

GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

PROTEST OF:

D.L.H. INDUSTRIES, INC.

UNDER IFB NO. 7392-AA-89-0-7-HT

RECEIVED
FEB 18 1988
Government of the District of Columbia
CONTRACT APPEALS BOARD
Long

MOTION TO DISMISS PROTEST; OR IN THE ALTERNATIVE,
REPLY OF THE DISTRICT OF COLUMBIA

Pursuant to 27 DCMR 107.7, the respondent, District of Columbia (the District), respectfully moves this Board to dismiss the above-referenced case for lack of jurisdiction. In the alternative, the District respectfully submits the following Reply to the Comments on the Agency Report filed by the protester, DLH Industries (DLH). This Reply supplements the Agency Report submitted by the District in this protest.

MOTION TO DISMISS

In its Comments, DLH seeks to have the Board review the legality of the procedures used by MBOC to approve the DAS decision to resolicit a cancelled sheltered market procurement in the open market. It is the position of the District that the MBOC has exclusive authority to approve contracting agencies' decisions regarding advertising in the open or the sheltered

market and this Board does not have jurisdiction to hear matters involving the procedures used by the MBOC to exercise that authority.

Where MBOC actions to certify companies as minority business enterprises (MBEs) are concerned, this Board has held that the bid protest procedure is not the proper vehicle for seeking relief since the MBOC has exclusive authority under the Minority Contracting Act to decide matters regarding certification. See Protest of Abstracts, Inc., 1 P.D. 106 (D.C. CAB 1987); Aceves Construction & Maintenance Co., 1 P.D. 50 (D.C. CAB 1987); and Southern International Corporation, 1 P.D. 30 (D.C. CAB 1987). In the same manner, the Minority Contracting Act grants exclusive authority to the MBOC to review the plans of contracting agencies to place contracts in the sheltered market. See D.C. Code section 1-1149 (1987 Repl. Vol.). Therefore, 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 the sheltered market.

Additionally, if, as DLH argues, the MBOC's approval of the DAS decision amounted to a contested case within the meaning of the APA, the matter would not properly be before this Board. The judicial review section of the APA provides for exclusive jurisdiction over contested cases in the D.C. Court of Appeals. See D.C. Code Section 1-1510; D.C. v. Douglass, 452 A.2d 329 (D.C. App. 1982) and Brenneman Assoc., Inc. v. D.C., 466 A.2d 459 (D.C. App. 1983).

Based on the above-stated arguments, the District respectfully moves the Board to dismiss this protest for lack of jurisdiction.

REPLY

Even if the Board determines it has jurisdiction to hear this protest, the legality of the MBOC's procedures in approving the contracting agency's actions is not relevant to this procurement. As explained in the District's Agency Report, the DAS contracting officer was given MBOC approval by the MBOC Staff Director of the decision to procure in the open market as required by MBOC regulations at 27 DCMR 604.9. The contracting officer was entitled to rely upon the representations of the Staff Director that approval was being given on behalf of the MBOC. He was not required to look behind the representations of the MBOC Staff Director. Any protest of the District's actions in placing this procurement in the open market should focus on the narrow issue of whether the contracting agency acted in compliance with the law.

The District's position is that issues involving the propriety of MBOC procedures are not relevant to the Board's decisionmaking in this case since they concern matters involving the activities of a separate District agency which were not within the purview of the DAS procuring official. The DAS contracting officer had no influence on the MBOC's delegation of decisionmaking to its Staff Director. Nor was he involved in

internal MBOC procedures in obtaining ratification of the Staff Director's decision, documenting its decision or maintaining records. Further, the issue of whether DLH was entitled to a hearing by the MBOC under the contested case provisions of the District's Administrative Procedures Act (APA) or under the Fifth Amendment of the U.S. Constitution would also not be relevant to the determination of whether DAS acting properly in resoliciting bread and bakery products in the open market.

In the event that the Board determines that these matters are properly before it, the District hereinafter addresses several specific issues raised in DLH's comments:

On Page 3 of its Comments, DLH argues that the procedural requirements of the Minority Contracting Act and the APA do not allow the Commissioners of the MBOC to delegate authority to the MBOC Staff Director to approve a contracting officer's decision to resolicit a procurement in the open market. However, DLH presents no legal authority to support its conclusions regarding ministerial and discretionary duties. Moreover, the Staff Director's approval of the DAS decision was not a discretionary duty since the MBOC regulations, at 27 DCMR 604.9, set standards by which such approval would generally be granted.

On page 4 of its comments, DLH alleges that the MBOC Resolution, at Exhibit H of the District's Agency Report, does not actually delegate authority to the Staff Director to approve or disapprove a contracting agency's decisions regarding resoliciting a formerly sheltered market procurement in the open market. DLH is relying upon its own interpretation of the text

of the Resolution. The legal principle applicable in this case, which is often used by the courts in review of administrative actions, is that great deference should be given to an agency's own interpretation of its pronouncements. See Allen v. Bergland, 661 F. 2d 1001 (4th Cir. 1981), American Airlines, Inc. v. Sec. of Labor, 578 F.2d 38 (2d Cir. 1978) and Charles v. Krauss Co., 572 F. 2d 544 (5th Cir. 1978), reh. denied 575 F. 2d 881. Accordingly, the Board should give due consideration to the MBOC's interpretation of its own Resolution, which is that it authorizes the Staff Director to approve or disapprove a contracting agency's decision regarding resoliciting a procurement in the open or sheltered market.

DLH's Comments erroneously assume that the Staff Director reviewed the actual bid that DLH submitted to DAS in this solicitation to determine whether it was excessive, as authorized by section 6 of the Resolution. However, in approving the DAS decision, the MBOC Staff Director relied upon section 2 of the Resolution, which authorizes the Staff Director to review the procurement plans of District agencies and determine which contracts are to be reserved for the sheltered market program. DAS did not allege that DLH's bid was excessive and did not submit the documentation required by MBOC regulations at 27 DCMR 604.10 to support such an allegation. There was no need to do so in this case since DLH's bid had already been rejected by the DAS contracting officer as being nonresponsive and the solicitation had been cancelled. The MBOC was engaged in its own review of

DLH's certification as an MBE¹ during this time due to complaints it had received about the company but the MBOC did not review the bid submitted by DLH in response to this IFB and did not determine whether it was excessive.

On page 7 of its Comments, DLH states that the Commissioners of the MBOC failed to ratify the Staff Director's approval of the DAS decision to advertise in the open market. The minutes of the August, 1987 MBOC meeting which DLH attached to its Comments indicate the entire Commission was informed of the decision and DLH's protest in this matter. Express approval of the Staff Director's approval of the DAS decision was not required. The fact that the Commissioners were made aware of the matter and raised no objections indicates approval of the Staff Director's course of action.

DLH's Comments also allege that the Minority Contracting Act grants a property interest in the sheltered market program to DLH as a minority business enterprises. First, DLH had no property interest in having this procurement placed the sheltered market since it had no property interest in award of this contract. The D.C. Court of Appeals has held that unsuccessful bidders on a contract have no property interest in that contract for which due

¹ The Minority Contracting Act authorizes revocation of certifications and grants the right to a contested hearing in those proceedings. See D.C. Code section 1-1148 (c). MBOC regulations set forth procedures for periodic compliance reviews of certified MBE's for which informal preliminary hearings may be held as well as formal trial-type hearing procedures. See 27 DCMR sections 705 -708.

process requires a hearing prior to contract award. See Network Technical Services v. D. C. Data et al., 464 A. 2d 133 (D.C. App. 1983).

Further, The District's sheltered market program does not give DLH or other MBE's a right to have a procurement placed in the sheltered market since it does not require that contracting agencies place any particular procurement in either market, either initially or upon resolicitation. The sheltered market program, as set forth in Minority Contracting Act and MBOC regulations, only sets goals for MBE participation in District contracting and requires that contracting agencies establish programs for allocating a percentage of its yearly number of contracts for procurement in the sheltered market. See D.C. Code sections 1-1146 and 1-1147 (1987 Repl. Vol.) and 27 DCMR Sections 602 & 604.

Moreover, DLH was not deprived of an opportunity to participate in the District's sheltered market program by the DAS decision to resolicit this procurement in the open market. DLH's certification as an MBE was not affected by that determination so it could continue to submit bids on sheltered market solicitations.

In arguing that it has a liberty interest for which due process requires a full hearing, DLH's Comments allege that MBOC approval of the DAS decision was based on an MBOC determination regarding DLH's capability of performing the contract or on the acceptability of DLH's bid. To the contrary, as stated above, the MBOC did not review DLH's bid submitted to DAS under this

solicitation. The MBOC did not make a determination regarding DLH's capability to perform this contract. Rather, DLH is referring to the concept of "responsibility" under District law.² DLH's inability to perform, i.e. nonresponsibility, was determined by the DAS contracting officer during the normal solicitation review process. See Exhibit E to the District's Agency Report. The DAS contracting officer was required to reject DLH's bid since a contract can only be awarded to a responsible bidder. See D.C. Code Sections 1-1183.3(e) and 1-1183.4(f).

MBOC neither participated in nor reviewed the decision of the DAS contracting officer regarding DLH's ability to perform the contract. After the DAS contracting officer found that DLH, the only bidder, was not responsible, he cancelled the solicitation. The MBOC's involvement came after those decisions were made and was limited to reviewing the DAS decision to resolicit the procurement in the open market. There was no factfinding to be made by MBOC in this matter so no testimony of witnesses or other presentations of evidence were necessary.

² The Procurement Practices Act at section 1-1181.7 (40) defines a responsible bidder or offeror as one who has the capability to perform the contract requirements. DAS procurement procedures require that bidders affirmatively demonstrate responsibility to DAS contracting officials. See Materials Management Manual section 2641.11 (B) (8). DLH was unable to do so.

Therefore, a hearing was not required.

Based upon the above, the District respectfully requests the Board to deny this bid protest.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply of the District of Columbia was mailed, first class, postage prepaid, on this 16th day of February, 1988 to the following:

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