

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD**

Protest of:

Urban Service Systems Corporation
2041 Martin Luther King Jr. Avenue, SE
Washington, D.C. 20020

Solicitation No. DCAM-2005-B-0027
Trash and Recyclable Materials Collections
Pick-up Services for District Government Buildings

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CAB Nos. P-0735, P-0739

**Protestor's Response to the District's Motion to Correct Opinion and
Request for Reconsideration of Order Denying Protests**

Urban Service Systems Corporation (Urban) hereby joins the motion of the District of Columbia (District) to "correct its Opinion"¹ dated October 16, 2006 because it omits facts critical to the resolution of these consolidated cases. In addition, and pursuant to CAB Rule 117.2, Urban requests that this Board reconsider its opinion and issue specific findings of fact in support of an order that conforms evidence Urban submitted in support of its motion for partial summary judgment on July 21, 2006. In support of this response and request, Urban states as follows:

1. On October 16, 2006, this Board denied Urban's consolidated protests noting (Order at 1) that "the District has moved to dismiss the current protests on the grounds that the new protests are untimely and that the Board previously considered and decided

¹The District does not appear to ask this Board to "correct" any sort of typographical error. Rather, the District seems to ask the Board to issue new findings of fact to support its contention that TAC was entitled to certification as an LSDBE as of February 2006. Insofar as the District is seeking reconsideration of the opinion to conform to the evidence submitted by the parties, Urban joins that request.

against Urban on the same issues raised here.” After finding no jurisdictional impediment to consideration of the protests, the Board held

We conclude that the contracting officer did not violate the law, regulations, or the terms of the solicitation in deciding to award to TAC on the basis of the bids opened on August 30, 2005. Because bids are evaluated as of bid opening date, in this case August 30, 2005, TAC was properly certified through a provisional certification and entitled to a 9 percent reduction in its bid prices as we previously held in CAB No. P-0714.

(Order at 2). In reaching that conclusion, the Board stated

Urban understandably challenges the now-expired provisional certification and asks us again to independently review the certification of TAC to protect the integrity of the procurement. We declined to do so in CAB No. P-0714 because the exceptional circumstances provoking such a review were not present . . . As of August 30, 2005, the DSLBD/OLBD made a provisional recertification of TAC which we held to entitle TAC to a 9 percent bid preference. Urban successfully challenged the recertification of TAC before the SLBOC, however, the denial of recertification occurred on November 8, 2005, well after bid opening. Because the law is clear that preferences are determined for price evaluation purposes at the time of bid opening . . . the subsequent denial cannot retroactively changed the bid price evaluations as of August 30, 2005.

(Order at 6) (emphasis supplied);

2. The Board did not, however, address - or even mention - Urban’s motion for partial summary judgment or the “exceptional circumstances” identified therein. The failure to address Urban’s motion under applicable precedent is reversible error, as we now show.

By motion dated July 21, 2006 (Transaction No. 11861106), Urban moved for partial

summary judgment arguing (Mot. at 3-4)

Three out-of-state companies, not individuals, owned TAC, a Delaware corporation, on August 30, 2005 (Ex. 2 at 41-4). At that time, TAC garaged all of its trucks -its physical resources to provide transportation and hauling services - in Maryland and Virginia rather than in the District (Ex. 2 at 9, 14 and 21). TAC had contracts valued at more than Twenty-two Million Dollars at the time and a bonding capacity of Ten Million Dollars (Ex. 3; Ex. 2 at 34-5). A bonding capacity of Ten Million Dollars indicates that TAC had access to an individual or firm with sufficient assets to guarantee the bond at its face value (Affidavit of Edward J. Casselle, attached hereto a made a part hereof as Ex. 4);

TAC clearly was not entitled to certification as an LBE at bid opening on August 30, 2005 because it maintained its physical resources (trucks) outside of the District. Moreover, TAC was not entitled to DBE status on August 30, 2005, because it admittedly was able to post a Ten Million Dollar performance bond for a previous contract (Ex. 2 at 34-5). To post that bond TAC, and the company or individual that provided its backing on the bond, would have had to demonstrate financial resources in the face amount of the bond, *e.g.*, Ten Million Dollars. Individuals or companies holding more than Ten Million Dollars in credit clearly are not disadvantaged within the meaning of the LSDBE statute;

3. In support of its argument that TAC was not entitled to any preference points as of the bid opening on August 30, 2005, Urban filed a statement of undisputed facts that the District failed to dispute or oppose. When the District failed to dispute those facts, this Board was required to deem them admitted. *Beard v. Banks*, 2006 U.S. LEXIS 5176 (June 28, 2006) (holding that a non-moving party who fails to “challenge the facts identified in the [moving party’s] statement of undisputed facts . . . is deemed to have admitted the validity of the facts”). Therefore, this Board was required to deem the following facts as admitted:

- a. The District issued TAC a temporary certification on August 30, 2005.
- b. In 2005, TAC was owned by three out-of-state companies.

- c. In 2005, TAC was incorporated in Delaware.
- d. In 2005, TAC garaged all of its trucks in Maryland and Virginia.
- e. In 2005, less than 10% of TAC's workforce was located in the District.
- f. In 2005, TAC had a bonding capacity of Ten Million Dollars.
- g. In 2005, TAC expended more on administrative expenses in Pennsylvania than it did in the District.
- h. In 2005, TAC had annual revenues of at least \$22,000,000.00.

Indeed, the task of this Board on Urban's motion for partial summary judgment was to determine whether, on the basis of those undisputed facts, it was entitled to summary judgment on its argument that as of August 30, 2005, TAC was not properly certified as an LSDBE because it failed to meet the then-extant requirements for certification under District law. Indeed, it was this Board's task, in reviewing Urban's motion for partial summary judgment, to look at all of the "pleadings . . . together with the affidavits" to determine where Urban was entitled to judgment as a matter of law. SCR 56(c). This Board thus was required to determine whether TAC was entitled to certification as an LSDBE based on the above undisputed facts and the affidavit of Urban's expert witness who opined that "to acquire a Ten Million Dollar performance bond in the manner described by Mr. Adolph in his sworn testimony of November 8, 2005, TAC would have had to have a current line of credit available at the bonding company or financial institution issuing its stand-by letter of credit in an amount at least equal to the amount of the bond" (Affidavit of Edward J. Casselle, Ex. 4 to *Protestor's Motion for Partial Summary Judgment* at ¶4). The Board's failure to apply applicable standards and precedent to its review of Urban's motion

for partial summary judgment is, accordingly, reversible error. The Board should correct that error promptly;

4. The District asks this Board to issue an opinion based on the fact that the SLBOC re-certified TAC on February 12, 2006. Urban joins in the request that the Board correct the record to reflect that re-certification with the caveat that, as indicated on the District's Ex. 2 to the instant motion, TAC's re-certification was not made retroactive to August 30, 2005. Urban also requests that this Board issue an additional finding of fact that as of February 12, 2006, and based on that re-certification, TAC was only entitled to the 6% preference point reduction reflected in the District's Ex. 2, the official record of the DSLBD, and not the 9% preference point reduction it previously had received based on the provisional certification.²

By requesting that additional finding of fact, the District again puts before the Board the legal question of whether a provisional certification by the DSLBD that entitles a company to a 9% bid price reduction survives a subsequent final certification by the SLBOC that entitles a company to only a 6% bid price reduction. If the Board continues to find that, as a matter of law, a provisional certification by staff on the date of bid opening operates as a "grandfather" provision so as to grant a company a continuing certification not subject to revision upon final review by the SLBOC, it should identify the provision of

²Although the District failed to submit a statement of undisputed facts with its motion to dismiss, Urban is willing to stipulate that the SLBOC certified TAC in February 2006, entitling it to six preference points (Protest No. P-0739, Ex. L; District Ex. 2 to the instant motion) if the District also will stipulate that in March 2006 the SLBOC reported Urban as being entitled to seven preference points (Protest No. P-0737, Ex. M). As we have shown previously, when TAC's bid price is adjusted by 6% only (based on its entitlement to a 6% preference point reduction) Urban is the lowest bidder for Award Group I.

law - or the controlling precedent of the Court of Appeals - that supports so unique a holding;³

5. Finally, the Board should amend its opinion to explain how the decision by a staff member of the DSLBD to issue a provisional certification without any reference to the statutory requirements for certification fails to rise to the level of an “exceptional circumstance” that would justify Board review of that action under its decision in *C&D Tree Service, Inc.*, CAB No. P-0440, Mar. 11, 1996, 44 D.C. Reg. 6426, 6433-6439, when the SLBOC declined to ratify the provisional certification for nearly six months. That circumstance is made all the more exceptional by the undisputed facts showing that at the time of bid opening on August 30, 2005 - and the contemporaneous issuance of the provisional certification - TAC was not entitled to any bid price reduction because it was a Delaware company, owned by three out-of-state companies, that garaged all of its trucks outside of the District, employed a workforce made up of more than 90% non-District residents and had a bonding capacity of Ten Million Dollars. Further compounding the “exceptional” nature of the circumstances surrounding TAC’s certification are the undisputed facts that the SLBOC voted not to certify the company on November 8, 2005 for specific reasons⁴ and

³Of course, an unreviewed decision by this Board - like those of any fact-finding tribunal - has no binding or precedential effect.

⁴The verbatim transcript of that vote reads at pages 83-7, in its entirety

1 CHAIRMAN GLYMPH: Okay. Before we vote, I
2 guess I would like the commissioners to put on the
3 record the concerns that we have, I guess,
4 regarding this.
5 COMMISSIONER POWELL: One of my concerns

(continued...)

⁴(...continued)

6 was that his trucking business was located outside
7 the District, and the other thing was that the fee
8 that he would have to pay for his trucks, which
9 Commissioner Gomez indicated was \$13,000 a year,
10 and that he had no trucks registered in the
11 District, and his employees, he had--he did
12 indicate he had seven or 14. Which one?

13 CHAIRMAN GLYMPH: Well, he said 14, but
14 the UC-30 that he filed as of July 3 1st, 2005
15 showed four.

16 COMMISSIONER POWELL: The number of
17 employees that he indicated was questionable to me.

18 CHAIRMAN GLYMPH: Okay. Thank you, sir.
19 Commissioner Gomez?

20 COMMISSIONER GOMEZ: I find long-term
21 inconsistencies in the participation of the company
22 in this program. His company started in 2000. He
1 has over 100 trucks. That's a lot of equipment for
2 a disadvantaged business. The bonding seems to be
3 backed up by another source, and the preponderance
4 of the business activities of the company take
5 place outside the District of Columbia.

6 The 10 acres and the 115 trucks and the
7 80-some employees outside of the city, the
8 transactions outside, even of Maryland and
9 Virginia, and going to other states and other
10 participants do not seem to be in line with what
11 the program is to nurture and incentivize small
12 businesses, when in fact there are small businesses
13 in the same line of business in the city that are
14 operating and competing for the same kind of work.
15 It may be they don't have the same capacity, but
16 individually they could take pieces of it, not a
17 single company taking all of it. So I think the
18 preponderance of the business activities do not
19 take place within the District of Columbia proper.

20 CHAIRMAN GLYMPH: Commissioner Johns?

21 COMMISSIONER JOHNS: An applicant for
22 certification as a local, small, disadvantaged
1 business must show that it is a local business by
2 showing evidence that the business's
3 enterprise--the business enterprise's principal
4 office is physically located in the District of
5 Columbia.

6 The law defines principal office as the
7 primary office based upon the totality of the

(continued...)

⁴(...continued)

8 business activities in which routine and essential
9 business functions occur.
10 In this case, although TAC's
11 representative, Mr. Adolph, testified that certain
12 routine business functions occurred in D.C.,
13 including bookkeeping and other recordkeeping,
14 payroll maintenance, there are also a number of
15 business functions that occur outside of the
16 District, as bookkeeping, payroll maintenance, and
17 there are other things listed in the law as
18 examples--for instance, receipt of business
19 telephone calls, receipt of correspondence, storing
20 of books and records, et cetera.
21 Even Mr. Adolph admitted in his testimony
22 that with respect to receipt calls, there are
1 functions that occur in D.C. and outside of D.C.
2 Looking beyond that, there are certain
3 indications that show that further support that the
4 principal business functions are occurring outside
5 of D.C.
6 For instance, when looking at profit and
7 loss from June 2005, it shows a breakdown of
8 administrative salaries, with 21,000 going to D.C.,
9 31,000-plus going to Pennsylvania, and 133,000
10 going to other, which I surmise includes at the
11 very least Maryland.
12 That indicates that there is more
13 administrative functions going on outside of D.C.
14 than in.
15 Also Mr. Adolph testified that he had over
16 100 trucks, none of which are housed in D.C.
17 However, there are some housed in Maryland,
18 Pennsylvania, and Virginia, which I think is a
19 further indicator that principal business functions
20 are occurring outside of D.C.
21 Lastly, he testified that he had over 85
22 employees, and based on the information provided to
1 this commission, only four of which are D.C.
2 residents, which I think also gives further
3 indication that the primary focus of this business
4 is more outside of D.C. than in.
5 And with that, that is why I vote to deny
6 TAC Transport.
7 CHAIRMAN GLYMPH: There's nothing more I
8 want to add to the record. I just agree with my
9 fellow commissioners, and I think in looking at

(continued...)

reversed itself without any explanation in the record of this case on February 16, 2006. The totality of undisputed facts here constitutes such “exceptional circumstances” as to require this Board to look behind the provisional certification issued to TAC on August 30, 2005⁵ and conclude that on that date TAC was not entitled to a bid price reduction of any kind and, accordingly, that it was not the successful bidder for Award Group I.

WHEREFORE, Urban joins the request of the District for re-issuance of its order of October 16, 2006 to include all omitted findings of fact.

Respectfully submitted.

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DATED: October 24, 2006

⁴(...continued)
10 preponderance of the evidence here, I just see more
11 of it outside of D.C. and less in D.C.
12 So we have a motion that has been properly
13 seconded. All in favor, please say aye.
14 [Chorus of ayes.]
15 We will then deny TAC
16 Transport, LLC.

(Protest No. P-0735, Ex. 3).

⁵At a very minimum, the Board should define precisely the circumstances that constitute the “exceptional circumstances” necessary for review of an SLBOC certification since we have shown repeatedly that the SLBOC “abdicated its function” to certify TAC in accord with law in this case, the only “exceptional circumstance” thus far defined by the Board, and explain precisely how Urban has failed to make a case of “exceptional circumstances.”

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of October, 2006, I served a copy of this document by e-file upon:

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