

DCCAB

PROTEST OF: CAPITOL PAVING OF D.C., INC.

UNDER RFP POKA-2005-B-0015-LS

October 12, 2006

For the Protester: Douglas A. Datt, Esq. For the District of Columbia Government: Howard Schwartz, Esq., Senior Assistant Attorney General, and Jennifer L. Longmeyer-Wood, Esq., Assistant Attorney General. For Fort Myer Construction Corp.: Christopher M. Kerns, Esq.

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

OPINION

Capitol Paving of D.C., Inc., has protested the District's award of an alley rehabilitation contract to Fort Myer Construction Corporation, arguing that the contracting officer should not have assigned to Fort Myer during bid evaluation a 10 percent bid preference as a "longtime resident business" ("LRB") - a new form of preference instituted pursuant to the recently enacted Small, Local, and Disadvantaged Business Enterprise Development and Assistance Act of 2005, D.C. Law 16-33 ("SLDBEDA Act"). Capitol Paving attacks the validity of the LRB certification on a number of bases, including that the Small, Local Business Opportunity Commission ("SLBOC") incorrectly certified Fort Myer as a LRB, that no certifications could be made in the absence of implementing regulations, that LRB certification cannot be made to anyone until the year 2012, and that Fort Myer has not shown 20 years of eligibility for local business enterprise status as a prerequisite to LRB certification. Because the record shows that SLBOC certified Fort Myer as a LRB, and we defer to SLBOC's interpretation of the SLDBEDA Act, we conclude that Capitol Paving has not shown that the contracting officer's reliance on that certification violated law, regulation, or the terms of the solicitation. Accordingly, we deny the protest.

BACKGROUND

On March 3, 2006, the Office of Contracting and Procurement ("OCP") issued Solicitation No. POKA-2005-B-0015-LS on behalf of the District's Department of Transportation ("DDOT") to seek a contractor to rehabilitate alleys at various locations throughout the District. Nine amendments were issued, and the bid opening date was extended from April 5, 2006, to May 26, 2006.

Solicitation 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", 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;

M.1.1.4 Two percent reduction in the bid price or the addition of two points on a 100-point scale for a local business enterprise (LBE) certified by the SLBOC or the DSLBD, as applicable;

#### M.1.2 Application of Preferences

The preferences shall be applicable to prime contractors as follows:

M.1.2.3 Any prime contractor that is an LRB certified by the SLBOC or DSLBD, as applicable, will receive a ten percent (10%) reduction in the bid price for a bid submitted by the LRB in response to an IFB or the addition of ten points on a 100-point scale added to the overall score for proposals submitted by the LRB in response to an RFP.

M.1.2.4 Any prime contractor that is an LBE certified by the SLBOC or the DSLBD, as applicable, will receive a two percent (2%) reduction in the bid price for a bid submitted by the LBE in response to an IFB or the addition of two points on a 100-point scale added to the overall score for proposals submitted by the LBE in response to an RFP. . . .

(AR Ex. 1). Section M.1.5.1 recites that any vendor seeking to receive preferences on the solicitation must submit documentation at the time of its bid evidencing the vendor's certification by the SLBOC as an SBE, LBE, DBE, DZE, LRB, or RBO.

Section J entitled "List of Attachments" includes subsection J.11 ("LSDBE Certification Package (27 Pages))" containing various materials from the predecessor to the DSLBD including an obsolete listing the certification categories -- SBE, LBE, DBE, DZE, and RBO -- but not including the new category for LRB that was part of the 2005 SLDBEDA Act. The attachment contains other informational materials concerning the LSDBE program such as a fact sheet, user's guide, frequently asked questions, checklist, waiver application, and LSDBE certification application, but none of these other materials mention the new LRB certification category.

On March 22, 2006, OCP conducted a pre-bid conference. Four bids were received and opened on the bid opening date, May 26, 2006. At bid tabulation on June 1, 2006, Capitol Paving was the apparent low bidder before preference points. On June 2, 2006, the contract specialist completed the "Local, Small, Disadvantaged Business Enterprise Responsiveness Determination and Percentage Reduction Worksheet" ("worksheet") for all four bidders. The contract specialist states that the preference percentage reductions found in his worksheet were based on the evidence of certifications which he verified electronically using the LSDBE website. (AR, Ex. 6). Capitol Paving received a 2 percent reduction in its bid price for evaluation purposes based on its certification as an LBE. A September 30, 2005

letter certifying Capitol Paving as an LBE was attached to the worksheet. (See AR Ex. 2). The 2 percent reduction lowers Capitol Paving's bid price from \$26,556,255 to \$26,025,129.90. The Fort Myer worksheet states that it is entitled to a 12 percent reduction because it is certified as both a LBE and a LRB. The 12 percent reduction lowers Fort Myers bid price from \$27,132,323.20 to \$23,876,444.42. Capitol Paving was advised on June 7, 2006, that Fort Myer was the low evaluated bidder after the application of preference points.

Capitol Paving challenges the certification of Fort Myer. From the record, we find that Fort Myer had been certified by the former LBOC effective on September 21, 2004, as a LBE, with an expiration date of September 21, 2006. On March 20, 2006, Fort Myer submitted to the SLBOC an application for certification as a LRB. (Fort Myer Surreply Ex. B). The submission contains prior certification letters of Fort Myer issued by predecessors to the SLBOC - the District's former Minority Business Opportunity Commission ("MBOC") and the District's former LBOC - spanning the period March 4, 1986, through the most recent certification on September 21, 2004. Fort Myer also included copies of realty leases, corporate annual reports, certificates of good standing, and other documentation in support of its application for LRB status. By letter of April 4, 2006, the SLBOC approved the certification of Fort Myer as a LBE and LRB. The April 4 letter states in relevant part:

The District of Columbia Small & Local Business Opportunity Commission (SLBOC) during its meeting on 09/21/2004, approved your application for Certification and registered your business enterprise in the Small, Local, and Disadvantaged Business Enterprise Program as established by the Small, Local, and Disadvantaged Business Development and Assistance Act of 2005, effective October 20, 2005 (D.C. Law 16-33; 52 DCR 7503), as amended. The business enterprise is duly registered by the Commission as a:

Local Business Enterprise

Longtime Resident Business

This Certification of Registration, pursuant to D.C. Law 16-33 Subpart 3 will expire two (2) years from the effective date of approval. . . .

DATE OF APPROVAL: 09/21/2004

DATE OF EXPIRATION: 09/21/2006

(AR, Ex 4). Although the SLBOC's certification letter confusingly states that the "approval" was on September 21, 2004, which is impossible because the letter references and relies on the SLDBEDA Act which was enacted in 2005, and Fort Myer's request for certification was submitted on March 20, 2006, we find that the SLBOC simply expanded Fort Myer's prior certification of September 21, 2004, as an LBE, to include LRB status. Thus, LRB certification was effective from the date of the SLBOC letter of April 4, 2006, through the expiration date of the original LBE certification (September 21, 2006) so that both certifications would expire on the same date. (See Fort Myer Surreply, at 2, n.2).

On June 16, 2006, Capitol Paving filed its protest with the Board, arguing that the solicitation does not properly incorporate section M, that section M conflicts with section J, and that for various reasons Fort Myer should not have received the 10 percent preference for LRB status.

DISCUSSION

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

Capitol Paving first argues that under block 11 of the cover page the solicitation only references sections B through L and omits mention of section M. We do not find this argument persuasive because pages 127 through 131 do indeed contain section M, and those pages and the section are referenced in the upper right hand corner of the cover page which reads "Page 1 of Pages 131 Includes Sec. B thru M and attachments." Although cover page block 11 incorrectly identifies section L for the page ranges covering both section L and M, the pages for section M (pages 127-131) are identified and no bidder could have been prejudiced by this typographical error on the cover sheet. Capitol Paving also argues that section M conflicts with section J because the attachments for section J.11 do not make any mention of LRB status. We see no conflict and even if there were an ambiguity, Capitol Paving had to raise that prior to bid opening. Section J contains information about the LSDBE program and some forms that may be used. However, no reasonable bidder could interpret the guidance in section J as contradicting the clear references in section M to evaluation preferences being determined under the provisions of the SLDBEDA Act of 2005. Moreover, section M's direct and repeated references to the availability of preferences for a Longtime Resident Business (LRB) can leave no doubt that the contracting agency would be applying the current law governing the LSDBE program, notwithstanding the fact that section J's guidance and informational data had not been updated by the SLBOC and the contracting agency to reflect the current law.

Next, Capitol Paving raises a number of arguments as to why Fort Myer should not have been certified as a LRB and should not have received the 10 percent LRB preference. The SLDBEDA Act created a new definitions provision, codified at D.C. Code § 2-218.02, which contains the following definition for "Longtime resident business":

"Longtime resident business" means a business which has been continuously eligible for certification as a local business enterprise, as defined in § 2-218.31, for 20 consecutive years.

D.C. Code § 2-218.31 states:

A business enterprise shall be eligible for certification as a local business enterprise if the business enterprise:

- (1) Has its principal office located physically in the District of Columbia;
- (2) Requires that its chief executive officer and the highest level managerial employees of the business enterprise maintain their offices and perform their managerial functions in the District; and
- (3)(A) Is licensed pursuant to Chapter 28 of Title 47;
- (B) Is subject to the tax levied under Chapter 18 of Title 47; or
- (C) Is a business enterprise identified in § 47-1808.01 (1) through (5) and more than 50% of the business is owned by residents of the District.

Capitol Paving observes that the Mayor has not issued any regulations implementing the SLDBEDA Act, particularly with regard to the new certification category of LRB, and thus the SLBOC cannot make a LRB certification without regulatory guidance. In addition, according to Capitol Paving, without implementing regulations,

contractors cannot know if they could qualify for a waiver of any of the provisions for LBE status that in turn support LRB status. Because the preference for the LRB is so much greater than the other preferences, Capitol Paving argues that the lack of a waiver provision eliminates competition in the heavy construction and asphalt paving and road work industry since only Fort Myer qualifies for LRB status. Capitol Paving also contends that since the LBE preference category was created in 1992 by virtue of the Equal Opportunity for Local, Small, and Disadvantaged Business Enterprises Act of 1992, no contractor could be eligible for LBE status for 20 consecutive years. Under this logic, the first year that an entity could qualify for LRB status would be 2012, that is, 20 years after 1992. Finally, Capitol Paving argues that Fort Myer has not been "continuously" eligible for LBE certification because Fort Myer had been debarred by the Federal Highway Administration and later by the District government in 2003. According to Capitol Paving, the debarment interrupted Fort Myer's eligibility and thus it did not meet the 20 continuous years requirement for LRB status.

We conclude that there is no basis in the law or the facts here to justify our reviewing the legitimacy of the action by the SLBOC to certify Fort Myer as an LRB. Although there are no implementing regulations, we believe that the SLBOC made its LRB certification of Fort Myer based on the language of the SLDBEDA Act, and again, we see no basis for intruding on the SLBOC's interpretation of a statute that it is charged to interpret. Only in exceptional circumstances will we consider such a review, such as where the certifying agency has abdicated its function and we are left with no choice but to decide on the certification so as to protect the integrity of the procurement process and fulfill our statutory obligation under D.C. Code 2-309.08(d) of deciding whether an award complies with applicable law, regulations, and terms and conditions of the solicitation. Cf. Urban Service Systems Corp., CAB No. P-0714, Nov. 15, 2005, with C&D Tree Service, Inc., CAB No. P-0440, Mar. 11, 1996, 44 D.C. Reg. 6426, 6433-6439. Those exceptional circumstances are not present here. Such challenges to a certification are properly addressed to the SLBOC through the statutory mechanism provided in the SLDBEDA Act. Each of the arguments raised by Capitol Paving with regard to how SLBOC could properly certify Fort Myer are not properly before us and we find no error by the contracting officer in relying on the certification made by the SLBOC in this case. Accordingly, we deny the protest.

SO ORDERED.

JONATHAN D. ZISCHKAU Chief

Administrative Judge

CONCURRING:

WARREN J. NASH

Administrative Judge