companies.'" The Company is not officially changing its name" (Sigal Proposed Finding of Fact, Ex. 1, Attachment K). This amendment was never filed with Department of Consumer and Regulatory Affairs ("DCRA"). Nor was a trade name registration filed with DCRA. On April 9, 2002, Jair Lynch Consulting, LLC, changed its name to JLC Construction, LLC, and filed the name change with DCRA. (District Submission, filed Oct. 1, 2004, Ex. 2). In a OLBD recertification application, dated June 5, 2002, for JLC Construction/Jair Lynch Consulting, the name of the company is listed as "The Jair Lynch Companies." (AR Supplement, filed Aug. 24, 2004, Ex. 11). The LBOC recertified JLC Construction on March 12, 2003, as an LBE, SBE, DBE, RBO, and Development Zone Enterprise, for a period of two years. (District Submission, Oct. 1, 2004, Ex. 2).

The February 12, 2004 joint venture agreement between Tompkins and the Jair Lynch Companies has a cover page entitled:

Document T101
Agreement Between Joint Venturers
1996 Edition

On the second page of the agreement, Article 1, entitled "Agreement," provides:

AGREEMENT made this 12th day of February between the PARTIES to the Joint Venture: TOMPKINS BUILDERS, INC. ("Tompkins"), with an office at 1333 H Street, NW, Suite 200, Washington, DC 20005 and THE JAIR LYNCH COMPANIES ("JLC"), with offices at 1508 U Street, NW, Washington, DC 20009, to provide certain services to the OWNER, who is: the Government of the District of Columbia, Washington, DC, in connection with the following PROJECT: Unified Communications Center, Washington, DC

The name of the JOINT VENTURE is Jair Lynch/Tompkins Joint Venture

Article 3, entitled “Interests of the Parties,” provides:

3.1 The respective interests of the parties (the “Parties Interests”) in the profits arising from the Work and in all property accruing from or acquired in connection with the Work and their respective (a) obligations for contributions to and disbursements from working funds and (b) liabilities and obligations in connection with the Work, are:

THE JAIR LYNCH COMPANIES	51%
TOMPKINS BUILDERS, INC.	49%

Article 4, entitled “Management of the Joint Venture”, provides that the contract work will be under the direction and control of a Management Committee consisting of two members from each party. The article requires that actions and decisions of the Management Committee be taken by unanimous vote, and that in the event of a tie, William Brennan of Turner Construction Company (the parent company of Tompkins) will cast the tie-breaking vote. The Management Committee exercises control over the joint venture funding, accounting, expenses, property, services, and personnel.

Article 13, entitled “Services and Personnel”, provides:

The contract for the Project shall be carried out and performed on behalf of the Joint Venture under the direction and management of a Management Committee composed of Ed Small and Greg Druga of TOMPKINS BUILDERS, Inc., and Jair Lynch and Jonathan Weinstein of THE JAIR LYNCH COMPANIES. The executive committee shall work cooperatively in the determination of matters affecting the Joint Venture. The executive committee of Tompkins and JLC will share responsibility (JLC: 51%, Tompkins: 49%) for the delivery of the Project through the oversight and management of subcontractors to manage the construction requirements of Owner. . . .

The signature page of the joint venture agreement identifies the “First Party” as “The Jair Lynch Companies” and is signed by Jair Lynch as its president and CEO. The “Second Party” is identified as Tompkins Builders, Inc., and is signed by Stephen Sullivan, its vice president. (Protest CAB No. P-0694, Tab 1). Nowhere does the joint venture agreement mention the name “JLC Construction, LLC.”

The February 12, 2004 joint venture agreement was submitted to the LBOC the same day in order to obtain LBOC certification of this new joint venture. The joint venture had the agreement hand carried to the LBOC offices. In response to an order to submit the entire application package that was transmitted by the joint venture to the LBOC, the District states that the only item submitted to the LBOC was the actual agreement and that there was no transmittal letter or other attachments accompanying the application. (District Submission, filed Oct. 1, 2004).

On Tuesday, February 17, 2004 (the next business day after submission on Friday, February 12), the members of the LBOC met by means of a conference call, discussed the joint venture application, and approved it. (Protest, Tab 6). The LBOC's decision that the Lynch/Tompkins joint venture was entitled to 12 preference points was based on its belief that the Lynch/Tompkins joint venture members were Tompkins Builders, Inc., and JLC Construction, LLC. The only entity within the Jair Lynch umbrella of companies to be certified by the LBOC was JLC Construction, LLC. LBOC Chairman Glymph states in a February 26, 2004 email:

On Tuesday, February 17, 2004 at 10:30 am, a conference call was convened by the Local Business Opportunity Commission to discuss the Joint Venture application of JLC Construction, LLC and Tompkins Builders, Inc. . . . During the call, the Commissioners discussed the terms and conditions of the joint venture agreement and the collective qualifications and responsibilities of JLC Construction and Tompkins Builders. In addition, we discussed the scope of work between the joint venture parties and applauded Tompkins for joint venturing with an LSDBE company.

(Protest (CAB No. P-0690), Tab 6).

Bid Opening

Five bids were opened on February 17, 2004. (D&F to Proceed, at 1). After OCP deducted for certain optional bid items from the base bid prices, but before OCP applied any applicable preferences in evaluating the bid prices, the results showed that Sigal submitted the lowest actual bid of \$41,965,977, Clark Construction was second with a bid of \$42,475,957, and JLTJV was third with a bid of \$42,890,236. (AR Ex. 7, at SL-9).

JLTJV submitted its bid with a cover letter on letterhead reading "Jair Lynch/Tompkins Joint Venture." The letter states that JLTJV's bid consisted of a Bid Form (Document 00410), a Representations and Certifications form (Document 00450), an "Assurance of Compliance with Equal Employment Opportunity Requirements", an "Equal Opportunity Policy Statement", "Tax Certification Affidavits from both Tompkins Builders and Jair Lynch Companies", and a bid bond. (Protest (CAB No. P-0694), Tab 1; *see also* Sigal Proposed Findings of Fact, Ex. 1, Attachment A, at 177-217). The letter states that "The Joint Venture of Jair Lynch/Tompkins Joint Venture meets the requirement for the 12 point preference as described in the bidding documents." The 4-page Bid Form contains the pricing information of the bidder and provides on the final page the following information about the bidding entity:

Name of Bidder must be shown in full if an individual; and if a partnership, full names of all partners must be shown. If Bidder is a corporation, impress corporate seal and furnish name of State where incorporated. If joint venture, all parties must sign.

Bid of Jair Lynch / Tompkins Builders

a Joint Venture corporation/partnership/an individual . . .

District of Columbia (State)

doing business as Jair Lynch/Tompkins Builders Joint Venture.

Date: 2/17/04

By: Edward Small /s/ Edward Small (Signature) /s/ Jair Lynch
Management Committee member and Management Committee Member
President of Tompkins Builders, Inc. President of Jair Lynch Co

The next document in JLTJV's bid package was the joint venture agreement of February 12, 2004. The bid also appears to contain a nearly identical version of the joint venture agreement but dated February 17, 2004. The names of the parties and the signatories in both versions of the agreement are identical. The bid package contains a bid bond dated February 17 indicating the principal is Jair Lynch/Tompkins Joint Venture. It is signed by Curtis B. Harris, Vice President – Tompkins, and Jair Lynch, President – Jair Lynch Companies. The Representations and Certifications form identifies the bidder as a joint venture, lists the name of the bidder as "Jair Lynch/Tompkins Joint Venture," and is signed by Edward Small as a Management Committee member of the joint venture. A Tax Certification Affidavit is included in the name of joint venture partner, The Jair Lynch Companies, identifying the following information: Finance and Revenue Registration No. 02.68628, Federal Identification No. 52-2250054, and DUNS No. 10-995-8426. (Sigal Proposed Findings of Fact, Ex. 1, Attachment A, at 214). These numbers correspond to the numbers of JLC Construction, LLC. (District Submission, filed Oct. 1, 2004, Ex. 1). The bid of JLTJV did not contain a copy of any LBOC certification of JLTJV under the LSDBE Act, apparently because the LBOC acted on JLTJV's request for certification the day of bid opening.

After bid opening, OCP contacted the Office of Local Business Development ("OLBD"), which supports the LBOC, to verify that JLTJV was entitled to a 12 percent preference reduction as indicated in its bid. Nicole Copeland, OLBD's Certification Manager, replied to OCP later on February 17 in a fax transmittal, stating:

This letter is to confirm that the JLC Construction/Tompkins Builders Joint Venture was approved by the Local Business Opportunity Commission (LBOC) on February 17, 2004 for twelve preference points. Their certification letter has been sent to the LBOC Chairman for signature.

(AR Ex. 4). Also, on February 17, 2004, the LBOC's Chairman, Darrin Glymph, wrote to the JLTJV that:

The District of Columbia Local Business Opportunity Commission (LBOC) during its meeting on 2/17/04, Certified Jair Lynch/Tompkins Joint Venture as a Joint Venture in the Local, Small, and Disadvantaged Business Enterprise Program as promulgated by the "Equal Opportunity for Local, Small and

Disadvantaged Business Enterprises Act of 1999.”

(AR Ex. 3). Based on the confirmation from the LBOC that JLTJV was certified and entitled to 12 preference points, the contracting officer evaluated JLTJV’s bid by reducing the actual bid price by 12 percent based on its LBE, RBO, DBE, and enterprise zone status. The contracting officer evaluated Sigal’s bid by applying a 9 percent bid reduction based on it being certified as an LBE, RBO, and being located in an enterprise zone. Applying those preference reductions to the actual bids, JLTJV had the lowest evaluated price of \$37,743,408.52 and Sigal had the second low evaluated price of \$38,189,039.07.

The contracting officer has prepared a Chronology of Procurement which was submitted as part of the proposed award package to the Council. The Chronology indicates that during late February and early March 2004, the Director of OLDB raised objections to JLTJV’s initial subcontracting plan, and rejected OCP’s request for a waiver of the 50 percent self-performance requirement of Solicitation Paragraph 10.7.1. (Proposed Findings of Fact, Ex. 1, Attachment B, at 250-253). Entries in the Chronology for March 10-12, 2004, state as follows:

Per conference call between Allam Al-Alami, OCTO, Karen Hester, OCP, Brenda Spriggs, on 3/10/04. Allam stated that Peter Roy, OCTO, met with J. Flowers, OLDB, to discuss the LSDBE requirements for the UCC project. The result of the meeting was J. Flowers said that Jair Lynch/Tompkins misrepresented their joint venture and that the joint venture was invalid.

Meeting with K. Hester, OCP, A. Al-Alami, OCTO [Office of the Chief Technology Officer], and B. Spriggs, OCP, reiterating J. Flowers position that Jair Lynch/Tompkins joint venture is invalid. Misrepresentation by Jair Lynch/Tompkins.

Meeting between OCP, Kevin Green, Karen Hester, Brenda Spriggs, and J. Flowers, OLDB, regarding misrepresentation by Jair Lynch/Tompkins – meeting cancelled until further notice.

(*Id.* at 253).

Waiver of the 50 percent requirement was still at issue between OCP and OLDB in early April. On April 6, 2004, at a meeting among OCP, OCTO and OLDB personnel, it was agreed “to allow J. Flowers on[e] day, tomorrow to provide Waiver of the 50% LSDBE requirement for the prime LSDBE bidder to perform.” (*Id.* at 255).

On April 14, 2004, a meeting was held among Nate Frances, of the Chief of Staff’s Office in the Executive Office of the Mayor, Jacquelyn Flowers and Nicole Copeland, OLDB, and OCP representatives to discuss the pending issues. OLDB’s representative stated “that the Joint Venture was invalid because Jair Lynch cannot perform 50% of the construction work and Tompkins was performing the majority of the work and the Joint Venture is invalid. . . .” (*Id.* at 256). According to the Chronology entry for this meeting, “Nate Frances stated to J. Flowers if she had what she need[ed] from OCP to verify the Joint Venture. Nicole Copeland received all the information OCP had obtained from Jair Lynch/Tompkins. N. Copeland stated she would

look at the documents and get back to us tomorrow.” (*Id.*). By memorandum dated April 15, 2004, the OLBD Director approved the waiver of the 50 percent self-performance requirement. (AR at 4-5; AR Ex. 6). The record does not indicate any subsequent objections being raised by OLDB to the validity of the joint venture.

On April 20, 2004, Sigal filed a complaint with the LBOC asserting that JLTJV was not entitled to a 12 percent preference because the joint venture did not satisfy the statutory requirements for certification for 12 percent because Tompkins, not Jair Lynch Companies, controls the joint venture by virtue of its control of the Management Committee. Sigal also noted that the “Jair Lynch Companies” referred to in the joint venture agreement had never been certified by the LBOC, and that only a Jair Lynch entity named JLC Construction, LLC, was certified:

OLDB’s website does not list the Jair Lynch Companies nor does it indicate preference points given to the Jair Lynch Companies. OLDB’s website does list a “JLC Construction, LLC / formerly The Jair Lynch Consulting LLC

On April 28, 2004, Karen Hester, the OCP contracting officer, signed a determination and findings, determining the JLTJV was a responsible contractor and that it was in the best interest of the District to award the contract to JLTJV. The findings which support the determination were signed by Brenda Spriggs, the OCP contract specialist. (AR Ex. 10).

On May 7, 2004, JLTJV returned to OCP a signed copy of the UCC construction contract. This was two months prior to Council approval of the award to JLTJV. (Proposed Findings, Ex. 1, Attachment A, at 128 - 131).

On June 8, 2004, the OCP contracting officer transmitted to the Council of the District of Columbia the proposed contract action for awarding the UCC contract to JLTJV. The proposed contract award recommendation was accompanied by a package of documents supporting the recommendation. (Proposed Findings, Ex. 1, Attachment A). Sigal became aware of the submission to the Council, and actively worked to convince the Council to disapprove of the proposed award to JLTJV, including having its president and counsel testify at a June 23 Council hearing against the proposed award. (Intervenor JLTJV Motion to Dismiss, filed July 30, 2004, at 3). On July 8, 2004 the Council approved OCP’s recommendation to award the UCC contract to JLTJV. On July 16, 2004, OCP notified JLTJV that its bid was accepted and the construction contract was signed by the contracting officer on July 27, 2004. (AR, at 5-7; Intervenor JLTJV Motion to Dismiss, at 3-4).

Sigal filed its first protest (CAB No. P-0690) of the contract award to JLTJV with the Board on July 8, 2004, alleging that: Sigal was the low evaluated bidder as the JLTJV did not qualify for a 12 percent preference (Protest Ground A); that the 50 percent self-performance waiver was prejudicial and contrary to law (Protest Grounds B and C); and that JLTJV’s bid bond was defective (Protest Ground D). (Protest CAB No. P-0690, at 2-3). On July 16, 2004, the District issued a Determination and Findings to Proceed With the Award After Receipt of a Protest. The Board denied the Protestor’s motion to challenge the District’s D&F on August 13, 2004.

On July 27, 2004, Sigal filed a second protest (CAB No. P-0693), adding allegations that the award of 12 percent preference to JLTJV was based upon a mistake of fact regarding the identity of The Jair Lynch Companies (assumed by Sigal to refer to a corporation called Jair Lynch Companies, Inc.), which was never certified by the LBOC as an LSBDE (Protest Ground E); and that JLTJV is not a responsible bidder because Jair Lynch Companies, Inc., was not a corporation in good standing as of the contract award date (Protest Ground F). (Protest CAB No. P-0693). The Board consolidated these protests. Intervenor JLTJV filed a motion to dismiss the protests on July 30, 2004, urging that the protest grounds were not timely filed as required by D.C. Code § 2-309.08.

On August 12, 2004, Sigal filed a third protest (CAB No. P-0694), withdrawing the allegation in its first protest that the bid bond was defective (Protest Ground D), and adding the ground that JLTJV's bid was not responsive and must be rejected because of ambiguity regarding the members of the joint venture. This protest ground stems from the JLTJV statement in its July 30, 2004 motion to dismiss that "The Jair Lynch Companies" as used in the bid and joint venture agreement is a trade name for JLC Construction, LLC, and does not refer to "The Jair Lynch Companies, Inc."

On August 13, 2004, the LBOC responded to Sigal's April 20 complaint with an Order of Dismissal, stating that Sigal's complaint "does not allege a violation of the act by the registrant, but 'challenges the [alleged] improper grant of 12 preference points to Lynch/Tompkins Joint Venture' by the Commission." (AR Ex. 8). According to the LBOC, D.C. Code § 2-217.04(e) "does not authorize the Commission to hear challenges to its certifications." D.C. Code § 2-217.04(e) provides in relevant part:

Any person may file with the Commission a complaint alleging a violation of this subchapter against any applicant for registration or contractor registered pursuant to this subchapter. The complaint shall be in writing and sworn to by the complainant. The Commission may, without a hearing, dismiss a complaint which is frivolous or otherwise without merit. Any hearing shall be heard within 3 months of the filing of the complaint. The Commission shall cause to be issued and served on the person or organization alleged to have committed the violation, hereafter called the respondent, a written notice of the hearing together with a copy of the complaint If, at the conclusion of the hearing, the Commission determines that the respondent has violated the provisions of this subchapter, the Commission shall issue, and cause to be served on the respondent, a decision and order, accompanied by findings of fact and conclusions of law, requiring the respondent's registration to be revoked or suspended, or take any other action as it deems appropriate.

Nevertheless, the LBOC did briefly address Sigal's allegation that Tompkins, not Jair Lynch Companies, controlled the joint venture. The LBOC states in its decision:

[T]he Commission determined that the language in the joint venture agreement demonstrated that the Jair Lynch Companies, which the Commission understood

to mean JLC Construction, LLC, represented “at least 51% ownership and control over the venture”. As a result of this certification, JTJV was entitled “to receive the preferences” granted to JLC Construction, LLC “as if it were” that entity. Since JLC Construction, LLC’s certification entitles it to 12 preference points, the contracting agency must accord that same preference to JTJV.

DISCUSSION

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

JLTJV argues that all of the protest grounds raised in Sigal’s first two protests, CAB Nos. P-0690 and P-0693, are untimely because Sigal knew of the bases of the protest allegations long before the protests were filed on July 8 (P-0690) and July 27 (P-0693). JLTJV points to Sigal’s complaint filed with the LBOC in April 2004 raising the issues of whether JLTJV was properly entitled to a 12 percent preference and whether the 50 percent self-performance requirement was properly waived. JLTJV also urges that Sigal’s efforts to convince the Council to disapprove of the proposed contract award to JLTJV in June 2004 show Sigal’s knowledge of the bases of these protests well before the protests were filed with the Board. JLTJV cites our decision in *Micro Computer Co.*, CAB No. P-0226, Jan. 9, 1992, 39 D.C. Reg. 4381, *reconsid.*, 40 D.C. Reg. 4388, for the proposition that the 10-business day period begins when the protester first knows or should have known the basis of the protest, regardless of when the contracting officer makes an award. Sigal responds that the time period does not begin until there has been an official action adverse to it and that the contract award was the official action adverse to it. According to Sigal, a protest is premature until the unsuccessful bidder receives notice of award. Since the award was not made until July 16, 2004, and Sigal did not receive notice of the award until July 22, its protests in P-0690 and P-0693 were timely filed.

The Procurement Practices Act provides the following in D.C. Code § 2-309.08 with regard to an award protest:

(a) This section shall apply to a protest of a solicitation or award of a contract addressed to the Board by any actual or prospective bidder, offeror, or contractor who is aggrieved in connection with the solicitation or award of a contract.

....

(b)(2) In cases other than those [based upon alleged improprieties in a solicitation] . . . , protests shall be filed not later than 10 business days after the basis of protest is known or should have been known, whichever is earlier.

The correct principle of law on timeliness of a protest in connection with an award is that 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 that party. JLTJV misconstrues our decision in *Micro Computer*. That case addressed the issue of the timeliness of a protest filed against the presumptive low bidder even though no award had been made. *Micro Computer*

simply stands for the proposition that the Board may entertain jurisdiction over a protest which technically is premature because there has been no formal action taken by the contracting officer adverse to the protester. There is no difficulty in such an approach because if the presumptive low bidder does not receive award or the protester receives the award, the protest will be moot and voluntary dismissal will follow. *See, e.g., Consolidated Waste Industries*, CAB No. P-0300, Oct. 8, 1992, 40 D.C. Reg. 4570. If the protester does not receive award, the Board can then resolve the protest based on an actual decision adverse to the protester. Further, it may be useful for the contracting officer and government legal counsel to learn of a protest ground even if prematurely filed because the agency may be expected to take a more informed contract action based on the issues raised in the protest.

Usually, the contracting officer's official action adverse to the party will be a notice of award, a notice of intent to award, a notice that the party did not receive award, a notice that the party's bid or offer will not be further considered in the procurement, a notice that the party's offer is not within the competitive range, or a notice that the bid or offer is rejected for some other reason. It is well settled in our cases that a bidder or offeror does not have to file a protest in connection with an award until it has received notice of an official action by the contracting officer which is adverse to it. *See, e.g., Unfoldment, Inc.*, CAB No. P-0447, Aug. 2, 1996, 44 D.C. Reg. 6488, 6490-91 (protester's challenge to an anticipated award to the incumbent and an affirmative determination of the incumbent's responsibility status is premature and speculative); *Consolidated Waste Industries*, CAB No. P-0430, June 12, 1995, 42 D.C. Reg. 4983 (protester merely surmises that the District intends to award the IFB to another bidder; since the District had not yet completed its responsibility determination nor awarded a contract; protest was premature). In *Alexandria Scale*, CAB No. P-0361, Mar. 25, 1993, 40 D.C. Reg. 5055, the facts showed bid opening on June 12, 1992, that protester notified the contracting officer by letter of June 23 that the low bidder could not meet the specifications, and that between June 18 and December 14, 1992, the contracting agency made inquiries to the low bidder seeking responses to protester's June 23 letter. On January 7, 1993, after a partial award was made to the low bidder, the protester filed its protest on January 14, 1993, 7 days after award, but months after being on notice of the underlying basis for the protest. The Board held that the protest was timely filed because the operative date for the starting the 10-day filing period was the date on which the bidder was notified of the adverse agency action -- January 7, 1993, in that case. In *Koba Associates, Inc.*, CAB Nos. P-0344, P-0359, Mar. 3, 1993, 40 D.C. Reg. 5003, we held that the 10-day period for filing a protest begins to run when the District takes adverse action to the concerns of the offeror, not when the offeror raises the issues in a letter to the contracting officer seeking clarification. In *Koba*, the protester sought clarification by letter of August 27, 1992, challenging a direction given by the contracting agency during discussions, but the 10-day time for filing its protest began to run when protester received the September 24, 1992 notice terminating negotiations. Thus, *Koba's* protest was timely filed on October 7, 1992. *See also Fort Myer Construction Corp.*, CAB No. P-0261A, Jan. 28, 1992, 39 D.C. Reg. 4400 (although Fort Myer was aware of low bidder's bid mistake at the time of bid opening on October 10, 1990, it was not aggrieved until November 1, 1990, when the District informed Fort Myer that the low bidder's error was not disqualifying).

Under these principles of timeliness, we conclude that the protest grounds in P-0690 and P-0693 were untimely raised on July 8 and July 27, 2004. *Sigal* states that it was aware of

LBOC's certification of JLTJV (and the consequent eligibility for a 12 percent preference) in mid-March 2004 (Sigal Opposition, filed Aug. 11, 2004), and challenged the certification and entitlement of JLTJV to a 12 percent preference in its April 20, 2004 complaint to the LBOC. Certainly, by the time that the contracting officer submitted the proposed contract award to the Council on June 8, 2004, Sigal knew or should have known the bases for all of its protest grounds in P-0690 and P-0693. That does not end the inquiry because for determining timeliness, pursuant to D.C. Code § 2-309.08, we must determine also when Sigal first learned of an official action adverse to Sigal in connection with award of the contract. We conclude that Sigal learned of an official action adverse to it in connection with award of the contract when it received notice of the June 8, 2004 submission by OCP to the Council proposing award of the UCC contract to JLTJV. For contracts in excess of \$1 million, D.C. Code § 2-301.05a requires that the Mayor shall "submit the proposed contract to the Council for review and approval in accordance with the criteria established in this section." Section 2-301.05a(c)(1) states that proposed contracts submitted to the Council shall contain a summary, including, but not limited to, the following:

- (A) The proposed contractor, contract amount, unit and method of compensation, contract term, and type of contract;
- (B) The goods or services to be provided, including a description of the economic impact of the proposed contract . . . ;
- (C) The selection process, including the number of offerors, the evaluation criteria, and the evaluation results, including price and technical components;
- (D) The background and qualifications of the proposed contractor, including its organization, financial stability, personnel, and prior performance on [contracts] with the District government;
- (E) Performance standards and expected outcomes of the proposed contract;
- (F) A certification that the proposed contract is within the appropriated budget authority for the agency . . . ;
- (G) A certification that the proposed contract is legally sufficient and has been reviewed by the Office of the [Attorney General] . . . ;
- (H) A certification that the proposed contractor is current with its District and federal taxes . . . ;
- (I) The status of the proposed contractor as a certified local, small, or disadvantaged business enterprise;
- (J) Other aspects of the proposed contract that the Chief Procurement Officer deems significant; and
- (K) A statement indicating whether the proposed contractor is currently debarred from providing services to any governmental entity

Sigal filed a copy of the documents transmitted by OCP to the Council for the section 2-301.05a review. (Proposed Findings of Fact, Ex. 1, Attachment A). That submission to the Council was a notice of intent to award to JLTJV. Accordingly, as of June 8, 2004, Sigal knew or should have known the grounds of its protests in P-0690 and P-0693 and it was aware of the OCP contracting officer's intent to award the UCC contract to JLTJV by virtue of OCP's June 8 submission of the proposed contract award to the Council. Not only did Sigal learn of the

submission to the Council, but it actively lobbied the Council to disapprove of the proposed award to JLTJV.

We now address Sigal's protest ground in P-0694 which was filed on August 12, 2004. Sigal alleges that the JLTJV bid was nonresponsive because the identity of one of the joint venture parties – "Jair Lynch Companies" – was ambiguous. Sigal contends that within the four corners of the bid documents and from publicly available records, it is not possible to conclude, as the contracting officer did, that "Jair Lynch Companies" referred to JLC Construction, LLC, which is the name of the corporation that the contracting officer understood as being the joint venture party which entered into the agreement with Tompkins. Sigal notes that within the Jair Lynch umbrella of companies, there is no legal entity named "Jair Lynch Companies" and JLC Construction, LLC, is not publicly registered under a trade name of "Jair Lynch Companies." Moreover, JLTJV itself states that the only Jair Lynch party to the joint venture is JLC Construction, LLC, *i.e.*, neither all of the Jair Lynch companies taken together nor any other individual Jair Lynch entity is a party to the joint venture. While there is a Jair Lynch entity named "Jair Lynch Companies, Inc.," that corporation was formed in August 2003, is not certified in any manner by the LBOC, and thus could not support the allowance of a 12 percent preference to JLTJV.

JLTJV states that this protest ground, like the protest grounds in P-0690 and P-0693, was untimely raised because Sigal knew of the basis of the protest long before August 12. We agree. Sigal states that it first learned of the protest ground when it received JLTJV's motion to dismiss on July 30, 2004, which contained the assertion that the name "Jair Lynch Companies", as used in the joint venture agreement and in the bid documents, is a trade name for JLC Construction, LLC, and not Jair Lynch Companies, Inc. We find that Sigal knew of the underlying facts by no later than April 20, 2004, when it filed a complaint with the LBOC. In the LBOC complaint, Sigal states that "OLDB's website does not list the Jair Lynch Companies nor does it indicate preference points give to the Jair Lynch Companies" but "does list a 'JLC Construction, LLC / formerly The Jair Lynch Consulting LLC.'" (Protest P-0690, Tab 9). By the time of the June 8 submission of the proposed award to the Council, Sigal knew or should have known of the basis for the protest, and, when coupled with its learning of OCP's June 8 proposed contract award submission to the Council, started the time period to file its protest within 10 business days. Because the protest in CAB No. P-0694 was not filed until August 12, the protest is untimely.

Accordingly, we dismiss the three protests as untimely.

SO ORDERED.

DATED: November 24, 2004

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

CONCURRING:

/s/ Matthew S. Watson
MATTHEW S. WATSON
Administrative Judge