

GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

PROTEST OF:

D.L.H. INDUSTRIES, INC.)	
)	CAB No. P-62
Under Contract No. 7392-AA-89)	
-0-7-HT)	

For the protester: William L. England, Jr., Esq., Brooks & England, Washington, D.C. For the District government: Nancy Hapeman, Assistant Corporation Counsel, D.C., Office of the Corporation Counsel, Administrative Services Section.

Before Samuel S. Sharpe, Acting Chairman.

SUMMARY OF DECISION

1. SOLICITATION CANCELLATION.--

a. The regulation of the Minority Business Opportunity Commission ("MBOC") requiring that "[o]nce an agency has placed a contract in the sheltered market, it shall not be removed by the agency without the approval of the Commission" was violated by the MBOC in connection with the cancellation and removal of the invitation from the sheltered market and its reissuance in the open market for the reasons that (1) the MBOC commissioners did not affirmatively approve the removal of the invitation and (2) the MBOC Staff Director's approval of the invitation's removal was without a clear delegation of authority in the MBOC resolution to which attention was called to by the District.

b. Where conflict exists between the D.C. Procurement Regulations and the MBOC's regulations on the necessity for the procuring agency to first obtain the MBOC's approval before cancelling a sheltered market solicitation and resoliciting the

requirement in the open market, the conflict, in the interest of adjudicatory efficiency, should be resolved at the earliest practicable time by appropriate rulemaking.

2. JURISDICTION.--

a. Contrary to the District's contention, the Board, under the D.C. Procurement Practices Act ("PPA") (D.C. Code, § 1-1189.8(c) (1987 Replacement)) has clear authority to hear protests raising the procedural question of whether an alleged condition precedent contained in the MBOC's regulation to the proper removal of the invitation from the sheltered market was satisfied.

b. The Board does not have jurisdiction to consider the protester's allegation that the MBOC's actions relative to the removal of the invitation from the sheltered market violated the contested case hearing provisions of the D.C. Administrative Procedure Act ("DCAPA") because there is nothing in the PPA which can be fairly construed as empowering it to administer or enforce the DCAPA.

3. REMEDY.--Although the Board finds that the MBOC failed to comply with its regulation governing its approval of the removal of a solicitation from the sheltered market, it does not feel that its failure warrants the relief the protester requests (namely, cancellation of the open market procurement and issuance of a new invitation in the sheltered market or termination for the convenience of the District of any awarded contract) because (1) the circumstances resulting in the removal of the invitation from the sheltered market fell squarely within the MBOC's rule permitting it to approve the removal of a solicitation from the

sheltered market, (2) the protester did not give any plausible reason and the Board does not discern any which would suggest that if the MBOC had affirmatively acted on the removal information presented to it by the Staff Director, it might have disapproved the removal of the invitation from the sheltered market and (3) it is questionable whether the protester (who was determined to be nonresponsible in the predecessor sheltered market procurement) would have benefited from a cancellation of the open market invitation and a resolicitation of the requirement in the sheltered market given the relative short period (1 1/2 months) between the nonresponsibility determination and the issuance of the open market invitation and further considering that the protester did not challenge the nonresponsibility determination before this Board.

DECISION

D.L.H. Industries, Inc. ("DLH"), a minority business, protests the issuance of IFB No. 7392-AA-89-0-7-HT ("IFB") in the open market. See Protest of Solicitation filed on July 29, 1987. The IFB was issued by the Department of Administrative Services ("DAS") to procure bread products. See Agency Report, Exhibit A.

The facts which gave rise to DLH's protest are that prior to the issuance of the IFB, DAS placed in the sheltered market (for certified minority bidders only) a similar invitation, IFB No. 7045-AA-89-0-7-HT for bread and bakery products. See Agency Report, Exhibit C. Because DLH was the only minority firm to submit a bid in response to the sheltered market invitation and

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was found to be nonresponsive, DAS' Director determined that the invitation "must be cancelled" and "[t]he requirements for bread and bakery products will be resolicited in the open market." Agency Report, Exhibit F-2, paragraph 4. Facts Which Justify Cancellation. Based on this determination, DAS issued the IFB, as it did, in the open market. Agency Report at 1.

DLH essentially alleges that the issuance of the IFB on the open market was unlawful due to two procedural defects: (1) the removal of the predecessor invitation from the sheltered market was not approved by the commissioners of the Minority Business Opportunity Commission ("MBOC") as required by the MBOC's rule at 27 DCMR § 604.9 (June 1985) and (2) the removal of the invitation, if approved by the MBOC, was not in accordance with the contested case hearing requirements of the District of Columbia Administrative Procedure Act ("DCAPA"), D.C. Code, § 1-1509 (1981).

The District filed an agency report setting forth its disagreement on the merits with DLH's allegations. In addition, the District filed a motion to dismiss this protest.

The District's motion to dismiss will be addressed first. The District asserts that because "the Minority Contracting Act grants exclusive authority to the MBOC to review the plans of the contracting agencies to place contracts in the sheltered market . . . there is no basis for review by this Board of the procedures used by the MBOC in approving contracting agencies' decisions regarding advertising in the open or sheltered market." Motion to Dismiss Protest; or in the Alternative, Reply of the

District of Columbia at 2. The authorities cited for this assertion are Abstracts, Inc., 1 P.D. 106 (D.C. CAB 1987), Aceves Construction & Maintenance Company, 1 P.D. 50 (D.C. CAB 1987) and Southern International Corporation, 1 P.D. 30 (D.C. CAB 1987). DLH opposed the District's asserted ground for dismissal. In general, it contends that the District misinterprets the procurement law in the District of Columbia. See Protester's Comments on Motion to Dismiss Protest; or in the Alternative, Reply of the District of Columbia at 2 and 3.

In the Abstracts and Southern cases, the Board concluded that since the MBOC has conclusive authority under the Minority Contracting Act (D.C. Law 1-95, as amended, D.C. Code, § 1-1141, et seq. (1981)), the Board lacks jurisdiction to hear and decide protest complaints alleging error in certification actions taken by the MBOC. See Abstracts at 110-111 and Southern at 31-32.^{1/} Here, unlike in Abstracts and Southern, the Board is not in effect being asked to go behind an action or a determination falling in the exclusive province of the MBOC and pass judgment on its propriety. Rather, the question presented by DLH's protest is whether an alleged condition precedent in the MBOC's regulation to the proper removal of the invitation from the sheltered market and the reissuance of the requirement on the open market was satisfied.

^{1/}The District's reference to Aceves is not considered to be possibly relevant since it did not deal with the question of the Board's authority to review a certification action taken by the MBOC.

The District of Columbia Procurement Practices Act of 1985 ("PPA") mandates that the Board "decide whether the solicitation or award [being protested] was in accordance with the applicable law, regulations, and terms and conditions of the solicitation." D.C. Code, § 1-1189.8(c) (1987 Replacement). This provision plainly enough gives the Board authority to decide whether any applicable law or regulation was violated by the issuance of the IFB in the open market. Unquestionably, because of the minority contracting factor in this case, any minority contracting provisions in the law or regulations having a bearing on the solicitation process is as much a part of the applicable law and regulations as is the PPA and the District of Columbia Procurement Regulations ("DCPR"). Thus, on the basis of the foregoing discussion, the Board rejects the District's argument that it lacks jurisdiction to hear DLH's protest.

Having determined that the Board has jurisdiction in this case, it now proceeds to consider the merits of DLH's allegations. Section 604.9 begins, "Once an agency has placed a contract in the sheltered market, it shall not be removed by the agency without the approval of the Commission." The District states that information regarding the cancellation of the IFB and its issuance in the open market was presented by the MBOC staff to the commissioners during their executive sessions on July 15 and August 18, 1987. Agency Report at 6. The District, however, states in response to the Board's query, that the commissioners did not take any action on the information that was presented to

them.^{2/} See Response of the District of Columbia to Questions Presented by the Contract Appeals Board, Questions C.1, C.2 and C.3 and Answers C.1, C.2 and C.3.

That being the case, the Board reaches the District's defense that the MBOC's Staff Director approved the removal of the invitation from the sheltered market, and she was authorized to approve the removal in behalf of the commissioners by the resolution they entered into at their March 1986 meeting. See Agency Report at 5 and Motion to Dismiss Protest; or in the Alternative, Reply of the District of Columbia at 3 and 4. DLH contends that the commissioners cannot lawfully delegate to the Staff Director the authority to approve the removal of a solicitation from the sheltered market. Protester's Comments on Agency Report at 2 and 3. Assuming arguendo that the commissioners could lawfully delegate such authority, DLH contends that they did not do so in the resolution they passed in March 1986. Id. at 4 and 5.

After its preamble language, the resolution of March 1986 begins:

RESOLVED that the MBOC staff with the direction of the Staff Director shall assist the duly appointed Commissioners in performing their statutory functions as set forth in D.C. Code, Sec. 1-1149 (1981) by performing the following tasks and making appropriate action recommendations to the Commission.

(Emphasis added.) Paragraph (2) of the resolution sets forth the second task to be performed by the MBOC staff. It reads:

Reviewing the procurement plans of each agency of the District of Columbia government and determining

^{2/}No explanation was offered by the District as to why the commissioners did not act on the information presented to them.

which contracts shall be reserved for the Sheltered Market Program.

The District construes the two quoted provisions together "as authorizing the Staff Director to perform the task of approving or disapproving a decision by procuring officials to resolicit a cancelled sheltered market procurement in the open market." Response of the District of Columbia to Questions Presented by the Contract Appeals Board, Answer a.2. Whatever the exact meaning of the two provisions is when read together, the Board is of the view that the meaning advocated by the District does not coexist very well with the resolution's employment of the words "shall assist . . . by making appropriate action recommendations to the Commission."

In further support of its construction of the resolution, the District offered the affidavit of the MBOC chairman presiding at the time the resolution was passed. Response of the District of Columbia to Questions Presented by the Contract Appeals Board, Attachment 3. In his affidavit, the Chairman says:

1. I was the Chairman of the Minority Business Opportunity Commission (MBOC) from October 1980, to October 1987. The resolutions adopted by the MBOC on March 4, 1986, delegating administrative duties to the MBOC Staff Director were intended to give the Director the authority to manage the day-to-day operations of the MBOC in accordance with D.C. Law 1-95, as amended.
2. The MBOC interpretation of paragraphs (2) and (6)^{3/} of the attached resolution was that the Director correspond with contracting agencies on

^{3/}Paragraph (6) reads:

Reviewing bids in the sheltered market and authorizing agencies to refuse to let a contract where it determined that bids for a particular contract are excessive.

Minority Business Enterprises (MBEs) certified to submit bids/proposals on contracts. This interpretation includes the notion that if there are no certified MBEs to perform on a contract that the Director would concur with the contracting agency not to place a contract into the Sheltered Market.

3. These resolutions were in effect at the time Maudine R. Cooper, Executive Director, communicated her verbal approval to Bruce Marshall on the determination of the Department of Administrative Services to solicit in the open market for bids on the contract previously held by DLH Industries.

Irrespective of whatever deference the Board would be obliged to give an interpretive statement of the MBOC Chairman, the Board agrees with DLH's view that the Chairman's affidavit "does not expressly state that the Commission delegated to its Staff Director the authority to approve agency removal of a contract from the sheltered market." Protester's Comments on the District of Columbia's Response to Questions Presented by the Contract Appeals Board at 3. The Board is therefore left with a literal reading of the resolution which, in the context of this case, means that removals of solicitations from the sheltered market are to be submitted by the Staff Director to the commissioners with an appropriate action recommendation.

The District advances the argument that "MBOC approval is not required prior to placing a cancelled sheltered market solicitation in the open market." Response of the District of Columbia to Questions Presented by the Contract Appeals Board, Answer e. In connection with this argument, the District calls attention to the following sections of the DCPR (which currently appear in 35 DCR, Part 2 (Feb. 26, 1988)):

1102.1. If the contracting officer cancels a sheltered market solicitation for any of the reasons set forth in chapters 15, 16 or 17, the contracting officer shall provide a copy of the determination to the MBOC in addition to complying with the reporting requirements of this title.

1102.2. After the contracting officer cancels a sheltered market solicitation, the contracting officer may resolicit in the open market if the service, supply, or construction is still required.

The District, without citing any authority, states that

[w]hile there is an apparent inconsistency between the above sections of the procurement regulations and MBOC regulations at 27 DCMR sec. 604.9, which call for MBOC approval of an agency's removal of a contract from the sheltered market, it appears that the procurement regulations control. They were promulgated and approved by the D.C. City Council after the MBOC regulations and repealed by implication, any inconsistent provision in the earlier MBOC regulations.

Id.

The Board thinks that whatever repealing effect the DCPR sections may have had with respect to the MBOC's regulations, they obviously could not have repealed them retroactively to the time prior to the cancellation of the sheltered market invitation and its removal from the sheltered market. See 73 C.J.S. Prospective or Retroactive Operation § 98. It is quite clear from a comparative reading of the cited DCPR sections and MBOC regulations (which appear to still be in effect)^{4/} that they are in conflict with one another on the necessity for the procuring agency to first obtain the MBOC's approval before cancelling a

^{4/} See Office of Documents & Administrative Issuances Monthly Update of Amendments to the D.C. Municipal Regulations As of June 1988, 27 DCR 5146, 5161 (Jul. 1, 1988).

sheltered market solicitation and resoliciting the requirement in the open market. In the interest of adjudicatory efficiency, this conflict should be resolved at the earliest practicable time by appropriate rulemaking.

DLH alleges that the DCAPA applies to the MBOC. Thus, it argues that even if the MBOC had approved the removal of the sheltered market invitation from the sheltered market, the decision is void and of no effect because DLH was not afforded a contested case hearing prior to the removal as it asserts the DCAPA requires. The District provided extensive argument as to why DLH's argument should not prevail. The short answer to DLH's argument is that the Board does not have jurisdiction to consider allegations of DCAPA violations because there is nothing in the PPA which empowers it to administer or enforce the DCAPA. Therefore to the extent that DLH wishes to seek vindication of any perceived violations of the DCAPA, it should initiate other appropriate action.

In sum, the Board finds that the MBOC failed to comply with its regulation (§ 604.9) in connection with the removal of the invitation from the sheltered market for the reasons that (1) the commissioners did not affirmatively approve the removal of the invitation and (2) the Staff Director's approval of the invitation's removal was without a clear delegation of authority in the commissioners' resolution of March 1986. Although the Board concludes that the MBOC did not comply with its regulation in dealing with the removal of the invitation from the sheltered market, it does not feel that its failure warrants the relief DLH

requests (namely, cancellation of the procurement and issuance of a new solicitation in the sheltered market or termination of any awarded contract for the convenience of the District) even assuming that the relief could be effectively granted at this time. The reasons for this view are explained in the ensuing discussion.

Section 604.9 states that the MBOC's approval to remove a solicitation from the sheltered market shall generally be given only upon a showing of the following:

- (b) That at least one attempt to solicit bids for the contract in the sheltered market has failed to produce an acceptable bid.

The issuance of IFB No. 7045-AA-89-0-7-HT evidences a bona fide attempt was made to solicit an acceptable bid in the sheltered market. This attempt, as already stated, failed for the reason that the sole bidder (DLH) was determined to be nonresponsive. Although the quoted ground for approving the removal of a solicitation from the sheltered market may have been met by the facts in a particular case, § 604.9(b) does not automatically require that the commissioners approve the removal. Thus, the Board cannot conclusively presume that if the commissioners had acted on the information presented to them by the Staff Director, they would have approved the invitation's removal. Nonetheless, it is observed that DLH has not given any plausible reason and the Board does not discern any which would suggest that if the commissioners had affirmatively acted, they might have disapproved the removal of the invitation. Moreover, given the relatively short period between the District's final

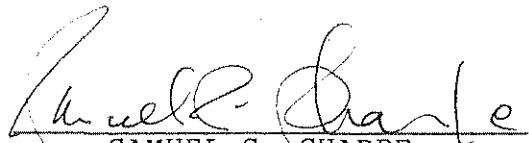
determination that DLH was nonresponsible relative to the sheltered market procurement and the issuance of the IFB (approximately 1 1/2 months), it is questionable whether DLH would receive any benefit from a cancellation of the IFB and the reissuance of an invitation in the sheltered market. This is particularly so in view of the fact that DLH did not challenge the nonresponsibility determination before this Board.

Accordingly, it is hereby

ORDERED that

1. The District's motion to dismiss the protest is denied.
2. The protest is denied.

July 19, 1988
DATE


SAMUEL S. SHARPE
Acting Chairman

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