

## DISTRICT OF COLUMBIA CONTRACT APPEALS BOARD

PROTEST OF:

OHMS ENERGY COMPANY, LLC	)	
	)	CAB No. P-0807
Under IFB No. DCAM-2009-B-7003	)	

For Ohms Energy Company, LLC: Mr. Sheirmiar White, *pro se*. For the District of Columbia Government: Talia Sasson Cohen, Esq., Assistant Attorney General, Office of the Attorney General.

Opinion by Chief Administrative Judge Jonathan D. Zischkau, with Administrative Judge Warren J. Nash, concurring.

### OPINION DISMISSING PROTEST

*Filing ID 26475091*

Ohms Energy Company, LLC, protests the failure of the Office of Contracts and Procurement (“OCP”) to issue the subject solicitation for electricity supply as a set aside procurement and otherwise comply with the requirements of the Small, Local, and Disadvantaged Business Enterprise Development and Assistance Act of 2005, D.C. Code §§ 2-218.46, 2-218.47, and 2-218.52. The District has moved to dismiss the protest as untimely since the protest was filed over two months after the bid opening date. Ohms has not responded to the motion. We deem the motion as conceded and in any event the record clearly shows that Ohms’ challenge of the solicitation is untimely. Accordingly, we dismiss the protest.

### BACKGROUND

On February 13, 2009, OCP issued on behalf of the Office of Property Management (“OPM”), IFB No. DCAM-2009-B-7003 in the open market for a contractor to provide electricity supply for an annual load of approximately 400,000,000 kilowatt hours. (Agency Report (“AR”) at 2; AR Ex. 1). The IFB provided for a reverse auction whereby only bidders that met certain eligibility requirements were permitted to participate in the reverse auction. (*Id.*). In addition, while the IFB contemplated the award of one requirements contract for the supply of electricity for OPM accounts, both the energy purchasers under the DC Municipal Aggregation Program and the Metropolitan Council of Governments could (i) issue their own invitation for bid and execute their own contracts or (ii) negotiate a price under the IFB and issue a separate order. (*Id.*). The original deadline for the submission of bid packages was March 16, 2009. By Amendment A0001, dated March 13, 2009, the District extended the date for the submission of bid packages to March 20, 2009. Through subsequent amendments, the District extended the date for the submission of bid packages to March 24, 2009. (*Id.*).

Section 1.3 of the IFB provided that “Bidders interested in participating in this IFB shall comply with the Eligibility Criteria as defined in Section 2 and shall submit a Bid as described in Section 4.” Once OCP determined that a bidder met the eligibility criteria as listed in section 2 of the IFB, then that bidder could participate in the reverse auction. Section 2, entitled “Eligibility Criteria”, provided as follows:

In order to bid each Bidder must possess and submit the following with its Bid Package:

- i. Evidence that the Bidder is licensed by the District of Columbia Public Service Commission to provide Electricity Supply;
- ii. Evidence that the bidder possesses a Federal Energy Regulatory Commission (FERC) power marketing license. Bidders must include FERC Docket No., Date of Application, and Date of Approval;
- iii. Evidence that the Bidder has firm transmission service agreements in the Bidder’s name with the Pennsylvania, New Jersey, Maryland Interconnection, L.L.C (“PJM”) for the interconnection points between the applicable Local Distribution Utility “LDU”, as defined in Section 6.1, system and PJM to effect delivery to the Delivery Points of the contract; and
- iv. Signed acceptance of the Fee Schedule. Attached herein as ATTACHMENT G.

(AR Ex. 1).

On March 24, 2009, the date for the submission of the bid packages, OCP received bids from the following six bidders: Constellation New Energy Power, Gexa Energy DC, LLC, Hess Corporation, Ohms, Pepco Energy Services, Inc., and Washington Gas Energy Services, Inc. (AR Ex. 2). On May 12, 2009, OCP requested from all six bidders additional responsibility data. On May 18, 2009, OCP received responses from the following four bidders: Gexa, Hess, Pepco, and Washington Gas. On June 1, 2009, OCP conducted the reverse auction and on June 2, 2009, awarded Contract No. DCAM-2009-R-7003, to Washington Gas. (AR at 3; AR Ex. 2). Because Ohms failed to comply with the responsibility data request, the District found Ohms nonresponsible, and Ohms thus did not participate in the reverse auction. Ohms filed its protest on June 1, 2009. The District moved to dismiss the protest as untimely on June 29, 2009. Ohms was given an extension of time to respond but has never responded to the motion.

## **DISCUSSION**

Ohms’s protest is not a model of clarity but Ohms appears to contend that the IFB fails to satisfy the requirements of the Small, Local, and Disadvantaged Business Enterprise Development and Assistance Act of 2005, D.C. Code §§ 2-218.46, 2- 218.48, and 2-218.52. The District responds that the protest is untimely since Ohms failed to file the protest with the Board prior to bid opening and waited until over two months after bid opening to file its protest. If a

protest is based upon alleged improprieties in a solicitation, the Procurement Practices Act requires the protester to file its protest prior to bid opening. D.C. Code § 2-309.08(b)(1) states in relevant part: “A protest based upon alleged improprieties in a solicitation which are apparent prior to bid opening or the time set for receipt of initial proposals shall be filed prior to bid opening or the time set for receipt of initial proposals.”

It is clear from the facts that Ohms waited until after bid opening to file its protest challenging the terms of the solicitation. By not responding to the motion to dismiss, we deem the motion as conceded by Ohms. In any event, the record shows that Ohms’ protest is untimely.

Accordingly, we dismiss the protest.

**SO ORDERED.**

DATE: August 6, 2009

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

CONCURRING:

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