

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD
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April 15, 1999

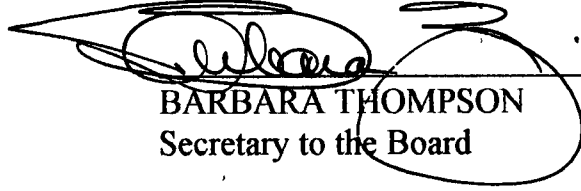
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SUBJECT: CAB No. **P-576 and P-577**, Protests Of: **The Answer Temps, Inc. (TAT)**

Attached is a copy of the Board's Opinion dismiss P-576, and denying and dismissing P-577.


BARBARA THOMPSON
Secretary to the Board

GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

PROTESTS OF:

THE ANSWER TEMPS, INC.)	
)	CAB Nos. P-576, P-577
Under Contract No. DCPS-E-99023-OT)	

For the Protester, The Answer Temps, Inc.: Laurence Schor, Esq., Brian T. Scher, Esq., McManus, Schor, Asmar & Darden, L.L.P. For the Intervenor, Horton & Barber Professional Services, Inc.: Ronald L. Thomas, Esq. For the Government: Howard Schwartz, Esq., and H. Christopher Malone, Esq., Assistants Corporation Counsel.

Opinion by Administrative Judge Jonathan D. Zischkau, with Chief Administrative Judge Lorilyn E. Simkins, concurring.

OPINION

The Answer Temps, Inc. ("TAT") challenges an award by the District of Columbia Public Schools ("DCPS") to Horton and Barber Professional Services, Inc. ("H&B") for transportation of special education students on the ground that H&B is not a responsible contractor. In a supplemental protest (CAB No. P-577), TAT contends that DCPS improperly applied only a 5 percent preference to its bid price rather than a 10 percent preference. We conclude that the existing record supports the 5 percent preference applied by DCPS to TAT's bid price and therefore deny the supplemental protest. Because TAT was the third low bidder, it lacks standing to protest the award made to H&B. Accordingly, we dismiss CAB No. P-576.

BACKGROUND

On March 1, 1999, DCPS requested oral quotations by later the same day from TAT, H&B, C. Price & Associates ("C. Price"), and McLean Transportation, under Solicitation No. DCPS-E-99023-OT, for bus drivers and attendants. The bidders were instructed to provide a faxed verification of their oral quotes on March 2, 1999. All four bidders provided timely quotations. (District's Motion to Dismiss/Agency Report ("AR") Ex. 2). DCPS's bid tabulation shows that H&B was the low evaluated bidder based on its actual bid price (\$16.50 per hour for bus drivers and \$12 per hour for attendants) being reduced by a 12 percent preference -- 5 percent as a local business enterprise ("LBE"), 5 percent as a disadvantaged business enterprise ("DBE"), and 2 percent for being located in an enterprise zone. (AR Ex. 3). C. Price was the second low bidder (\$16.10 for bus drivers and \$11.99 for attendants), TAT was the third low bidder with its actual bid price (\$17.65 for bus drivers and \$12.65 for attendants) being reduced by a 5 percent preference as a LBE. (AR Ex. 3).

By determinations and findings dated March 3, 1999, the District's Chief Procurement Officer determined that the emergency procurement was justified and that H&B was a responsible contractor. (AR Exs. 4, 5). DCPS issued a contract to H&B the same day.

TAT filed a protest, docketed as CAB No. P-576, challenging H&B's responsibility. TAT argues that H&B's past performance since September 28, 1998, has been seriously deficient. TAT cites a DCPS's admission that H&B has experienced a daily percentage of missed bus trips of approximately 16 percent, and H&B's failure to properly screen and train bus drivers and attendants. (Protest, at 3; Exs. 1-3). TAT further alleges that H&B does not have the necessary organization, experience, and accounting and operational controls to properly perform the contract. TAT states that H&B "consistently fails to pay employees for all of the hours they have worked, fails to properly withhold taxes, fails to pay benefits, and has failed to provide employees with W-2 forms" and that H&B has "refused to provide employees with information necessary for them to make worker's compensation claims, thereby denying the employees the ability to recover for those claims." (Protest, at 3).

On March 5, 1999, TAT filed a supplemental protest challenging DCPS's evaluation of TAT's bid pursuant to the Equal Opportunity for Local, Small, and Disadvantaged Business Enterprises Act. According to TAT, DCPS incorrectly applied a preference reduction of only 5 percent (for LBE certification) to TAT's bid when TAT was entitled to a reduction of 10 percent for both LBE and DBE certification. If a 10 percent preference reduction is applied, TAT becomes the second low bidder with standing to challenge the award to H&B. The LBOC certificate of registration for TAT, however, only specifies that TAT is registered as a LBE and SBE. (TAT Supplemental Protest, Ex. B). The certificate does not show TAT registered as a DBE which would qualify it for another 5 percent reduction. TAT responds that in 1996 it qualified as both a LBE and DBE and that its registration expired in 1998. (TAT Response, filed March 15, 1999, Ex. 1). When TAT submitted its application for recertification, the MBOC (the predecessor of the LBOC) issued the recertification identifying TAT as registered for LBE and SBE status, but not DBE status. TAT states that it only recently realized this discrepancy and is taking steps to have the LBOC correct its certificate. (TAT Response, at 4). TAT also challenges C. Price's responsibility. In the Agency Report, there is a June 1998 determination and findings prepared in connection with a 1998 procurement for bus driver and attendant services, determining that TAT was responsible but indicating that C. Price had been declared nonresponsible "due to its inability to provide the required services in a timely manner so as to prevent a disruption of services." (AR Ex. 1). TAT argues that the status of C. Price has not changed since 1998, and that it is a management company, having no drivers and attendants of its own to provide the required services.

In response to a Board order, H&B has submitted an affidavit from Mr. Paul Horton, H&B's owner and chief executive officer. Mr. Horton states that H&B: (1) has paid its bus drivers and attendants for all hours worked and in accordance with applicable wage decisions, including fringe benefits; (2) has provided employees with W-2 forms and has properly withheld employee federal and local taxes; and (3) has never refused to provide an employee with the information necessary for such employee to make a worker's compensation claim. (H&B Response, filed March 12, 1999, Ex. 1). In response to Mr. Horton's affidavit, TAT submitted an affidavit of a former H&B employee (who worked for H&B for one

month) who asserts that H&B did not pay her for one day of work and failed to provide her with a W-2 form. (TAT Response, Ex. 2).

On March 31, 1999, the District filed affidavits of Mr. Kevin West, DCPS's Transportation Officer, and Mr. Patrick V. Fiel, DCPS's Director of Security. Mr. West states that H&B has provided on average approximately 30-40 more bus drivers and attendants per month (from October 1998 through the present) than TAT did when it was DCPS's contractor (from April 1998 through September 1998). Mr. Fiel states, *inter alia*, that 13 TAT employees tested positive for drugs during TAT's performance period compared with 9 H&B employees testing positive for drugs since H&B began performing, and 11 TAT employees had unsatisfactory criminal backgrounds compared with 8 H&B employees.

DISCUSSION

We exercise protest jurisdiction pursuant to D.C. Code § 1-1189.3 (Supp. 1998).

Before we reach the merits of TAT's protest of the award to H&B, we first consider the District's argument that TAT lacks standing because it would not be in line for award even if its protest in CAB No. P-576 challenging the award to H&B were sustained. In its supplemental protest, CAB No. P-577, TAT challenges DCPS's failure to apply a 10 percent preference reduction to its bid. If TAT is correct about its entitlement to an additional 5 percent for DBE status, then it would become the second low evaluated bidder and thus have standing in P-576. The problem with TAT's position is that its current LBOC certification only supports a 5 percent preference which is the percentage DCPS used in evaluating TAT's bid. The record does show that TAT was certified as a LBE and DBE from 1996 to 1998. The record does not explain why it was recertified only as a LBE in 1998. TAT states that it only recently realized that the recertification omitted DBE status. According to TAT, its status did not change and therefore LBOC erred in omitting DBE status from the recertification in 1998. Although TAT states that on March 16, 1999, it would request the LBOC to certify TAT as a DBE, the record does not indicate any decision by the LBOC. In addition, if the LBOC were to certify TAT as a DBE in response to TAT's request, the certification would have to apply retroactively – at least prior to March 2, 1999, the deadline for quotations – in order for the DBE certification to have a material affect on the evaluation of TAT's bid price. Because we have expedited these protest proceedings at TAT's request, and TAT has not requested that we defer ruling while its request is pending before the LBOC, we decide the matter based on the present record. DCPS properly evaluated TAT's bid with only a 5 percent preference for LBE certification since that is the only certification appearing on the certificate of registration and there is no evidence of any self-certification by TAT. Accordingly, we deny TAT's protest in P-577. Therefore, based on the evaluated bids, TAT is third low.

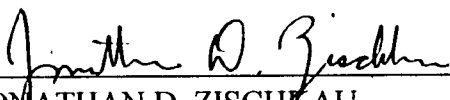
TAT offers one other ground for it to meet the standing requirement. In its final submission, TAT challenged C. Price's responsibility based on a determination made last year that C. Price was not responsible. We have reviewed the document in the record that references that such a determination was made, but the evidence falls well short of that needed for us to conclude that C. Price is not responsible for purposes of the procurement at issue in the present case. Thus, TAT is not in line for award even if we

were to sustain its challenge in CAB No. P-576. Accordingly, we dismiss the protest because TAT lacks standing.

In summary, we deny CAB No. P-577 and dismiss CAB No. P-577.

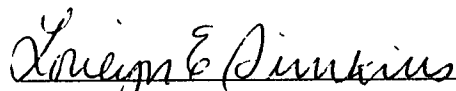
SO ORDERED.

DATED: April 14, 1999



JONATHAN D. ZISCHKAU
Administrative Judge

CONCURRING:



LORILYN E. SIMKINS
Chief Administrative Judge