

PROTEST OF:

HORTON & BARBER CONSTRUCTION SERVICES, LLC)
) CAB No. P-0752
 Under IFB No. DCHA-2007-B-0002)

For the Protester: Latif Doman, Esq., Doman Davis LLP. 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.

Filing ID 15020818

BACKGROUND

On January 22, 2007, the Office of Contracting and Procurement (“OCP”) issued in the open market (with a 35 percent set-aside for LSDBE subcontracting) IFB No. DCHA-2007-B-0002, on behalf of the Department of Parks and Recreation (“DPR”), for a contractor to provide comprehensive landscape maintenance and management services for approximately 450 acres of land at 72 recreational centers and facilities in Wards 1 through 8. (Agency Report (“AR”) Ex. 1). Bidders were to bid fixed-unit prices that would result in a requirements contract with total amounts based on estimated quantities of work. (AR Ex. 1). The bid opening date was February 5, 2007. Six bidders responded with bids and OCP performed an initial bid tabulation based on an evaluation of bid prices that was later determined to be erroneous. The initial bid tabulation showed the following order of evaluated prices from lowest to highest: Horton & Barber, IIU

Consulting, Community Bridge, Inc., RBK Landscaping Construction, KC Home Improvement, and Turf Center Lawns. (AR at 3; AR Ex. 5). The OCP contract specialist and the contracting officer's technical representative made site visits to the facilities of Horton & Barber, IIU Consulting, and Community Bridge. (AR Ex. 6).

During the evening of February 8, 2007, OCP faxed Horton & Barber a letter requesting responsibility data by noon on February 9. (AR Ex. 11). The contracting officer requested financial data consisting of the following "certified" documents: balance sheet, most recent income statement, cash flow statement (and any additional notes, explanations, or disclosures relating to the financial statements provided), auditor or reviewer report (if the financial statements provided had been audited or reviewed), written evidence that the company is being given favorable consideration for a surety bond, financial rating from Dun and Bradstreet for the last two years, and a list of any back taxes owed. (AR Ex. 11). The letter also requested current and past production data including a listing of current contracts similar in size, scope, and dollar value to the services to be provided under the solicitation; employee/staffing data; data reflecting tools, equipment, vehicles, and facilities; written statements or commitments concerning financial assistance and subcontracting arrangements; insurance; and analysis of operational procedures. (*Id.*).

On February 9, Horton & Barber responded to the request by furnishing a package consisting of an undated cover letter and approximately 100 pages. (AR Ex. 12). The cover letter merely states: "[Horton & Barber] inadvertently did not include our Tax, First source, and EEO compliance information in our bid for Contract DCHA-B-2007-0002. Please find the enclosed documents." (*Id.*). In another undated cover letter, which Horton & Barber says accompanied the responsibility package, Mr. Barber states: "Horton & Barber . . . is please[d] to submit our responsibility information to the District [A]ttached is [our] response to the information received via fax at 7:58 p.m. February 8 Please [call] my office . . . if there [are] any further questions or information needed." (Response to Agency Report, Ex. D). The responsibility documents submitted by Horton & Barber do not seem to be well organized, lacking an index and only partial indications of which documents were meant to respond to the various categories of responsibility data requested by the contracting officer. The Horton & Barber documentation is comprised of the following: a first source employment agreement, a 1-page employment plan that is for the most part blank, a tax certification affidavit, EEO forms, employment data form, subcontract summary form, partial corporate and financial information, information relating to tools, equipment, vehicles, and facilities, current and past contracts, subcontract information, employee/staffing data, written commitments concerning financial assistance, an analysis of operational procedures, insurance, and information regarding other contracts.

Horton & Barber's financial documentation consisted of 3 pages: a 1-page profit and loss statement for the year ended December 31, 2006, a 1-page balance sheet for the year ended December 31, 2005, and a 1-page statement of earnings for the year ended December 31, 2005. Although the latter two documents contain a note referring to an "independent accountant's report and notes to compiled financial statements", there are no such reports, notes, or other statements in the package submitted by Horton & Barber. There is no reliable information indicating that these three financial documents in the record were prepared by an independent

accountant. The profit and loss statement for 2006 shows net income of \$230,678 on gross revenue of slightly more than \$3,300,000. The approximate \$3,100,000 in expenses included expenses of almost \$846,000 for "trucking" and \$756,000 for "dumping." The 2005 "statement of earnings" shows net income before taxes of \$276,333, but a net increase to retained earnings of less than \$100,000, on gross 2005 revenue of \$3,195,000. Expenses include \$657,000 in "trucking" and nearly \$614,000 for "consultants." (AR Ex. 12).

Regarding employees, there is a document entitled "Employment Data" which shows 4 "officials and managers", 1 "office and clerical", 2 "craftsman (skilled)", 5 "operative (semi-skilled)", for a total of 12 employees. On a subsequent page, entitled "Projected Goals and Timetable for Future Hiring", hiring of 10 craftsmen and 2 laborers is indicated. Under the category for "tools/equipment, vehicles, and facilities", we find reference to: a November 2006 rental agreement for a half acre lot in Upper Marlboro, 5 illegible certificates of title for vehicles, and a 2-page document dated January 31, 2007, apparently invoicing Horton & Barber for approximately \$50,000 for certain pieces of equipment.

The contracting officer provides the following summary of two site visits of Horton & Barber's facilities conducted by the contract specialist and contracting officer technical representative:

DPR and OCP visited two sites for Horton and Barber. There were no fax machines, phone lines or computers at the sites visited. The first site was a secluded and vacant lot void of any facilities or improvements other than a muddy, gravel lot. The contractor had (3) pickup trucks on site and an enclosed trailer attached to one of them. None of the trucks had signage. DPR/OCP observed that there was no building to keep the equipment out of the elements and it appeared as if the site had been created recently, as there were new border markers staking out the property. There were several ride-on mowers, but upon closer observation, the mileage on the odometers was high. Horton and Barber had no "zero-turn" and walk-behind mowers, one backpack blower and three "weed-eaters."

On the second site visited, the observation team members observed several parked passenger buses, none of which appeared to be in operating condition. The team members believed the site to be a junkyard. There was no signage that identified the name and type of business.

At the site, there was one trailer with several walk behinds mowers. The mowers appeared to be in an advanced age. DPR/OCP only saw one "weed-eater". This equipment, assuming it ran at all, was adequate for one crew. Based on their site visit, DPR/OCP concluded that the equipment . . . that was shown was not adequate to provide the services required for this IFB.

(AR Ex. 6). On February 21, 2007, the contracting officer determined Horton & Barber to be nonresponsive. (AR Ex. 7). The determination provides in relevant part:

1. Lack of Financial Capability - Balance Sheet, Income Statement, Profit or Loss Statements, Dun & Bradstreet Business Reports, and other documentation of financial capability.

The requested information was analyzed by the OCP Cost Price Analyst. Based on the Financial Statement Analyses dated 02/12/07, attached to this D&F, the Contracting Officer determined that Horton and Barber does not have the financial capability for a project of this magnitude.

. . . .

5. Organizational and Operational Experience - Contractor's time in business and experience with similar (size and dollar value) performance requirements. Based on the information submitted the Contracting Officer determined that Horton and [Barber has] had no similar size projects within the last three years.

. . . .

7. Production Equipment, Supplies, and Facilities – Government estimate provided by DPR with consideration for any agreements providing the Contractor the ability to access the needed equipment or supplies. . . . The Contracting Officer directed the Contract Specialist and the COTR to make a site visit of the three lowest bidding vendors. The site visit, which is further detailed below, showed that Horton and Barber have insufficient equipment at their sites to service this contract. An inspection of the Horton and Barber sites by the Contract Specialist and the COTR found that they did not have adequate equipment, as specified by DPR in the specification list shown below, to perform the services required in this contract. . . .

8. Evidence of Obtaining Performance Bond - All bidders were asked to obtain a performance Bond. Horton and Barber submitted a letter from Infinity Surety stating that a Bond could be obtained for Landscaping (Design, Fertilizing and Planting), but not for grounds maintenance or tree trimming services. Based on this information the Contracting Officer determined that Horton and Barber could not comply with this requirement.

In the business clearance memorandum, the contracting officer summarized the nonresponsibility determination as follows:

Based on the site visits and the financial statement analyses, it was determined that Horton and Barber failed to satisfactorily meet the requirements of the solicitation for the following reasons:

Horton and Barber does not have sufficient equipment to perform the landscaping requirements of the contract and needs the assistance from a subcontractor to do so. However, their subcontracting plan, as submitted, is not responsive to the requirements of the IFB and does not adequately address these issues.

Horton and Barber identified a specific area on a vacant lot as the space that would be utilized for their equipment, rather than an existing, stocked and dedicated facility.

OCP asked Horton and Barber to provide evidence of being eligible to obtain a performance Bond. They submitted a letter from Infinity Surety stating that a Bond could be obtained for Landscaping (Design, Fertilizing and Planting) but not for grounds maintenance or tree trimming services - as specified in the IFB.

The OCP Cost Price Analyst analyzed Horton and Barber's financial statements. H&B provided a profit and loss statement dated December 31, 2006 and a balance sheet for the year ending on December 31, 2005. A review of the 2005 Balance Sheet (which is outdated) revealed only \$18,617 in cash.

Staffing levels did not appear to be sufficient to fulfill the requirements of the contract.

Horton and Barber submitted the lowest bid but price but it is not feasible or reasonable when compared to the government estimate and the other bidders' pricing. . . .

(AR Ex. 6). On February 21, 2007, by a Determination and Finding for Contractor Responsibility, the contracting officer determined Community Bridge a responsible bidder. (AR Ex. 8).

On March 5, 2007, Horton & Barber filed the instant protest challenging the District's determination of nonresponsibility. By a March 15, 2007 determination and findings to proceed with award, OCP determined that it was in the best interest of the District to proceed with award of the contract while the protest is pending. On March 19, 2007, the District awarded the landscape and maintenance contract, Contract No. DCHA-2007-C-0002, to Community Bridge.

On March 26, 2007, the District filed its Agency Report, arguing in support of the nonresponsibility determination that Horton & Barber did not have the financial capability for a project of this size, did not meet DPR recommended staffing levels, did not provide the District with three references of work of similar size and scope, did not have the necessary equipment to perform the contract, and failed to meet the mandatory 35 percent set-aside for LSDBE subcontracting as required by the IFB.

On or about March 30, 2007, OCP discovered that section B, CLIN 3, of the solicitation contained an incomplete format for calculating the total estimated amount of the bid extensions. OCP did not discover the problem until March 30, 2007. Solicitation section B, CLIN 3, grass cutting, reads as follows:

Turf Management and Maintenance Services As Described in C.3.2 through C.3.2.4	UNIT Per acre	PRICE PER UNIT \$_____	ESTIMATED QUANTITY 450 Acres	TOTAL ESTIMATED AMOUNT \$_____
--	----------------------	-------------------------------	-------------------------------------	---------------------------------------

From the table set forth above, a bidder must bid a price per acre and the acre price would then be multiplied by 450 acres for the total estimated amount of CLIN 3. In initially tabulating the bids for CLIN 3, OCP used the price for performing *one cut* of the 450 acres and compared the total of all CLINS for the base and option years to establish the lowest to the highest bid prices. However, on or about March 30, 2007, OCP discovered that the correct method of establishing the lowest to the highest bid prices would require OCP to “extend” each total bid for CLIN 3 by the estimated number of cuts for the first year of the contract (20 cuts), which would require OCP to multiply the total amount for cutting 450 acres by the estimated 20 cuts for the first year of the contract and recalculate the option years accordingly. When OCP revised the bid tabulation based on 20 cuts, the order of the lowest to the highest bidders changed, but Horton & Barber remained the lowest priced bidder. (District’s April 20, 2007 Supplement to the Agency Report and Reply to Horton & Barber’s Response to the Agency Report, at 3-4; AR Ex. 13). The corrected bid prices and evaluated prices for the six bidders are as follows:

Bidder	Bid Price for Base Year and Four Option Years (Estimated Amounts)	Evaluated Bid Price
1. Horton & Barber	\$7,794,019.50	\$6,858,737.16
2. IIU Consulting	\$10,217,403.85	\$9,359,141.93
3. RBK Landscaping Construction	\$11,771,969.58	\$10,359,333.23
4. Turf Center Lawns	\$12,200,900.00	\$12,200,900.00
5. Community Bridge	\$13,385,668.60	\$12,342,925.02
6. KC Home Improvement	\$15,119,490.00	\$14,907,817.14

(AR Ex. 13). The contracting officer reevaluated the remaining order of bidders, and ultimately concluded that the three low bidders, including Horton & Barber, were nonresponsible, while the fourth low bidder withdrew its bid, leaving Community Bridge, the awardee, as the lowest

responsible bidder. (District's Supplement to the Agency Report; District's Agency Report in CAB No. P-0753 (RBK Landscaping Protest)).

DISCUSSION

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

Horton & Barber asserts that it was unreasonable for the contracting officer to require it to respond with responsibility data within 17 hours (*i.e.*, February 8 at about 7:30 p.m. to February 9 at 12 noon). (Response to Agency Report, at 2-3). The District replies that Horton & Barber did not object to the expedited response time and the contracting officer acted reasonably in basing her nonresponsibility determination on the data actually provided by Horton & Barber. We see no basis for setting aside the nonresponsibility determination. Horton & Barber made no objection to the response time – nor requested additional time to respond – and thus the contracting officer could properly assume that the contractor had no additional information it wished to provide. If Horton & Barber had asked for more time, there is no reason to believe that the contracting officer would not have allowed Horton & Barber to supplement its response in light of the short request time.

Horton & Barber argues that it provided financial data showing solvency and cash reserves. We sustain the contracting officer's determination that Horton & Barber did not demonstrate adequate financial capacity to perform the contract. The financial statements were not current and complete, rendering it impossible for the contracting officer to have a reasonable understanding of the company's financial position. For a contract of the size at issue here, the contracting officer reasonably doubted the company's ability to finance the significant work required by the solicitation.

Horton & Barber also complains that the contracting officer used "secret criteria" in rendering the nonresponsibility determination and should not have found it nonresponsible with regard to bonding, equipment, facilities, and staffing capacity. We conclude that Horton & Barber has not demonstrated that the contracting officer violated law or the terms of the solicitation. The contracting officer properly analyzed the factors for making a determination on responsibility and we find a reasonable basis in the record provided by Horton & Barber and the contracting agency for the nonresponsibility determination. Horton & Barber has not rebutted the showing that it had insufficient and inoperable equipment and inadequate facilities to perform this large contract. Without addressing the adequacy of the new information provided in Horton & Barber's response to the Agency Report, we note that the new information was not provided in a timely manner to the contracting officer for her even to consider it in making the responsibility determination. Finally, we sustain the contracting officer's conclusion that Horton & Barber did not provide adequate evidence of past performance references for work of similar scope and size.

CONCLUSION

Horton & Barber has not shown that the contracting officer's determination of nonresponsibility violated law or the terms of the solicitation. We find that the record adequately

supports the findings of the contracting officer. Accordingly, for the reasons discussed above, we deny Horton & Barber's protest.

SO ORDERED.

DATED: May 25, 2007

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

CONCURRING:

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