

GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

PROTEST OF:

CONSOLIDATED WASTE INDUSTRIES

Under IFB No. OMS-5030-AA-KH

)
) CAB No. P-430
)

For the Protestor: Wilton Lash, President, *pro se*. For the Government: Nancy Hapeman, Esq. and Warren Nash, Esq., Assistants Corporation Counsel.

Opinion by Administrative Judge Cynthia G. Hawkins-León, with Administrative Judges Lorilyn E. Simkins and Jonathan D. Zischkau, concurring.

OPINION AND ORDER ON DISTRICT'S MOTION TO DISMISS

Procedural History

On March 10, 1995, Consolidated Waste Industries ("Consolidated" or "Protestor") filed the above-named protest of the apparent award of IFB No. OMS-5030-AA-KH to Tricon of Washington, D.C. ("Tricon" or "apparent awardee") on February 28, 1995. Protestor alleges that the apparent awardee is unable to comply with the requirements and restrictions involving the utilization of subcontractors in contracts awarded to a prime contractor who has been certified by the Minority Business Opportunity Commission ("MBOC") as a small business. Specifically, Protestor contends that, due to a lack of the necessary hauling equipment and drivers, the apparent awardee is unable to perform fifty percent (50%) of the hauling and transporting of the pebble and granular lime with its own equipment as required by the Special Conditions provisions of the IFB. IFB No. OMS-5030-AA-KH, Section II, "Special Conditions," ¶2A at page 9.

The Board granted the District's Motion to Extend the Time to Respond to the Protest; thus, extending the District's time to respond to May 1, 1995. See Board Order, April 11, 1995. Thereafter, the District timely filed a Motion to Dismiss on April 26, 1995. Protestor failed to respond to the District's Motion to Dismiss. Pursuant to Board Rule 307.4, 36 D.C. Reg. 2714 (April 21, 1989), when a Protestor fails to file comments on an agency report or dispositive motion filed in lieu thereof, the factual allegations in the protest that are not admitted by the District, or otherwise corroborated on the record, may be disregarded. Alternatively, in accordance with Board Rule 110.5, 36 D.C. Reg. 2692 (1989), in light of Protestor's failure to

file a timely opposition to the District's motion, the Board may, if it so chooses, treat the motion as conceded. *Heller Electric Co., Inc.*, CAB NO. P-244, December 23, 1991, 39 D.C. Reg. 4373; *Barcode Technologies, Inc.*, CAB No. P-298, January 16, 1992, 39 D.C. Reg. 4387. In this case, as will be discussed below, since the Board has determined that the issues raised by Protestor are not for resolution by this Board pursuant to our protest procedures, it will not be necessary for the Board to determine whether it should disregard any or all of the factual allegations.

Facts

On January 20, 1995, the Department of Public Works issued IFB No. OMS-5030-AA-KH ("IFB") for the purchase of pebble and granular lime. The IFB was issued in the sheltered market for small businesses certified in the procurement category of "goods and equipment" or "transportation and hauling." Motion for Time Extension, Exhibit 1.

On February 24, 1995, bids were opened. A total of seven bids were submitted, including the bids of the Protestor and the apparent awardee, Tricon. Motion to Dismiss, Exhibit 1. The District evaluated the bids based on the price for a base year plus two option years. Motion for Time Extension, Exhibit 1, "Special Conditions," ¶¶ 8 and 9, pages 12-13. Based on that standard, Tricon was the apparent low bidder. Motion to Dismiss, Exhibit 1.

As previously stated, on March 10, 1995, Protestor filed the instant protest. On April 26, 1995, the District filed a Motion to Dismiss due to the Board's lack of jurisdiction to hear the protest.

As of the April 26, 1995 filing of the District's Motion to Dismiss, the contract had not been awarded. To date, the Board has not been notified by the District that the contract has been awarded.

Decision

Protestor alleges that Tricon, as the prime contractor, will be unable to comply with the IFB's requirement as stated in Section II, "Special Conditions," ¶2A that fifty percent (50%) of the contracting effort -- not including the cost of materials, goods and supplies -- be performed by the prime contractor's own organization and forces. Motion for Time Extension, Exhibit 1 at page 9.¹

¹ Special Condition ¶2A states in pertinent part:

When a prime contractor is certified by the Minority Business Opportunity Commission as a small business, the prime contractor shall perform at least fifty

In keeping with decisions of the Comptroller General, to which this Board looks for guidance, this Board has consistently held that matters relating to contract administration are not reviewable under this Board's protest procedures. *See generally Shane Meat Co.*, CAB Nos. P-339, P-347 and P-349, January 8, 1993, 40 D.C. Reg. 4885, *citing Markhurd Aerial Surveys, Inc.*, B-210108, January 17, 1983, 83-1 CPD ¶51; *Alexandria Scale t/a Bay Scale, Inc.*, CAB No. P-361, March 25, 1993, 40 D.C. Reg. 5055. The Board finds that Protestor's question concerning Tricon's ability to comply with the requirements of the IFB is a matter of contract administration.

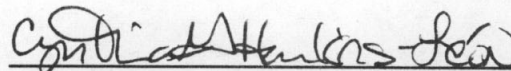
In addition, the Board finds that Consolidated has merely surmised that the District intends to award the IFB to Tricon: the District has not yet completed its responsibility determination (Motion for Time Extension, Exhibit 2), and the contract has not yet been awarded. Thus, in keeping with precedent, the Board further finds the protest to be premature. In sum,

[p]rotests that merely anticipate improper agency action are speculative and premature and provide no basis for consideration by our [Board] (citations omitted).

Group Insurance Administration, Inc., CAB No. P-354, February 2, 1993, 40 D.C. Reg. 4933, 4938.

ACCORDINGLY, based upon the facts, legal precedent and reasoning set forth above, the protest is hereby **DISMISSED**, with prejudice.

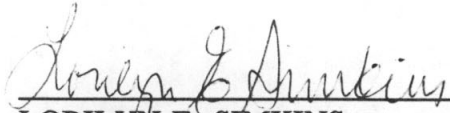
DATE: June 12, 1995


CYNTHIA G. HAWKINS-LEÓN
Administrative Judge

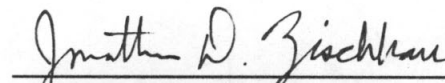
percent (50%) of the contracting effort excluding the cost of materials, goods, and supplies, with its own organization and resources, and if it subcontracts, fifty percent (50%) of the subcontracting effort excluding the cost of materials, goods, and supplies shall be with certified local, small and disadvantaged business enterprises

Id.

CONCUR:



LORILYN E. SIMKINS
Chief Administrative Judge



JONATHAN D. ZISCHKAU
Administrative Judge