

GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

PROTEST OF:

CAPITOL PAVING OF D.C., INC.)	
)	CAB No. P-0741
Under IFB No. POKA-2006-B-0090-LJ)	

For the Protester: Douglas A. Datt, Esq. For the District of Columbia Government: Howard Schwartz, Esq., Senior Assistant Attorney General, and Talia S. Cohen, Esq., Assistant Attorney General.

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

OPINION

LexisNexis Filing ID 12877636

Capitol Paving of D.C., Inc., has protested the District's solicitation for joint seal, slurry seal, and bituminous surface treatment for various roadways in the District of Columbia, arguing that the solicitation contains inconsistencies regarding how bids will be evaluated under the small, local, and disadvantaged business enterprise ("SLDBE") preference program as authorized by the Small, Local, and Disadvantaged Business Enterprise Development and Assistance Act of 2005, D.C. Law 16-33 ("SLDBEDA Act"). Capitol Paving argues that while Section M of the solicitation defining the evaluation criteria refers to preferences for "longtime resident businesses" ("LRBs") and resident-owned business enterprises, the "LSDBE Certification Package" found in Attachment J.7 of the solicitation does not mention either preference. In addition, the preference percentage reductions found in section M and Attachment J.7 also differ. Capitol Paving further argues that no award may be made based on a LRB preference because (1) there are no regulations implementing the LRB certification preference authorized by the SLDBEDA Act, and (2) the LRB certification as a matter of law cannot be applicable to any contractor until the year 2012. Apparently because Capitol Paving currently does not qualify for the 10 percent LRB certification preference but one of its competitors has recently been certified as a LRB (Fort Myer Construction), Capitol Paving argues that employing the LRB preference absent any waiver provision would eliminate competition and thus cannot be used in bid evaluations.

We conclude that the first protest ground relating to the inconsistency between Solicitation Section M and Attachment J.7 has been rendered moot because the District issued an amendment removing Attachment J.7. Concerning the other protest grounds involving legal arguments challenging the use of any LRB preferences in District procurements, we have recently rejected essentially the same arguments in *Capitol Paving of D.C., Inc.*, CAB No. P-0736, Oct. 12, 2006. Accordingly, we dismiss the protest in part as moot and deny the remaining protest grounds.

BACKGROUND

On July 28, 2006, the Office of Contracting and Procurement ("OCP") issued in the open market IFB No. POKA-2006-B-0090-LJ with a bid opening date of August 31, 2006. OCP issued the IFB on behalf of the District of Columbia Department of Transportation ("DDOT"), for a contractor to provide

joint seal, slurry seal, and bituminous surface treatment in order to repair cracks in various roadways in the District. (Agency Report (“AR”) Ex. 1). Section J of the IFB lists seven attachments including Attachment J.7, the “LSDBE Certification Package.” In accordance with the 2005 SLDBEDA Act, Section M of the IFB provides preferences for small, local, disadvantaged, resident-owned, longtime resident, and enterprise zone businesses. Specifically, Section M provides, in accordance with the SLDBEDA Act, that a ten percent reduction is allowed for a certified longtime resident business. Section M, entitled “Evaluation Factors”, contains the following relevant provisions:

M.1.1 Preferences for Local Businesses, Disadvantaged Businesses, Resident-owned Businesses, Small Businesses, Longtime Resident Businesses, Longtime Resident Businesses, or Local Businesses with Principal Offices Located in an Enterprise Zone

Under the provisions of the “Small, Local, and Disadvantaged Business Enterprise Development and Assistance Act of 2005” (the Act), Title II, Subtitle N, of the “Fiscal Year 2006 Budget Support Act of 2005”, D.C. Law 16-33, effective October 20, 2005, the District shall apply preferences in evaluating bids or proposals from businesses that are small, local, disadvantaged, resident-owned, longtime resident, or local with a principal office located in an enterprise zone of the District of Columbia.

M.1 General Preferences

For evaluation purposes, the allowable preferences under the Act for this procurement are as follows:

. . . .

M.1.1.3 Ten percent reduction in the bid price or the addition of ten points on a 100-point scale for a longtime resident business (LRB) certified by the SLBOC or the DSLBD, as applicable

(AR Ex. 1). Attachment J.7, the solicitation’s LSDBE Certification Package, contains information and forms regarding the District’s preference program. (Protest, Ex. 2). The problem with the package is that it appears to be seriously outdated, with some of the documents bearing revision dates in 1999, and none of the documents reflecting the major statutory changes made by the 2005 SLDBEDA Act to the preference program. On August 15, 2006, Capitol Paving filed the instant protest, pointing out that there is no reference in Attachment J.7 to a certification for resident-owned or longtime resident businesses.

On August 21, 2006, OCP issued Amendment No. 2, which deleted Attachment J.7 of the IFB. (AR Ex. 1). On August 29, 2006, OCP issued Amendment 3, which extended the bid opening date to January 10, 2007. The District filed its Agency Report on September 5, Capitol Paving filed comments on September 11, and the District filed a reply on September 19, 2006.

DISCUSSION

We exercise jurisdiction pursuant to D.C. Code § 2-309.03(a)(1).

In response to Capitol Paving's first protest ground alleging inconsistencies between Section M and Attachment J.7, the District issued Amendment No. 2 deleting in its entirety Attachment J.7 which contained the outdated LSDBE preference program information package. Capitol Paving nevertheless urges that this amendment does not moot the first protest ground because removing Attachment J.7 means that the solicitation no longer provides preference program information and certification and waiver application forms to prospective bidders. Capitol Paving's argument is without merit. The package is no more than an informational aid to bidders and its elimination does not render the solicitation defective in any respect. Section M provides the evaluation criteria regarding the District's preference program and that content is derived directly from the SLDBEDA Act. Bidders can obtain information and forms from the Small, Local Business Opportunity Commission ("SLBOC") or its supporting Department of Small and Local Business Development. Accordingly, we dismiss as moot Capitol Paving's first protest ground.

Capitol Paving next argues that no award may be made under the challenged solicitation based on a LRB preference because (1) there are no regulations implementing the LRB certification preference authorized by the SLDBEDA Act, and (2) the LRB certification as a matter of law cannot be applicable to any contractor until the year 2012. Apparently because Capitol Paving currently does not qualify for the 10 percent LRB certification preference but one of its competitors has recently been certified as an LRB, Capitol Paving argues that applying the LRB preference absent any waiver provision would eliminate competition and thus cannot be used in this procurement.

We recently rejected similar arguments in *Capitol Paving of D.C., Inc.*, CAB No. P-0736, Oct. 12, 2006, where Capitol Paving challenged OCP's applying a 10 percent preference to Fort Myer Construction based on a longtime resident business certification issued by the SLBOC to Fort Myer. We sustained the contracting officer's determination to evaluate Fort Myer's bid using the LRB preference. Although we certainly look forward to the Mayor's issuance of revised regulations to implement the SLDBEDA Act and to replace various regulations that are obsolete, we cannot conclude that the current solicitation, in providing preferences pursuant to the SLDBEDA Act, violates the law. Accordingly, we deny Capitol Paving's other grounds for protest.

SO ORDERED.

DATED: November 9, 2006

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

CONCURRING:

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