

GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

PROTEST OF:

Maryland Construction, Inc.)	
)	CAB No. P-0650
Under Solicitation No. POAM 2001-C-0009-JH)	

For the Protester, Timothy P. Leahy, Esq., Byrd and Byrd, LLC. For the Government,
Howard Schwartz, Esq. and Warren J. Nash, Esq., Assistants Corporation Counsel.

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

OPINION

Courtlink Filing ID 494272

Protester, Maryland Construction, Inc. (“MCI”), has protested against award to the apparent low bidder, Engineering Management Services, Inc. (“EMS”), alleging irregularities in the EMS bid bond and in announcement of the EMS bid at opening. The District has moved to dismiss the protest on the ground that MCI is not a certified small business and therefore lacks standing to protest the award of a contract set aside for small businesses. We agree with the District and dismiss the protest.

It is undisputed that MCI is not “certified” as a small business by the Local Business Opportunity Commission (“LBOC”).¹ It is further undisputed that Box 6 in the upper right of the first page of the solicitation designated the solicitation as “Set-Aside - Building Construction.” (Protester’s Reply to Motion, at 1) But it is also undisputed that the solicitation did not contain the standard clauses required in a set-aside solicitation which limit eligible bidders to “certified” small businesses only. (District Response, 3, note 1).

As a general rule, an entity which is not certified as a small business by the LBOC is not eligible for award of a contract set-aside for small businesses and lacks standing to protest award. See *J&K Distributors, Inc. of Washington, D.C.*, CAB No. P-432, June 13, 1995, 42 D.C. Reg. 4986. It is undisputed that MCI was not certified as a small business when the bids were opened. As opposed to *J&K*, where certification was specifically required, MCI contends that, since the solicitation lacked specific language requiring that only *certified* small businesses were eligible to bid, although it is not certified, it cannot be excluded. We disagree with MCI.

¹ The Board takes administrative notice of the Office of Local Business Development database of LSDBE certified contractors accessible at <http://www.olbd.dc.gov/services/certification/search.asp>

At best, the terms of the solicitation are ambiguous. The solicitation stated, as protester acknowledges, that it was “set-aside.” The Council has clearly stated its intent that the “set-aside” programs which it mandated shall be established “to assist contractors who are certified as local business enterprises, disadvantaged business enterprises, or small business enterprises (emphasis supplied)” D.C. Code § 2-217.03 (2001 ed.) An ambiguity must be resolved in conformity with the intent of the legislation establishing the program so as to uphold the lawfulness of the solicitation.²

If MCI believed that the solicitation, as written, differed from the statutory set-aside program, an ambiguity or impropriety existed on the face of the solicitation when it was issued. Pursuant to our rules, “[a] protest based upon alleged improprieties in a solicitation apparent prior to bid opening . . . shall be filed with the Board prior to bid opening. . . .” Rule 302.2(a). A bidder who fails to seek clarification of an ambiguity on the face of a solicitation prior to bid opening risks a contrary interpretation of the allegedly ambiguous provision and is precluded from raising such issues to the Board after opening.

Since the solicitation clearly stated that the contract was to be “set-aside,” the Board determines that the term must be read in conformity with the statutory definition of set aside procurements which restricts bidders on such procurements to firms certified by the LBOC. Because Protester was not certified, it is not eligible for award and lacks standing to protest. The protest is DISMISSED.³

SO ORDERED.

Dated: January 17, 2002

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

CONCURRING:

/s /Jonathan D. Zisschkau
JONATHAN D. ZISCHKAU
Administrative Judge

² There is no question that it was the intent of the contracting agency to require certification. The advertisement of the solicitation in the *Washington Times* clearly stated that “This project is set aside for “Certified Local Small and Disadvantage Business Enterprises Certified in the Category of Building Construction.” (October 15, 2001)

³ Forney Enterprises, Inc., a certified small business bidder on this solicitation has moved to intervene in this protest asserting that EMS is not itself certified and not eligible for award. The Board has not determined whether the apparent law bidder, EMS, is qualified for award. That determination must be first made by the contracting officer and is not yet ripe for consideration.