

DISTRICT OF COLUMBIA CONTRACT APPEALS BOARD

PROTEST OF:

SYSTEM “42” INC.)
) CAB No. P-0751
Under Solicitation No: DCAM-2007-B-0006)

For the Protester, System “42” Inc.: Aniema Udofa, President, *pro se*. For the District of Columbia Government: Howard Schwartz, Esq., and Talia S. Cohen, Esq., Assistant Attorneys General.

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

OPINION

Filing ID 14517956

System “42” Inc., the protester, has challenged a contract award to Garcete Construction Company for construction of the Ward One Senior Wellness Center, on the ground that Garcete is not capable of performing the construction work. The District has filed a combined motion to dismiss and Agency Report, arguing that System “42” lacks standing to protest because it is not certified as a small business enterprise (“SBE”) in this SBE set-aside procurement, and that on the merits, Garcete was properly awarded the contract. We conclude that the solicitation was an SBE set-aside procurement and that System “42” has not demonstrated that it was properly certified as an SBE under District of Columbia law. Accordingly, we dismiss the protest because System “42” lacks standing.

BACKGROUND

On November 29, 2006, the Office of Contracting and Procurement (“OCP”), on behalf of the Office of Property Management (“OPM”), issued IFB No. DCAM-2007-B-0006, for the construction of a new Ward One Senior Wellness Center. There is a dispute between the parties concerning whether the solicitation is an SBE set-aside or open market procurement. Centered at the bottom of the title page for the specifications, there is text in bold font which reads: “OPEN MARKET.” However, at page 1 of the IFB, in block 6, the text “SBE Set-Aside” is checked while the text “Open Market with set aside [f]or LSDBE subcontracting” is not checked. Section B.2, entitled “Designation of Solicitation for the Small Business Set Aside Market Only”, at page 3, states:

This Invitation for Bids is designated for certified small business enterprise (SBE) bidders only 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, as amended.

An SBE must be certified as small in the procurement category of Building Construction in order to be eligible to submit a bid in response to this solicitation.

(Agency Report ("AR") Ex. 1). System "42" notes in its protest that OCP's advertising for the solicitation in the Washington Times Classified Section and at the OCP website both identify the procurement "Market Type" as "Small Business Enterprise Set-Aside." (System "42" Protest, at 1; AR Ex. 10, BCM ¶ 4.2). System "42" never raised any question of an ambiguity in the solicitation being an open market or set-aside procurement prior to bid opening. OCP opened five bids on January 5, 2007, with bid prices as follows:

<u>Bidder</u>	<u>Price</u>
CNA	\$1,707,000
Monument	\$4,351,000
System "42"	\$4,995,000
Garcete	\$5,200,000
FEI	\$6,057,000

(AR at 4).

FEI, the highest bidder, filed a protest on January 10, 2007, docketed as CAB No. P-0747, challenging the four lower bids. On January 23, 2007, Garcete filed a protest of the same procurement, docketed as CAB No. P-0749. Thereafter, OCP determined the bids of System "42" and CNA to be nonresponsive because neither provided proof of its certification as an SBE by the District of Columbia Small and Local Business Opportunity Commission ("SLBOC") as required by the IFB. The District awarded the contract to Garcete after determining that it was properly certified and was a responsive and responsible bidder. On February 20, 2007, we dismissed FEI's protest because FEI voluntarily requested dismissal and Garcete's protest was moot in light of the District's award to it. On February 23, 2007, System "42" filed the instant protest. The District filed its combined motion to dismiss and Agency Report on March 15, System "42" filed a one-page response on April 3, and the District filed a reply on April 13, 2007.

DISCUSSION

Considering the solicitation in its totality, the only reasonable interpretation is that the solicitation was an SBE set-aside in the procurement category of building construction. Section B.2 clearly places the solicitation in the SBE set-aside market. Block 6 found on page 1 of the solicitation confirms the fact of the SBE set-aside, as do the newspaper and website advertisements noted by System "42" in its protest. The "Open Market" label found on the title page of the specifications must be seen merely as a typographical error in light of the specific solicitation provisions defining the solicitation as an SBE set-aside procurement. System "42" also argues that it is a "small business" in accordance with the United States Small Business Administration's "Small Business and Size Guidelines." This argument misses the mark because federal SBA certification is not determinative of District of Columbia SBE certification by the SLBOC. These certification systems are governed by their own legislation and regulations. System "42" has provided no evidence that it was, at the time of bid opening, certified by the District's SLBOC as an SBE in the procurement category of building construction. System "42" also relies on certifications it says it has with the Maryland Department of Transportation, Prince George's County Minority Program, and the Metropolitan Washington Airport Authority. These certifications are not relevant to whether System "42" is an SBE (certified by the

District's SLBOC) in the procurement category of building construction. As there is no indication that System "42" was so certified as a District SBE in the appropriate procurement category, it was not eligible to bid on this set-aside procurement, and therefore lacks standing to protest. *See M&G Services, Inc.*, CAB No. P-0652, May 10, 2002, 50 D.C. Reg. 7419. Accordingly, we dismiss the protest for lack of standing.

CONCLUSION

For the reasons discussed above, we dismiss the protest of System "42" for lack of standing.

SO ORDERED.

DATED: April 17, 2007

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

CONCURRING:

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