

[the District's] lines and circuits." The letter was not titled a "Request for Proposals," nor was it identified by an "RFP No.," as is the normal course in solicitations, but did state as its subject, "Procurement of Services to Audit Telephone Lines and Services." (*Id.*)

The request letter detailed "21000 Centrex lines, various XMB lines associated principally with the PBX at the Reeves Municipal Center, about 500 1MB lines, and about 1000 data circuits. In addition, the government pays for lines and circuits for the Lorton complex in Virginia and the Laurel complex in Maryland" and stated that the District believed that "savings may exist because of unused lines" and "further believes that savings may exist because of 1MB lines that are used when less costly Centrex lines could be used instead." In addition to the specific lines and circuits identified, the letter was an open-ended invitation to propose to discover other savings which might be achieved in an audit of telephone service. Following the reference to line and circuit savings the request letter stated that "[t]he government also requires an audit to verify the accuracy of invoices" and reiterated that "[t]he government requires the services of a contractor to identify all lines and circuits billing errors, including, but not limited to, those described above." (*Id.*) (Emphasis added).

The request letter stated that "[t]he contractor will be required to work directly with the telecommunications coordinators of 60 to 65 agencies." The intended agency input was emphasized by the requirement that "[t]he contractor will describe the project in a general meeting of the coordinators to be convened by the government within seven (7) days of contract award." (*Id.*) The letter does not reference any existing actions being taken by the government to secure refunds, nor does it give notice that any types of audit or individual areas of overbilling are off-limits to the contractor.

The request letter concluded that "prospective offerors are requested to provide proposals describing how the above work would be undertaken and how the savings would be shared, including the percentage requested." Ambush timely submitted a proposal, followed, after negotiations, by a best and final offer ("BAFO").²

Ambush's proposal, as refined in the BAFO, was responsive to the request letter but was clearly not limited to merely to an audit of lines and circuits. Ambush included equipment, and specifically AT&T equipment, within the scope of its proposed audit. Ambush prefaced its offer stating that "[s]ince the divestiture of AT&T on January 1, 1984, many organizations with leased AT&T equipment . . . have been erroneously billed." At the time that Ambush submitted its

² No copy of the BAFO was introduced during the hearing in this matter. A copy of the BAFO was requested by the Board after the hearing. Neither the District's nor the Ambush's files contained a hard copy of the document submitted by Ambush. Ambush maintained an electronic record which it asserts is identical to the hard copy actually submitted. (Affidavit of Vernon Ambush). Since the District incorporated specific sections of the BAFO into the contract, the BAFO must have existed prior to the execution of the contract and is essential to interpretation of the contract. The electronic document submitted by Ambush is the only document alleged to be the BAFO. There is no evidence challenging its authenticity. The Board therefore accepts the printout of the electronic record as the best evidence of the actual BAFO and, in the absence of any evidence submitted by the District to different terms, has relied on that record in its interpretation of the contract.

proposal, AT&T did not provide any dial tone lines and circuits to the District.³ (Hearing Transcript (“Tr.”) 110 and 122 (Brown); Tr. 134 (Bernhardt)). Although AT&T may have provided long distance service to the District, (Tr. 110 and 122 (Brown)), such service was not invoiced by AT&T, but was rather invoiced through Bell Atlantic. (Tr. 137-8 (Bernhardt)). The only items therefore which appeared on AT&T invoices are for equipment.

“AT&T” or “equipment” was referenced in four of six bullet points in the introduction to the BAFO:

For the D.C. Government, the AGI telecommunications staff proposes the following:

- Decode, analyze, and interpret the Public Service Commissions tariffs as they relate to leased AT&T equipment, your regional Bell Operating Company (RBOC) and Interexchange Carrier (IXC) circuitry and determine the accuracy of your monthly telephone billing;

* * *

- Compare your current on-site equipment, circuitry and features to what you are being billed and determine billing errors;

* * *

- Submit projected refund analysis reports to AT&T, the RBOC and the appropriate IXC requesting refunds; and
- Maintain continuous contact with client, AT&T, the RBOC and the IXC personnel until the refunds are processed and the entire project is completed.

In the BAFO, Ambush proposed to perform the work in 5 phases. Four of the 5 phases specifically mentioned AT&T and/or equipment.⁴ There is no indication in the record that the District raised any question as to the scope of the proposed audit. Indeed, Ambush’s BAFO was accepted and portions of the BAFO were incorporated by reference as the contract scope of work. (Appellant’s Ex. 1). The Scope of Work in the contract reads, in relevant part, as follows:

ARTICLE I – SCOPE OF WORK

The Contractor will perform telephone line and circuit auditing services for approximately 21,000 Centrex lines, various XMB lines associated with PBX at the

³ Mr. Ambush, in deposition testimony, indicated that AT&T may also have provided data circuits. (Ambush Dep. July 13, 1998 at 21). The Board accepts the testimony of the District officials that AT&T did not provide circuits.

⁴ Mr. Ambush testified at the hearing without having located or reviewed the BAFO that equipment was never mentioned in the contract. (Tr. 52-56 (Ambush)). The District argued, also without the benefit of reviewing the BAFO, that no reference to equipment was included in the contract. (Posthearing Brief, 25). The Board understands this testimony as referring to those parts of the contract that were admitted into the record at the hearing, but not those portions of the BAFO incorporated by reference into the contract and not available at the time of the hearing.

Reeves Center, 500 1MB lines and approximately 1,000 data circuits. The government requires that the Contractor identify all line and circuit billing errors, including, but not limited to, those described above, in accordance with the following:

A. Request for Proposals (RFP) No. 4043-AA-NS-6-GM issued November 8, 1993 (Attachment 2);

B. Following sections of the AGI Best and Final Offer dated 11/23/93 in response to RFP No. 4043-AA-NS-6-GM issued November 8, 1993 (Attachment 3):

1. PHASE I - ITEMS I THROUGH 4
2. PHASE II - ITEMS 1 THROUGH 8
3. PHASE III - ITEMS 1 THROUGH 6

* * *

5. PHASE V - ITEMS 1 THROUGH 10 AND ITEM 11 revised to read as follows: "Calculate fiscal year 1994 savings to be realized by analyzing the identified circuit data."

* * *

The referenced Phase I BAFO sections read as follows:

1. Describe the project in a general meeting of the telephone coordinators to be convened by the government within seven working days of contract award.
2. Gather required documentation from C&P Telephone Company (CSR), AT&T and other circuit vendors that provides [sic] circuitry for each agency.
3. Decode, analyze and recap monthly charges billed by C&P Telephone Company, AT&T and other circuit vendors.
4. Generate a documented listing of all circuitry included in the billings provided by C&P Telephone Company, AT&T and circuit vendors.

The referenced Phase II BAFO sections read as follows:

1. Work directly with the telephone coordinators of the 60 to 65 agencies to schedule appointments for on-site analysis of their respective agency. Obtain tapes, electronic disks or hard copy of the DC Government's telephone directory.
2. Perform an on-site inventory by actual physical count of all circuitry for each of the agencies in the Government.
3. Verify existence of circuitry through empirical evidence, dialing telephone lines and/or testing lines electronically.

4. Interview on-site telephone coordinators to further validate circuit discrepancies and unused circuitry. Obtain a list of on-site telephone users.
5. Prepare a comparative analysis of the information disclosed from the records of C&P Telephone Company, AT&T and other circuit vendors versus the actual count recorded during the on-site physical inventory.
6. Generate a formal audit report detailing the billing errors disclosed by the comparative analysis.
7. Prepare a formal claim for any refunds due from C&P Telephone Company, AT&T and other circuit vendors.
8. Submit the formal audit report claim(s) for refunds to the Contracting Officer of the District of Columbia and the telephone coordinators for review and final approval.

The referenced Phase III BAFO sections read as follows:

1. Perform a savings analysis of the D.C. Government's telecommunications system to identify unused lines.
2. Identify lines which are not being used based on the results of the on-site inventory.
3. Verify existence of circuitry through empirical, dialing telephone lines and/or testing lines electronically. Verify status of lines with the agency's on-site telephone coordinator.
4. Identify the lines to be disconnected and under the authority of the Contracting Officer notify the on-site agency telephone coordinator of the intent to disconnect.
5. Compile a list of lines to be disconnected after the coordination and confirmation of the disconnection with on-site agency telephone coordinator.
6. Calculate fiscal year (FY) 1994 savings to be realized by the disconnection of identified unused lines and equipment.

The referenced Phase V BAFO sections read as follows:

1. Gather required documentation from C&P Telephone Company (CSR), AT&T and other circuit vendors that provide data circuitry to each agency.
2. Decode, analyze and recap monthly charges billed by C&P Telephone Company AT&T and other circuit vendors for data circuits.
3. Generate a documented listing of all data circuits included in the billings provided by C&P Telephone Company, AT&T and circuit vendors.
4. Perform an on-site inventory by actual physical count of all data circuits for each of the agencies in the Government.
5. Verify existence of data circuitry through empirical evidence and/or test lines electronically.

6. Interview on-site telephone coordinators to further validate data circuit discrepancies and unused data circuitry. Obtain a list of data circuit users.
7. Prepare a comparative analysis of the information disclosed from the records of C&P Telephone Company, AT&T and other data circuit vendors versus the actual count recorded during the on-site physical inventory.
8. Generate a formal audit report detailing billing errors disclosed by the comparative analysis.
9. Generate a formal claim for refunds due from C&P Telephone Company, AT&T and other circuit vendors.
10. Submit the formal audit report claim(s) for refunds to the Contracting Officer of the District of Columbia and the telephone coordinators for review and final approval.
11. Calculate fiscal year (FY) 1994 savings to be realized by [analyzing]⁵ the identified data circuits.

The contract contained an "integration clause" stating that: "This contract, including specifically incorporated documents, constitute the total and entire agreement between the parties. All previous discussions, writings and agreements are merged herein." (*Id.*, Art. X.) In addition, the contract states an order of precedence mandating that inconsistencies shall be resolved in the following order: Articles I through X; Standard Contract Provisions; Request for Proposals, and; Specified sections of the BAFO. (*Id.*, Art. VIII).

Section C of Article I provided that Phases I through V, including Phase III would be completed within 120 days. Two amendments to the contract extended the time for performance to September 30, 1994.

In the communications industry, lines, circuits and equipment have distinct meanings. (Tr. 49 (Ambush); Tr. 98 (Brown); Tr. 183 (Eley)). Lines, sometimes referred to as dial tone service, carry voice communication on separate telephone numbers. (*Id.*). Circuits, or data circuits, carry data communications. (*Id.*). Equipment, as used in the telecommunications industry, is the switching apparatus used to make the connections between the lines and circuits. (Tr. 49-50 (Ambush)). Equipment controls the communications network and is essential to operate the telephone and data systems. Equipment includes hardware such as computers, switching equipment and PBXs. (*Id.*) Equipment does not include devices such as fax machines which merely utilize telephone lines, although such devices may be referred to as "customer premises equipment." (Tr. 98 (Brown)).

It is well-known to telephone professionals that Judge Greene's landmark decision breaking up AT&T divested it of providing dial-tone service, that is, lines and circuits.⁶ The

⁵ The contract substituted "analyzing" for "the conversion of" which appeared in the BAFO.

⁶ "Section I of the proposed decree would provide for significant structural changes in AT&T. In essence, it would remove from the Bell System the function of supplying local telephone service by requiring AT&T to divest itself of the portions of its twenty-two Operating Companies which perform that function." *United States v. American Tel. & Tel. Co.*, 552 F. Supp. 131, 141 (D.C.D.C., 1982)

District's own witnesses⁷ concede that in the 1990s AT&T did not sell telephone dial tone service to the District. (Tr. 110 (Brown); Tr. 134 and 149 (Bernhardt)). ("[T]he local carrier is Bell Atlantic . . . [all District agencies] use the same dial tone provider, everybody does." (Brown 122-3). "AT&T has nothing to do with dial tone whatsoever." (Tr. 183 (Bernhardt)). AT&T supplied equipment,⁸ (Tr. 109 (Brown)), and possibly long distance service. (Tr. 109 and 122 (Brown); Tr. 134-5 (Bernhardt)). Even if AT&T provided long distance service, it did not bill that service directly to the District. AT&T long distance service was invoiced through Bell Atlantic, not directly by AT&T. (Tr. 138 (Bernhardt)).

The audit work was begun by a meeting on January 11, 1994, called by the District "for all agency coordinators, [and] all representatives. . . to discuss the future line and circuit audit that was going to be taking place citywide." (Tr. 98 (Brown)). At the behest of the District, representatives of AT&T were present at the meeting. (Tr. 100).

During the course of the audit, the District provided AT&T invoices to Ambush. (Tr. 151 (Bernhardt)). Ambush began the audit of AT&T invoices within the contract period and prior to September 16, 1994. (Appellant Ex. 5) Ambush determined that the invoices contained charges for unused equipment extending back prior to the inception of the contract, and, in some cases, as long as 4 years. (Appellant Ex. 7). Within the contract period, by memorandum dated on September 22, 1994, Ambush reported to the District that it "has discovered a potentially large amount of over-billing with the AT&T account." (Appellant Ex. 6). On September 26, 1994, Ambush gave a report to AT&T detailing total overbillings of \$361,859.58. (Appellant Ex. 7). The report identified overbillings for unused equipment at 415 12th Street, NW; 613 D Street; and 301 C Street, NW., totaling \$251,332.38. AT&T subsequently conceded that the District was erroneously billed \$245,303 at these locations.⁹ (Appellant Exs. 8 and 9).

After notice to AT&T by Ambush, no further effort was required by Ambush to secure refund of the erroneously billed amounts. The District actually received refunds from AT&T relating to the accounts and locations upon which Ambush reported in the amount of \$227,020.73.¹⁰ Other than the letters and memorandum sent by Ambush, there is no documentary evidence in the record to show that anyone other than Ambush, either in the

⁷ Ronald P. Brown, Department of Public Works telecommunications coordinator (Tr. 96) and William Bernhardt, Branch Chief, Department of Administrative Services, Information Resources Management Administration. (Tr. 130).

⁸ The AT&T office with which the District dealt was later included in the spinoff of AT&T's equipment operations into Lucent Technologies. (Tr. 110 (Brown); Tr. 176 (Eley)). Lucent is well known as a supplier of equipment, not lines and circuits.

⁹ Location

Location	Reported by Ambush (Appellant Ex. 7)	Conceded by AT&T (Appellant Exs. 8 and 9)
613 G St., NW	\$162,977.40	\$140,476.43
301 C St., NW	43,314.18	46,509.71
415 12 th St., NW	45,040.80	59,322.75

¹⁰ The difference between the overbilling conceded by AT&T and the refund represents a deduction by AT&T of \$19,288.16 for the "sale in place" value of the equipment at 415 12th Street, NW. (Appellant's Ex. 9).

District Government or AT&T, initially identified the erroneous billings and payments or initiated a claim for the refund.

DISCUSSION

It is undisputed that Ambush had a contract to perform an audit of telecommunication billing which provided that it would receive, as compensation, a percentage of refunds and future savings for erroneous billing identified during the contract term. It is further undisputed that the District received refunds after expiration of the contract for erroneous billings for unused AT&T telecommunications equipment which Ambush had reported during the contract period. Ambush's claim is for compensation based upon the refunds received by the District from AT&T and associated future savings.

This matter turns on the interpretation of the contract in two areas. First, whether audit of unused equipment billing is within the scope of the contract. And, second, if audit of unused equipment billing is within the scope of the contract, whether Ambush is entitled to compensation for savings achieved from removal of the specific unused AT&T equipment. Ambush contends that it is entitled to compensation based on savings on unused equipment it reported during the course of contract performance. The District contends that audit of equipment is not covered by the contract, and, even assuming that audit of equipment is within the scope of the contract, Ambush has not shown that its efforts identified the unused equipment for which refunds were received. The District further affirmatively asserts that any savings resulting from recognition of unused equipment was the result of the work of District and AT&T employees.

Contract Interpretation

Interpretation of a contract must begin with the contract itself, particularly when the contract is a so-called "integrated" agreement. The contract provides:

ARTICLE X - TOTAL AGREEMENT

This contract, including specifically incorporated documents constitute the total and entire agreement between the parties. All previous discussions, writings and agreements are merged herein.

"An integrated agreement is a writing or writings constituting a final expression of one or more terms of the agreement." Restatement, Second, Contracts ("Restatement") § 209(1). "The interpretation of an integrated agreement is directed to the meaning of the terms of the writing ... in light of the circumstances. . . ." (Restatement, § 212(1)).

It is sometimes said that extrinsic evidence cannot change the plain meaning of a writing, but meaning can almost never be plain except in a context. Accordingly, the rule stated in Subsection (1) is not limited to cases where it is determined that the language used is

ambiguous. Any determination of meaning or ambiguity should only be made in the light of the relevant evidence of the situation and relations of the parties, the subject matter of the transaction, preliminary negotiations and statements made therein, usages of trade, and the course of dealing between the parties.

Id. Comment b.

Notwithstanding that an agreement is integrated, negotiations prior to or contemporaneous with the adoption of the agreement are admissible to establish the meaning of the writing. Restatement § 214(c).

Words, written or oral, cannot apply themselves to the subject matter. The expressions and general tenor of speech used in negotiations are admissible to show the conditions existing when the writing was made, the application of the words, and the meaning or meanings of the parties. . . . In cases of misunderstanding, there must be inquiry into the meaning attached to the words by each party and into what each knew or had reason to know.

Id. Comment b.

The entire BAFO was an integral part of the contract negotiation. Since the District made its determination to award the contract based on the BAFO, the District clearly had knowledge of the offer made by Ambush. By incorporating portions of the BAFO into the final agreement, the District accepted the incorporated terms as they were used by Ambush in submitting its final offer. To the extent that it expressed no disagreement and made no clarifications of the meaning of the terms used in the BAFO, the District must be assumed to have concurred in the consistent meaning of terms in the entire BAFO. The words of the offer, as made, must be given the same meaning when abstracted from the BAFO and incorporated in the contract as the meaning the words had in the complete BAFO. Thus, the Board will consider, in addition to the sections of the BAFO which were specifically incorporated and became a part of the final contract, portions of the BAFO not incorporated into the contract which give meaning and context to the language of the incorporated sections.

If the incorporated terms, when read together with the unincorporated introductory terms, are still unclear, the Board must determine their most reasonable meaning. "A contract is not rendered ambiguous merely because the parties disagree over its proper interpretation. Instead, a contract is ambiguous when, and only when, it is, or the provisions in controversy are, reasonably or fairly susceptible of different constructions or interpretations, or of two or more different meanings. If there is more than one interpretation that a reasonable person could ascribe to the contract, while viewing the contract in context of the circumstances surrounding its making, the contract is ambiguous. The choice among reasonable interpretations of an ambiguous contract is for the factfinder to make, based on the evidence presented by the parties to support their respective interpretations." *Gryce v. Lavine*, 675 A.2d 67, 69 (D.C. 1996) (citations omitted). The first step in contract interpretation is determining what a reasonable person in the position of the parties would have thought the disputed language meant. *Intercounty Constr. Corp. v. District of Columbia*, 443 A.2d 29, 32 (D.C. 1982); *Minmar*

Builders, Inc. v. Beltway Excavators, Inc., 246 A.2d 784, 786 (D.C. 1968). The presumption is that the reasonable person knows all the circumstances before and contemporaneous with the making of the integration. The reasonable person is also bound by all usages—habitual and customary practices—which either party knows or has reason to know. The standard is applied to the circumstances surrounding the transaction and to the course of conduct of the parties under the contract, both of which are properly considered when ambiguous terms are present. *1901 Wyoming Ave. Cooperative Ass'n. v. Lee*, 345 A.2d 456, 461-62 (D.C. 1975). If the ambiguity is still not resolved, the Board will apply the rule construing the contract against the drafter. *Affordable Elegance Travel, Inc. v. Worldspan, L.P.*, 774 A.2d 320, 328 (D.C. 2001).

The contract document, exclusive of provisions incorporated by reference from the BAFO, does not mention “AT&T” or “equipment.” (Tr. 51-54 (Ambush)). The contract document, however, also does not describe its most important requirement—the scope of work. The required tasks are specified by incorporating by reference sections of the BAFO. The BAFO scope of work separates audit of telephone circuits (Phases II and III) from data circuits (Phase V)¹¹. Phase II deals with verification of telephone service and identification of nonexistent services billed to the District. It requires Ambush to: “Prepare a comparative analysis of the information disclosed from the records of C&P Telephone Company, AT&T and other circuit vendors versus the actual count recorded during the on-site physical inventory”; “Generate a formal audit report detailing the billing errors disclosed by the comparative analysis”; and “Prepare a formal claim for any refunds due from C&P Telephone Company, AT&T and other circuit vendors.” Phase III directs Ambush to identify telephone service provided but not actually used by the District and then to “[c]alculate fiscal year (FY) 1994 savings to be realized by the disconnection of identified unused lines and equipment.”

Phase V specifically references AT&T in 5 of the 11 sections incorporated into the contract.

By themselves, certain of the individual incorporated BAFO provisions may be unclear as to whether they include audit of AT&T equipment, as opposed to lines and circuits. Any ambiguity disappears, however, when read in the context of the entire BAFO. Ambush’s introduction to the BAFO is replete with specific references to audit of AT&T equipment billings. In the introduction, Ambush proposed to “interpret the Public Service Commission’s tariffs as they relate to leased AT&T equipment,” compare “current on-site equipment . . . to what you are being billed and determine billing errors,” and submit “projected refund analysis reports to AT&T.” The introduction is followed by a proposed phased scope of work, which was incorporated into the final contract. Since the incorporated sections and the introduction were included in a single BAFO document submitted by Ambush, the Board must read terms used in the scope of work consistently with the same terms in the introduction. Read together with the introduction to the BAFO, we believe that the most reasonable interpretation of the scope of work incorporated from the BAFO into the executed contract is that the references to gathering AT&T information and preparing a formal claim to AT&T must include AT&T equipment. This interpretation is confirmed by the final step in Phase III which requires Ambush “to calculate savings to be realized by the disconnection of identified unused lines and equipment.”

¹¹ Phase I appears to deal generally with all types of service. Phase IV deals with 1MB lines and Centrex service provided only by C&P.

Even if a consistent reading of the entire BAFO did not require inclusion of equipment within the scope of work, that would be the most reasonable interpretation of the scope of work standing alone. The Board must interpret the incorporated terms to give some meaning to the specific inclusion of AT&T as one of only two firms referenced by name in Phase II of the contract dealing with telephone service. Since AT&T did not provide dial-tone service, there would be no reason to include AT&T in the scope of work unless equipment was intended to be included in the audits. To interpret the incorporated provisions as excluding equipment would render the specific references to AT&T in Phases II and III dealing with telephone service meaningless.

Although the District used the shorthand title of 'line and circuit' audit to refer to the contractor's work, the references to AT&T were clearly not meaningless to District personnel initiating the contract. From the very start of the contract, the District included AT&T as a subject of the audit. Within two weeks after the beginning of the contract, District officials called a meeting "for all agency coordinators, [and] all representatives. . . to discuss the future line and circuit audit that was going to be taking place citywide." (Tr. 98 (Brown)). Representatives of AT&T were invited by the District and were present at the meeting. (Tr. 100). The District further conceded that in the course of performance of the contract it provided the AT&T invoices to Ambush. (Tr. 151-2 (Bernhardt)). AT&T invoices included only equipment. (Tr. 115 (Brown)). Since long distance billing was made through Bell Atlantic, there would be no reason for anyone knowledgeable in the telephone industry to include AT&T representatives at the initial meeting or to provide AT&T invoices unless billing for equipment was being audited.

The Board is not persuaded by the District's witnesses, Mr. Brown and Mr. Bernhardt. There is no indication that either of the two witnesses offered by the District was familiar with the negotiation or award of the contract. Mr. Brown, who had no authority as to the contract and was only "following the directions of [the Department of Administrative Services]" (Tr. 105), based his opinion as to coverage of the contract, not on the contract itself, but on a document distributed by Ambush at an initial meeting with agency personnel. (Tr. 99). Mr. Bernhardt, who also had no contracting authority (Tr. 133), was shown a contract document which did not include the referenced BAFO (Appellant's Ex. 1), and he expressed a general opinion as to the purpose of the contract without any specific reference to the contract terms. (Tr. 133). He acknowledged that he was not "instrumental in developing [the] contract, the scope of work or anything in the contract." (Tr. 153) In fact, Mr. Bernhardt testified that he was "only vaguely" familiar with the contract. (Id.). The District itself objected to any testimony by Mr. Bernhardt as to the RFP because he had never seen it before. (Tr. 154). The District did not offer any witness who participated in negotiating the contract, nor did it call any contracting officer involved in performance.

The Board finds that the most reasonable interpretation of the written contract, based on the negotiation, specifically the entire BAFO, and the actions of the District at the inception of the contract to include AT&T representatives at the initial meeting, is that audit of AT&T equipment billed to the District was within the scope of the contract.

Performance of work

Alternatively, the District argues that Ambush is not entitled to the compensation claimed because Ambush did not demonstrate that it performed the work for which it seeks compensation. (Appellee's Posthearing Brief, 17). The District states that "[t]he inescapable conclusion is that all of the work on the telecommunications equipment that led to the refunds or credits was done exclusively by DC government personnel and personnel from AT&T." (*Id.*, at 20). The District asserts as fact that "Ambush's knowledge of the telecommunications equipment issues derives from his conversations with Candy Cannon-Monk, an AT&T representative who worked for the billing manager," (*Id.*, at 12), implying that Ambush did not learn of the overbilled equipment through its own audit efforts.

In essence, it is that District's position that Ambush is not entitled to compensation under the contract unless it can demonstrate that it independently discovered the erroneous billing through its own efforts. The District, however, cites no provision of the contract which requires the contractor to document its efforts in determining the billing discrepancy. The payment provision of the contract provides only that "the contractor shall receive 33% of the gross amount of any moneys recovered or costs avoided pursuant to any claim made under this contract . . . for savings projected and/or realized in accordance with tasks listed in phases II and III of Article I.B. of this contract." (Appellant Ex. 1, Art VI A). Phase III, as incorporated into the contract, provides that the contractor shall, after analyzing telephone service and billing, "calculate fiscal year 1994 savings to be realized from the disconnection of identified unused lines and equipment." The District's logic that the contractor must show that it learned of the potential claims before District employees would create, during the contract period, a race between District employees and the contractor to initiate refund claims. This would be an untenable situation, since the contractor was "required to work directly with the telephone coordinators of 60 to 65 agencies" and to begin this collaboration "within seven (7) days of contract award." (RFP, AF, Ex 3). The Board finds that Ambush met the requirements of the contract by identifying the erroneously billed equipment and filing a claim on behalf of the District with AT&T.

The record does not support the District's position that Ambush's audit efforts did not result in the claim for overbilling for unused equipment. The District bases its assertion as to Ambush's source of the information on the testimony of the AT&T account executive for the District. First, the account executive does not claim any direct knowledge of how Ambush learned of the overbilling, but only testified as to her conjecture. She stated "I think what happened is [Mr. Ambush] got information from Candy Cannon-Monk, who really didn't know what was going on." (Tr. 188 (Eley)). She elaborated:

Mr. Ambush started calling all around my office, until he basically reached a live person because I was out in the field a lot because I was in sales. So I was out with my customers and he kept calling and when he couldn't get me he would dial zero and

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basically go around my office until he could find a live person. Candy was a [billing] rep. Bettie [Terry] was a [billing] rep. They really didn't know what really was going on or anything. They were enlightened by their supervisor. They all worked for Rose Tomlin, who was manager for billing.

(*Id.*, 194).

The documentary record supports Ambush. Ambush notified the District of the AT&T billing irregularities in general by memorandum dated September 22, 1994 (Appellant's Ex. 6), and reported them to AT&T with specificity in correspondence dated September 26, 1994. (Appellant's Ex. 7). According to the AT&T account executive, Mr. Ambush did not attempt to contact her until "October or November 1994" (Tr. 179 (Eley)). She was very certain about the time period because, after the first call, not knowing who Mr. Ambush was, she called George Walker, chief of telecommunications for the Department of Administrative Services and learned that the Ambush contract was completed. "I knew it was after September 30." (Tr. 186). Since Mr. Ambush's first reports of the irregularities were as early as September 22, 1994, Mr. Ambush clearly was already aware of the overcharges when he first called the account executive and was alleged to "dial zero and basically go around [the AT&T] office until he could find a live person" claimed to be Ms. Cannon-Monk.¹²

The September letter was directed to Ms. Terry, not Ms. Cannon-Monk. (Appellant's Ex. 7). Ms. Terry was within the billing office, the proper office within AT&T to correct billing errors. When the account executive finally spoke to Mr. Ambush, she indicated that her "billing person was already working on these types of things." (Tr.180) The fact that the billing office was working on the errors is not surprising, since Mr. Ambush had previously advised the billing office of the errors. When no response had been received for an additional two months, on November 28, 1994, Mr. Ambush spoke to Ms. Terry's supervisor, Ms. Tomlin, the billing manager. (Appellant's Ex. 8). As opposed to "enlightening" Ms. Terry and Ms. Cannon-Monk, Ms. Tomlin apparently asked Ms. Cannon-Monk to respond to Mr. Ambush. Ms. Cannon-Monk responded to Mr. Ambush in a memorandum dated December 9, 1994, estimating the refund amounts and stating that the delay in issuing the refund was determining the "sale in place" value of the equipment which, Ms. Cannon-Monk advised, "will have to be discussed with Sherri Eley." (*Id.*).

AT&T did not respond as to the sale in place values for a further three more months. On April 3, 1995, Ms. Eley sent a letter to the Public Schools offering a settlement of the overpayment. (Appellant's Ex. 9). Although Ms. Eley had advised Mr. Ambush that the billing person was working on the refund and although Ms. Eley had been copied on the December 9 memorandum, neither the billing representative, Ms. Cannon-Monk, her colleague, Ms. Terry, nor her billing supervisor, Ms. Tomlin, was shown as receiving a copy of the April 3, 1995, letter. (*Id.*). A conversation on April 10, 1995, between Mr. Ambush and Ms. Cannon-Monk was confirmed by Ms. Terry in a memorandum of that date which stated the final amounts of the refunds for 613 G and 301 C Streets. Ms. Eley was shown as receiving a copy of the memorandum. The Board finds no indication from the correspondence that AT&T was taking

¹² Neither Mr. Walker, nor Ms. Cannon-Monk was presented by the District as a witness.

any steps to correct the overbilling before Mr. Ambush brought it to the attention of the AT&T billing department and persisted in asserting the claims. The amount of the credit indicates that the overbilling had continued for over a year.

The District asks the Board to draw an inference that Ambush did not discover the unused, but billed, equipment because Mr. Ambush was unknown to Ms. Eley during the course of the audit. The District relies on testimony that Ms. Eley, the AT&T account representative working on the telecommunications upgrade, "had never heard of Mr. Ambush prior to October 1994." (Appellee's Posthearing Brief, 19). Whether or not Ms. Eley knew of Mr. Ambush is not dispositive of whether Ambush had performed an equipment audit. Ms. Eley testified:

Keep in mind, I am giving my best guess at everything that it entails because my responsibility was not a billing rep per se. But what it would entail for my billing manager to do was to basically make sure that what they had was what we were billing them for, and that is to sum it up in a nutshell."

(Tr. 180).

Ms. Eley's summation of the billing manager's responsibility is a clear statement of the Ambush audit function, to make sure that AT&T was billing the District correctly. The accuracy of the bills was the responsibility of the billing manager and her staff. On September 26, 1994, before the conclusion of the contract, Mr. Ambush properly contacted the billing representative, Ms. Terry, and followed up with the billing manager, Ms. Tomlin. Ambush introduced documentary evidence of these contacts. The District did not challenge the documents or offer testimony from the AT&T billing personnel rebutting Ambush's evidence.

Ambush's claims involve the Department of Public Works ("DPW") and the D.C. Public Schools. The District offered the testimony of Ronald Brown of DPW, William Bernhardt of the Department of Administrative Services and Marjorie Coachman of the Public Schools. None of the witnesses could shed light on the issue of whether Ambush discovered the unused equipment. Although the District presented these witnesses to show that it was District employees, not Ambush, whose work resulted in the refunds, their testimony does not support that premise.

The DPW portion of this claim involves billing codes BAC 101 and 168. (Posthearing Brief, 17) When asked if he remembered "thinking about BAC 101 and BAC 168 . . . preparing or seeing a request for equipment disconnection or refund or reimbursement from your offices at DPW to DAS on either of those account codes," Mr. Brown answered, "No, I do not, not at this time." (TR. 106). After describing equipment disconnection procedures, Mr. Brown was asked "Do you remember that happening with the two accounts here, BAC 101 and BAC 168?" Mr. Brown responded "No, I do not." (TR. 107).

It appears that Mr. Bernhardt was less than candid in his testimony. Although Mr. Bernhardt is shown as receiving a copy of Ambush's September 22 memorandum which clearly advised that Ambush had "discovered a potentially large amount of over-billing with the AT&T

account, Mr. Bernhardt testified that he was unaware of Ambush's claim for reimbursement for equipment until October or November of 1994 and specifically answered "No" as to whether he was aware prior to September 30, 1994, that Ambush was doing an equipment audit. (Tr. 145). On cross-examination Mr. Bernhardt conceded that Ambush could only have received AT&T invoices from his office and further stated that "they would have no reason to go to AT&T, except for long distance." (Tr. 151). Mr. Bernhardt had previously testified that long distance billing did not come from AT&T, but rather came as a single package from Bell Atlantic (Tr. 138), but gives no explanation as to why the AT&T invoices were provided.

At D.C. Public Schools, Ms. Coachman, the witness presented, was clearly not meaningfully involved in the audit of unused equipment. The Public Schools equipment which was disconnected was a Horizon system. (Tr. 181 (Eley)). Ms. Coachman denied that she was auditing unused equipment. (Tr. 170). When asked how long the Horizon equipment was not in operation she responded "Only about a month or two." (Tr. 171). The record shows the Horizon equipment was unused for well over a year and that the schools were overbilled by nearly \$60,000. (Appellant's Exs. 9 and 11). Ms. Coachman stated that she worked with Ms. Eley on the refund, which may very well be accurate and is not inconsistent with the record. The record does not indicate Ms. Eley's activity until December 1994; over two months after Ambush filed the District's claim. (Appellant's Ex. 8).

The District concluded its argument that Ambush had not done the work it claims by stating:

It is hard to imagine a professional telecommunications auditing company – much less any professional organization – failing to keep contemporaneous records of the work it claims to have done, particularly where there were as many individual components as here and compensation was based on the value of each piece of work.

(Appellee's Posthearing Brief, 20).

Since it is undisputed that AT&T actually gave the District a credit of over \$200,000, the process of instituting that credit must have begun somewhere. It is Ambush's position that it reported the claim for credit for unused AT&T equipment. It is the District's position that the credit was initiated either by the District or by AT&T.

Although the documentation produced by Ambush is sparse, the District produced no documentation whatsoever as to initiating the credits. Not a single document prepared by the District was introduced into the record or included in the Appeal File which referred to a claim to AT&T for unused equipment in any way. In addition, no witness testified that the District instituted any claim for refund. Similarly, not a single document prepared by AT&T indicated that AT&T itself had instituted the process which resulted in the credit. The record contains 3 documents prepared by AT&T. (Appellant's Exs. 8, 9 and 10). The earliest date of the AT&T documents was December 9, 1994, over two months after the first Ambush document. Two of the 3 documents specifically state that they were in response to inquires made by Mr. Ambush.

(Appellant's Exs. 8 and 9). Only one of the AT&T documents did not reference Ambush as its impetus. That document, which is dated April 3, 1995, Ms. Eley's advice to the Public Schools of the amount of the credit to be granted, is silent as to how the credit was initiated. (Appellant's Ex. 9). The Board notes, however, that the letter was sent over 6 months after Ambush made the claim to AT&T and nearly 4 months after a copy of a memorandum regarding the claim was shown as being sent to Ms. Eley. Testimony by the Public Schools indicated that Ms. Eley handled processing of the credit, but significantly gives no dates as to when Ms. Eley was involved. Ms. Eley did not testify as to who initiated the claim.

On the other hand, the Appeal File contains memoranda from Ambush dated prior to the completion of the contract advising the District and AT&T of the claim for unused equipment which were introduced into evidence without objection as to authenticity. (AF, Exs. 5 and 6). Two further memoranda prepared by AT&T responded to the claims by Ambush. (AF, Exs. 7 and 8). If AT&T was actually working on refunding overpayments to the Public Schools at the time they received Mr. Ambush's claim letter, it is unlikely that the responses to Mr. Ambush would not mention this fact. The responses, however, are totally devoid of any indication that AT&T was already processing a refund.

The preponderance of the evidence supports our finding that Ambush initiated the claim for refund. Since the District had the opportunity to introduce evidence challenging Ambush's efforts in initiating the AT&T claims or to show that they were otherwise initiated, it can only be concluded that no such evidence exists. When Ambush pressed the claim on behalf of the Public Schools, it received written responses from AT&T confirming the progress toward ultimate payment. If copies of the initiating documents within AT&T and justification for payment of the claim were available, they would show when the claim was first raised to AT&T. In the absence of any other documentation or testimony, we find that Ambush initiated the equipment refund claim with AT&T in accordance with the contract scope of work.

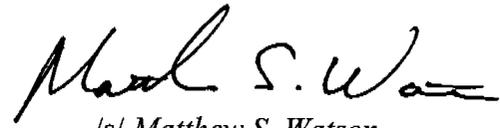
CONCLUSION

It is unquestioned that Ambush was aware of and reported AT&T equipment overbilling to the District prior to the conclusion of the contract on September 30, 1994. Based on the record, Ambush submitted a reimbursement claim for the equipment with AT&T and followed proper procedures in pursuing that claim on behalf of the District. The District was advised of the equipment overbilling in general terms by memorandum dated September 22, 1994. The amounts were accurately quantified in a memorandum to AT&T dated September 26, 2004, also prior to the completion of the contract. The Ambush documents are the only evidence in the record as to the presentation of equipment reimbursement claims to AT&T. Pursuant to the contract, Ambush is entitled to the full amount of its claim, \$135,259.72, plus interest at the rate of 4% from May 10, 1995, the date of its invoice to the District. (D.C. Code § 2-308.06 and D.C.

Code § 2-3302(b)). Because there is no provision for attorneys' fees in the Procurement Practices Act, Ambush's claim for such fees is denied.

SO ORDERED

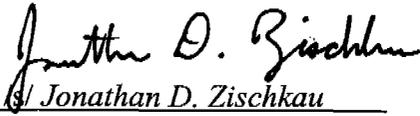
July 8, 2004



/s/ Matthew S. Watson

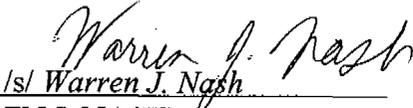
MATTHEW S. WATSON
Administrative Judge

Concur:



/s/ Jonathan D. Zischkau

JONATHAN D. ZISCHKAU
Chief Administrative Judge



/s/ Warren J. Nash

WARREN J. NASH
Administrative Judge

GOVERNMENT OF THE DISTRICT OF COLUMBIA
 CONTRACT APPEALS BOARD

APPEAL OF:)
)
 JET BLAST, INC.) CAB No. D-1039
)
 Under Contract No. OMS-3042--AA-KH)

For the Appellant: Scott M. Heimberg, Esq., and Andrea T. Vavonese, Esq. For the Government: Mark D. Back, Esq., and Andrew J. Saindon, Esq., Assistants Attorney General.

Opinion by Administrative Judge Warren J. Nash, with Chief Administrative Judge Jonathan D. Zischkau and Administrative Judge Matthew S. Watson, concurring.

OPINION

(Lexis-Nexis Filing ID 3986408)

Appellant Jet Blast, Inc., and appellee District of Columbia have each moved for summary judgment. Jet Blast requests payment of two unpaid invoices for services performed under the contract. Jet Blast also requests Quick Payment Act (“QPA”) penalty interest for late payments, 4 percent simple interest on the unpaid balance, and repayment of Jet Blast’s cost of pursuing payment from the District. The District responds that it overpaid Jet Blast for daily travel between Jet Blast’s home office in Baltimore, Maryland, and the District’s Blue Plains Wastewater Treatment Plant (Blue Plains) on 31 prior invoices. After completion of discovery, including document production and depositions, both parties agreed to submit this matter to the Board on the written record pursuant to Board Rule 209, 49 D.C. Reg. 2099 (Mar. 8, 2002).

BACKGROUND

On May 25, 1993, the Department of Public Works (DPW) issued Invitation for Bids (“IFB”) OMS-3042-AA-KH for high vacuum, high pressure cleaning services at Blue Plains. The IFB required the contractor to clean equipment at Blue Plains and remove various materials from the plant. The IFB contemplated award of a requirements contract with a base period of one year and two option years. The IFB directed bidders to address all correspondence regarding the IFB to the contracting officer at DPW’s Office of Management Services and listed Ms. Kathy Hatcher as the point of contact for all inquiries.

The price schedule on page 3 of the IFB contained four line item descriptions, as follows:

1. Waterjetblasting unit, sewer cleaning, minimum 2,000 pounds per square inch, 60 gallons per minute. Quantity, Estimated, 1,800 hours.
2. Liquid vacuum truck, minimum 400 cubic feet per minute. Quantity, Estimated, 1,800 hours.
3. Wet/dry vacuum truck, minimum 4,500 cubic feet per minute. Quantity, Estimated, 1,340 hours.
4. Miscellaneous equipment not included above, less discount offered off current contractor's current open market price list. \$5,000 Discount 20%.

In the schedule, the District set forth the estimated amount of time that the District intended to use for the three cleaning services included in the schedule. The IFB required the bidder to set forth in its bid a unit price per hour for each of the three services.

Special Condition 12 of the IFB described the unit prices set forth in the price schedule:

Unit prices and/or discounts offered herein for labor shall be portal-to-portal. Unit prices and/or discounts offered herein for equipment shall be for time at work site and shall include the total labor cost, accessories, materials, and chemicals necessary to complete the job.

The IFB did not expressly define the term "portal-to-portal" nor did it include an example of a "portal-to-portal" bid price. The IFB did not contain any language setting a ceiling for the amount of services to be ordered by the District.

Jet Blast submitted its bid to the District on June 25, 1993. The District determined that Jet Blast was the low bidder. On July 29, 1993, the District awarded the contract to Jet Blast. The contract awarded to Jet Blast had a maximum price of \$363,920 in the base year, \$377,400 in Option Year 1, and \$388,200 in Option Year 2, for a total amount of \$1,129,520. During the following three years, Jet Blast submitted 33 invoices to the District, totaling \$1,739,465.75 for work completed under the contract. The District paid 31 of the invoices. The District withheld payment on the last two invoices after the District determined that Jet Blast had erroneously submitted on each invoice a separate request for reimbursement for portal-to-portal travel costs (costs for travel time from Jet Blast's facility in Baltimore to Blue Plains) for the contractor's employees. The District determined that it had overpaid Jet Blast by \$153,846.00 in connection with the 31 prior invoices. Jet Blast's last two invoices totaled \$70,453.00.

Jet Blast bases its theory of recovery on: (1) an implied modification of the IFB based on a discussion between Mr. Edward Jefferson of Jet Blast and Mr. Marco Garcia

of the District, (2) a course of dealings evidenced by the District's payment of the 31 Jet Blast invoices that included an amount for travel, and (3) QPA interest penalties for the District's untimely payment of invoices. The District responds that the IFB and thus the contract required bidders to include portal-to-portal prices in the bid price for the labor hour rate, and that the District did not alter the schedule to allow separate payment of portal-to-portal travel beyond what the contractor included in its labor rate bid price. Additionally, while the District concedes that it paid some invoices late to Jet Blast, the District asserts that it does not owe to Jet Blast the amount claimed in Jet Blast's QPA claim.

A. Portal-to-Portal Pay

In its motion for summary judgment, Jet Blast asserts that during the bid phase, District employees told Jet Blast that Jet Blast should separately invoice travel labor hours. Jet Blast says that it concluded from these instructions that the District did not want Jet Blast to include travel costs in the bid.

Jet Blast general manager Mr. Edward Jefferson picked up the bid package and spoke with Ms. Kathy Hatcher, the point of contact identified in the IFB. In his deposition, Mr. Jefferson stated that Ms. Kathy Hatcher referred him to Mr. Walter Bailey, Chief of the Bureau of Wastewater Treatment, who referred him to Mr. Garcia, the Solid Processing Manager and the District employee who would review the work of the contractor. Mr. Jefferson stated that he discussed the billing of portal-to-portal travel costs with Mr. Garcia in a meeting with Mr. Garcia before Jet Blast submitted its bid, during which Mr. Garcia told him that the District would reimburse the contractor for travel time and that the successful contractor should include travel time on its invoices to the District. (Jefferson Aff. ¶ 5; Jefferson Dep. 42, 47-49). Mr. Jefferson further stated that Mr. Garcia's statement was consistent with Jet Blast's prior dealings with the District, and that the District had reimbursed Jet Blast for portal to portal travel time for all the work Jet Blast had performed for the District since 1985.

However, Mr. Garcia's deposition testimony contradicted Mr. Jefferson's recollection regarding the substance of that conversation. Mr. Garcia stated that: "Nobody said anything about it, before the bidders bid, to me. Nobody mentioned anything about portal-to-portal ... I don't remember anybody asking anything about travel time." (Garcia Dep. 88).

Mr. Jefferson stated that Jet Blast was confused about the meaning of Special Condition 12. According to Mr. Jefferson, the first sentence of Special Condition 12 indicates that the District would pay for labor travel costs portal-to-portal. However, he construed the second sentence to mean that the unit prices for equipment should include total labor costs for operating equipment at the work site only. In his affidavit dated August 14, 1998, Mr. Jefferson stated the following:

3. The first sentence of Paragraph 12 of the IFB states that unit prices for labor shall be portal-to-portal. This sentence indicated to me that the

District would pay for travel costs. The second sentence of Paragraph 12 states that unit prices for equipment shall be for time at the work site and shall include the total labor cost. This sentence indicated to me that the unit prices for equipment should include labor cost for time at the work site, but should not include labor travel portal-to-portal.

4. Based on the language of the IFB's Paragraph 12 stating that unit prices for labor shall be portal-to-portal, the failure to include an estimate of the number of trips to Blue Plains and the failure to include a line item for labor portal-to-portal on the Schedule, it was unclear to me how JBI should include labor travel costs in its bid. Additionally, because it was not known how many trips JBI would need to make to the work site, it was impossible to accurately estimate travel costs. JBI is based in Baltimore and the work was to be done in the District. Therefore, the number of trips portal-to-portal could have a significant impact on JBI's cost.

Jet Blast claims that its bid did not include travel time in the labor unit prices. Jet Blast submitted 33 invoices, dated August 31, 1993, through March 1996. Each invoice contained separate line items for the contract line items (waterblasting, liquid vacuum, wet/dry vacuuming and miscellaneous equipment) and an additional charge for travel time, routinely billed at 3 hours per day at a rate of \$27.00 per hour. According to the Appellant's motion for summary judgment, Jet Blast submitted with its invoices a sheet entitled "Daily Break Down of Monthly Invoice Per Day/Per Job" which provided a description of the work done for each day included in the invoice. For each day worked, the daily break down included a line item entitled "Travel Charge." Each daily sheet also included the number of hours, number of items, hourly rate, and total amount next to each line item. Finally, the invoices included job tickets for each day worked during the invoice period. Jet Blast submitted the job tickets daily to a DPW employee, usually Mr. Garcia or his subordinate, who signed the job ticket indicating that Jet Blast performed the work indicated on that ticket. On each ticket, Jet Blast indicated the travel time to and from the job site.

Jet Blast asserts that three District representatives reviewed Jet Blast's invoices: Mr. Marco Garcia or his designee, Mr. Walter Bailey, and Mr. Bailey's supervisor. Mr. Jefferson testified that Mr. Garcia called Mr. Jefferson after completion of the first month's work and asked Mr. Jefferson why the price on Jet Blast's invoice was so high. Jet Blast responded in a letter dated September 9, 1993, which set forth the price of contract performance to that date. (Appeal File, Tab 8). Mr. Jefferson next called Mr. Garcia to discuss the invoice and travel costs. According to Mr. Jefferson's affidavit of August 14, 1998, Mr. Garcia told Mr. Jefferson that the invoices were fine.

Jet Blast argues that it received from Mr. Garcia verbal authority to include requests for travel time payment in its invoices submitted to the District and it is therefore entitled to payment for travel as a separate line item. Further, Jet Blast argues that because the District paid 31 invoices without questioning the amount of any invoice, the

District agreed to pay for travel as a separate line item. Jet Blast argues that the District cannot now refuse to pay the amounts claimed by Jet Blast for travel time reimbursement.

The District asserts that the bid clearly required Jet Blast to include any travel time in its labor pricing. Certainly there was no separate line item price for portal-to-portal labor in Jet Blast's bid. Although the District admits that it paid to Jet Blast the charges set forth in the 31 invoices submitted to the District, the District asserts that it withheld payment on the last two invoices after determining that Jet Blast had erroneously billed, and the District had erroneously paid, portal-to-portal travel as a separate line item. The District asserts that Jet Blast overbilled the District by \$153,846.00.

Whether or not Mr. Jefferson and Mr. Garcia discussed portal-to-portal billing, it is clear that Mr. Garcia did not have authority to modify the IFB. There is no modification of the IFB issued by the contracting officer directing bidders to list travel time in any manner different from that provided in Special Condition 12, namely, that "unit prices ... offered herein for labor shall be portal-to-portal." Therefore, even if Mr. Jefferson and Mr. Garcia had discussed travel time billing as alleged by Mr. Jefferson, Jet Blast could not have relied on an oral conversation to modify the IFB. See *Coffin v. District of Columbia*, 320 A.2d 301, 303 (D.C. 1974). Jet Blast's claim that the IFB was unclear as to travel time does not help it.

Any ambiguity as to portal-to-portal labor payments was apparent on the face of the solicitation. While the first sentence of Paragraph 12 stated "Unit prices . . . for labor shall be portal-to-portal," the second sentence distinguished equipment pricing from the basic labor pricing, stating that "Unit prices for equipment shall be for time at the work site and shall include total labor cost . . . necessary to complete the job." The only reasonable interpretation of the language "unit pricing . . . for equipment shall be for time at work site" was that the equipment was to be priced for time at the work site while the second part of the sentence for "total labor costs" incorporated the "portal-to-portal" feature of the first sentence of Paragraph 12. The IFB's pricing schedule thus had no separate item for pricing the transportation labor that Jet Blast invoiced and now seeks to recover. Rather, the contract required the contractor to integrate his travel costs into the labor pricing according to the clear language of the first sentence of Paragraph 12.

When a term in an IFB is ambiguous, the bidder must request clarification of the term before submitting its bid. See *AnA, Incorporated*, CAB No. D-1022, July 19, 2000, 2000 BCA Lexis 20, *W.M. Schlosser Company, Inc.*, CAB No. D-0889, June 25, 1992, 40 D.C.Reg 4434, 1992 DCBCA Lexis 163, *J.L. Case Co.*, ASBCA 25419, 81-1 BCA ¶ 15064, *Malloy Construction Co.*, ASBCA No. 25055, 82-2 BCA ¶ 16104 (1982). Additionally, the party must make its inquiry to the person or persons identified in the IFB. The IFB identified Ms. Kathy Hatcher as the point of contact for all inquiries and directed bidders to submit all correspondence to the contracting officer. Jet Blast did not submit any request for clarification to Ms. Hatcher or to the contracting officer. Jet Blast could not reasonably believe that the alleged oral conversations with a District employee who was not the contracting officer would effectively modify the terms of the

solicitation. In our view, the language of Special Condition 12 is clear: the unit price for labor was to include all labor "portal-to-portal." Thus, if Jet Blast did not include sufficient amounts in its unit price for labor portal-to-portal it must live with its bid pricing for labor.

B. Equitable Estoppel

Jet Blast asserts that it should recover portal-to-portal payments from the District because the District established a pattern of paying portal-to-portal costs. Jet Blast asserts that the District's payment of 31 Jet Blast invoices that included a line item amount for travel effectively warned the District that Jet Blast expected to be paid for portal-to-portal travel. Additionally, Jet Blast asserts that the District's payment of those 31 invoices demonstrated that the District interpreted the contract language in the same manner as Jet Blast. The Jet Blast theory of recovery is that the District's payment of the 31 invoices irrevocably changed the contract so that the District is now obligated to pay Jet Blast for portal-to-portal travel. The problem with Jet Blast's argument is that the District properly could pay travel time insofar as it was included as part of the equipment costs called for by Special Condition 12. Thus, the District's payment of travel was proper to the extent that it did not exceed the labor price agreed between the parties in their contract which is based on Jet Blast's bid unit price for labor.

Jet Blast cannot assert that the District's payment of invoices had the effect of modifying the contract pricing terms that required portal-to-portal travel to be included in Jet Blast's unit labor rates. Certainly, there is no written contract amendment evidencing such a modification.

C. Late Payment Penalties

Jet Blast asserts, and the District admits in its brief, that the District made several late payments to Jet Blast after Jet Blast submitted invoices to the District. Jet Blast presented to the Board, as an attachment to the affidavit of Kevin Kavanagh, dated November 2, 1999, a spreadsheet setting forth an analysis of the payment dates for all invoices submitted to the District. The spreadsheet also sets forth interest penalties for each of the late paid invoices. The Board has reviewed that spreadsheet to determine the interest penalties that the District should pay to Jet Blast.

The Quick Payment Act (D.C. Code §§ 2.221.01-2.221.06) and the regulations promulgated at 1 DCMR §§ 1700-1799 set forth the mechanism to determine the amount of QPA penalties that the District must pay to contractors if the District fails to pay the contractor within the time period set forth in the Act.

D.C. Code § 2.221.02 provides as follows:

- (b)(1) Interest penalties on amounts due to a business concern under this subchapter shall be due and payable to the concern for the period beginning on the day after the required payment date and ending on the

date on which payment of the amount is made, except that no interest penalty shall be paid if payment for the complete delivered item of property or service concerned is made on or before:

- (A) the 3rd day after the required payment date, in the case of meat or a meat product, described in subsection (a)(2)(B)(i) of this section;
- (B) the 5th day after the required payment date, in the case of an agricultural commodity, described in subsection (a)(2)(B)(ii) of this section; or
- (C) the 15th day after the required payment date in the case of any other item. Interest, computed at a rate of not less than 1%, shall be determined by the Mayor by regulation.

The D.C. Municipal Regulations at 1 DCMR § 1709, provide the following:

1709.1 A business concern shall be entitled automatically to receive an interest penalty payment if the following conditions are met:

- (a) The business concern has a contract or purchase order for the goods or services provided;
- (b) The agency has accepted property or service and there is no disagreement over quantity, quality or other contract provisions which would affect payment;
- (c) A proper invoice has been received by the designated payment officer (except where no invoice is required; for example, as with periodic lease payment), or the agency has failed to give the business concern a notice of defect as required by Section 4905;
- (d) Payment is not made on or before the end of the following periods:
 - (1) Meat and meat food products -- the third (3rd) calendar day after the payment due date;
 - (2) Perishable agricultural commodities -- the fifth (5th) calendar day after the payment date; and
 - (3) Other goods, property or services -- the fifteenth (15th) calendar day after the payment date.

The D.C. Municipal Regulations, 1 DCMR § 1710, provides the following:

1710.1 Interest shall be calculated at the rate of one percent (1%) per month.

- 1710.2 Interest shall be computed from the day after the required payment through the actual payment date.
- 1710.3 When an interest penalty that is owed is not paid, interest shall accrue on the unpaid amount until paid. Interest penalties remaining unpaid for any thirty (30) day period will be added to the principal, and interest penalties thereafter, will accrue monthly on the total of principal and previously accrued interest.
- 1710.4 When an agency takes a discount after the discount period has expired, the interest payment shall be calculated on the amount of the discount taken, for the period beginning the day after the end of the specified discount period through the actual payment date.
- 1710.5 No interest penalties shall continue to accrue under the following circumstances: (a) after the filing of a claim for such penalties, or (b) for more than one year.
- 1710.6 Interest penalties of less than five dollars (\$5.00) shall not be paid unless requested.
- 1710.7 Adjustments shall be made for errors in calculating interest, if requested.

To start the analysis, the Board first subtracted from each invoice amount the amount claimed by Jet Blast for travel set forth on each invoice that is included in the supplemental appeal file. We made this subtraction, not because Jet Blast is not entitled to portal-to-portal travel costs but because such costs were to be already included in its unit labor rates. For example, for the first item on the spreadsheet, the invoice of August 31, 1993, the Board subtracted \$2,995.00 from the invoice amount, which is the amount that Jet Blast claims for travel for that invoice. The Board used the Jet Blast calculation of "Days Past Due" that is set forth in the attachment to the affidavit. The Board converted the "Days Past Due" to months past due, since the statute and the regulations clearly require the District to calculate the interest penalty for each month. 1 DCMR § 1710.3 requires the District to calculate interest penalties for each thirty day period for the unpaid amount, and to add the interest penalty to the principal amount. This section sets forth a standard compound interest formula that can be expressed in the following form: $S = P(1+i)^n$, where "S" equals the compounded amount (or future value), "P" equals the original principal amount, "i" equals the period rate of interest, and "n" equals the number of compounding periods.

For example, if Jet Blast claimed a late payment period that was equal to or less than 15 days, the Board did not apply a penalty. This matches the analysis used by Jet Blast's Mr. Kavanagh in his affidavit. If Jet Blast claimed a late payment period greater than 15 days but equal to or less than 60 days, the Board applied a 1 percent penalty to the amount of the unpaid invoice, that is, the invoice minus the travel amount, or

\$14,556.00 for the first item on the spreadsheet. Therefore, the penalty for late payment of the August 31, 1993, invoice is \$145.56. If Jet Blast claimed a late payment period greater than 60 days but equal to or less than 90 days, the Board applied a 1 percent penalty compounded for two months, in accordance with the formula set forth above. The Board completed its analysis of the payment history of the 33 invoices by using the procedures set forth above. Once the Board determined the number of months past due for each invoice, the Board used the standard compound interest formula to calculate the penalty for those late payment dates that exceeded 60 days. Accordingly, the Board's late payment penalties are lower than the penalties claimed by Jet Blast.

The District must adjust its records to determine the true amount, if any, that the District owes to Jet Blast, using the time periods set forth in the Kavanagh affidavit. Additionally, if applicable, the District must credit to Jet Blast 4 percent simple interest for any outstanding unpaid amount.

D. Payments exceeding contract limits

We understand from the pleadings that because the District paid to Jet Blast invoice amounts for travel costs, the District appears to have overpaid Jet Blast. The contract awarded to Jet Blast authorized payments of \$363,920 in the base year, \$377,400 in Option Year 1, and \$388,200 in Option Year 2. WASUA exercised Option Year 1 and Option Year 2 in contract actions 1 and 2, dated July 28, 1994, and July 6, 1995, respectively. The total price of the base year of the contract and the two option years is \$1,129,520, which is the same amount set forth in the Jet Blast bid. We note that the invoices presented by Jet Blast indicate that the District has paid to Jet Blast \$1,739,465.75 in 31 invoices, which exceeded by \$609,945.75 the contract amount of \$1,129,520 set forth in the contract. Neither party presented to the Board any explanation of the contract price overrun, nor could we locate in the record any indication that the District modified the contract to increase the price. The District should issue a contract modification indicating the proper adjusted contract price.

CONCLUSION

The Board concludes that the price schedule of the contract included portal-to-portal travel as part of the unit equipment rates. The Board also concludes that the District's contracting officer never modified the IFB or the resulting contract to alter the unit equipment rate to exclude portal-to-portal travel time. Accordingly, the District is not estopped from asserting that it overpaid Jet Blast during the contract. The Board orders the parties to determine the correct amount, if any, of Quick Payment Act interest that the District may owe to Jet Blast, based on the invoice payment dates submitted by Jet Blast. Since the contracting officer has not yet issued a written decision regarding the amount of any possible overpayment by the District to Jet Blast, the Board does not offer its opinion on that matter. The Board remands the claim to the Contracting Officer for resolution of any Quick Payment Act interest in light of any overpayment that the District may have paid to Jet Blast.

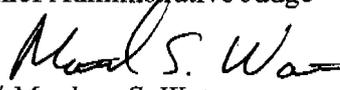
SO ORDERED

August 3, 2004


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

CONCURRING:


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


/s/ Matthew S. Watson
MATTHEW S. WATSON
Administrative Judge

GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

PROTEST OF:

ACS STATE AND LOCAL SOLUTIONS, INC.)	
)	CAB No. P-0691
OFFICE OF THE CHIEF FINANCIAL OFFICER)	
RFP No. CDOPD-04-R-002)	

For the Protester, ACS State and Local Solutions, Inc.,: William W. Thompson, Jr., Esq. and Michael A. Branca, Esq., Thompson and Waldron. For the Intervenor, J.P. Morgan Electronic Financial Service, Inc.: Stephen S. Kaye, Esq., Daniel C. Schwartz, Esq. and Elizabeth L. Martin, Esq., Bryan Cave LLP. For the District: Richard O. Duvall, Esq., Kristen E. Ittig, Esq., Catlin K. Cloonan, Esq. and Stuart W. Turner, Esq., Holland & Knight, LLP (Eric W. Payne, Esq., Office of the Chief Financial Officer).

Order by Administrative Judge Matthew S. Watson with Chief Administrative Judge Jonathan D. Zischkau and Administrative Judge Warren J. Nash, concurring.

ORDER

(LexisNexis Filing ID 4135004)

ACS State and Local Solutions, Inc. ("ACS") protested against award by the Office of the Chief Financial Officer ("OCFO") of RFP No. CFOPD-04-R-002 to J.P. Morgan Electronic Financial Service, Inc. (J.P. Morgan) for electronic benefit transfer ("EBT") services. The contract provides for the transmission on behalf of the District of food stamp and temporary assistance to needy families ("TANF") benefits for a period of 5 years with an option for an additional two years.

ACS asserted that (1) the contracting agency awarded the contract in violation of applicable statutes requiring that solicitations for competitive negotiated procurements state the relative importance of the factors to be applied in evaluating proposals; (2) the contracting agency awarded the contract in violation of applicable statutes requiring that solicitations for competitive negotiated procurements state the specific needs of the contracting agency that are to be used as the basis for the evaluation of proposals; (3) the contracting agency's evaluation of ACS's proposal was not in accordance with the evaluation criteria set forth in the solicitation; and (4) the contracting agency's evaluation of ACS's proposal was unreasonable, arbitrary, capricious and irrational. (Protest, 1-2). In its response to the Agency Report, ACS additionally asserted that the contracting officer failed to make a deliberative and informed decision to award the contract. (Opposition, 28).

The District moved to dismiss the protest for lack of jurisdiction on three grounds. First, that OCFO's procurement authority is not subject to the Procurement Practices Act, and, consequently, the jurisdiction of the Board. D.C. Code § 2-301.04(c). J.P. Morgan joined in this objection to the Board's jurisdiction. Second, that the RFP is for making Federal financial assistance over which the Board similarly does not have jurisdiction. *Id.* § 2-301.04(b). And

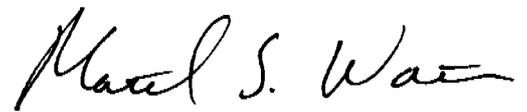
third, that ACS lacks standing to protest, alleging that the ACS proposal was nonresponsive making ACS not in line for award, a requirement to give the Board jurisdiction over its protest. The Board denied the motions to dismiss holding that the Board properly exercises jurisdiction over OCFO contracts consistent with the Court of Appeals' recent opinion in *Abadie v. D.C.C.A.B.*, 843 A.2d 738 (2004); that the RFP seeks a contract for services required to be provided by the District, not the granting of financial assistance, and, that ACS has standing to protest because its proposal was not clearly nonresponsive and was treated as responsive by the contracting officer.

On August 27, 2004, the Board held a hearing at which it received evidence and argument on the protest. Food stamps and TANF benefits are the principal source of income and nutrition to the recipients. Any interruption of the availability of EBT services would cause irreparable harm to a substantial number of District residents. The existing contract will expire at the end of this week. It is imperative that there be no gap in delivery of these benefits and no cloud on the continuation of these services. Although it is the Board's normal practice to fully explain its orders at the time of issuance, it is releasing this order immediately, to be followed by a full opinion at a later date.

The Board finds that the contracting officer properly exercised his authority in accordance with the RFP and did not abuse his discretion to determine which proposal offered the best value to the District based on the Final Proposal Revisions and the information the contracting officer received as to previous experience and performance by the offerors. Because ACS has not demonstrated a violation of applicable law, regulation, or the terms of the solicitation in connection with the award to J.P. Morgan, we deny the protest.

SO ORDERED.

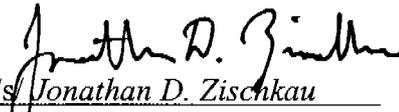
August 31, 2004



/s/ Matthew S. Watson

MATTHEW S. WATSON
Administrative Judge

Concur:



/s/ Jonathan D. Zischkau

JONATHAN D. ZISCHKAU
Chief Administrative Judge



/s/ Warren J. Nash

WARREN J. NASH
Administrative Judge

GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

APPEAL OF:

ROBERSON INTERNATIONAL, INC. <i>et al.</i> ,)	
)	CAB No. D-1233
Debarment by Debarment and Suspension Panel)	

For the Appellants: Ronald C. Jessamy, Esq. For the District: Keith D. Coleman, Esq.,
 Assistant Attorney General.

Opinion by Administrative Judge Matthew S. Watson, with Chief Administrative Judge
 Jonathan D. Zischkau, concurring.

OPINION

(LexisNexis Filing ID 4181547)

Roberson International, Inc., and its principals (collectively "Roberson") appealed a decision issued February 12, 2004, by the Debarment and Suspension Panel ("DSP") debarment the company and its principals from receiving District contracts for two years through July 18, 2005. (Appeal File ("AF") 5). The DSP was established pursuant to the *Debarment Procedures Emergency Amendment Act of 2003* ("Emergency Act"), D.C. Act 15-153, 50 D.C. Reg. 8730 (Oct. 17, 2003). Pursuant to that act, the DSP was authorized to rehear "[e]ach debarment and suspension initiated between April 1 . . . and September 16, 2003." (*Id.* § 2(e)). At the time of passage of the Emergency Act, Roberson had already been debarred from receiving District contracts for a period of one year through March 12, 2004, in accordance with a decision of the Chief Procurement Officer ("CPO") dated July 14, 2003. (AF 17). Although the one-year debarment had been proposed in a Determination and Finding dated February 20, 2003, (AF 10), and initiated by a notice of proposed debarment given to Roberson by letter dated March 12, 2003, (AF 11), on December 19, 2003, William Howland, Chairman of DSP, advised Roberson that the DSP would re-hear the evidence regarding the July 2003 debarment. (AF 5). On February 12, 2004, the DSP issued a final decision on rehearing debarment Roberson for a period of two years through July 18, 2005. Since the underlying debarment was not initiated between April 1, 2003, and September 16, 2003, as required by the statute to confer jurisdiction on the DSP to reconsider existing debarments, the Board finds that the DSP was without jurisdiction to rehear the debarment. The decision of the DSP debarment Roberson and its principals a second time for the same underlying basis is therefore invalid.

DISCUSSION

There is no question that the language of the Emergency Act states that it applies only to debarments which were "initiated [after] April 1, 2003." There is also no question that the Roberson debarment which was reheard by the DSP was initiated prior to that date (Appeal File ("AF") 11). "The [{"CPO"}] shall initiate debarment proceedings by notifying the contractor. . . ." (27 DCMR § 2214). Notice of the proposed debarment was given to Roberson by letter dated March 12, 2003. (Appellee's Statement Of Material Facts, 4) The District argues, nevertheless,

that, at least with regard to the Roberson debarment, the statutory language should be ignored based on the legislative intent of the Council. That intent, the District argues, is shown by a colloquy between members of the Council prior to passage of the emergency resolution declaring an emergency. In that exchange, Councilmember Brazil, responding to a question raised by Councilmember Patterson, named Roberson as a company whose then current debarment would be suspended by the proposed act and reheard by the DSP. (Appellee's Response, 3).

Even recognizing an intent of the Council expressed from the dais that the Roberson debarment be suspended and reheard by the DSP, the Board "must presume that [the Council] says in a statute what it means and means in a statute what it says there. . . . When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-254 (1992) (citations and internal quotation marks omitted). A specific date is, by definition, unambiguous. To accept the District's argument would not only have the Board change the meaning of an unambiguous term, but also expand the scope of the statute as passed. Quoting Justice Brandeis in *Iselin v. United States*, 270 U.S. 245, 250-51(1926), our Court of Appeals held as to such an expansion of a statute that "what the [appellant] asks is not a construction of a statute but, in effect, an enlargement of it by the court, so that what was omitted, presumably by inadvertence may be included within its scope. To supply omissions transcends the judicial function." *Luck v. District of Columbia*, 617 A.2d 509, 513 (1992).

The July 14, 2003, Roberson debarment in effect at the time of passage of the September 16, 2003, passage of the Emergency Act was not covered by the Emergency Act and therefore not suspended. Pursuant to the terms of the Emergency Act, the DSP had no authority to reconsider Roberson's status. The action of the DSP in rehearing the debarment was in excess of its jurisdiction and therefore invalid. The debarment decision of the CPO continued without suspension and, by its own terms, terminated March 12, 2004.

SO ORDERED.

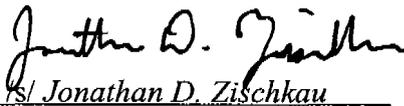
September 9, 2004



/s/ Matthew S. Watson

MATTHEW S. WATSON
Administrative Judge

Concur:



/s/ Jonathan D. Zischkau

JONATHAN D. ZISCHKAU
Chief Administrative Judge

GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

PROTEST OF:

FORNEY ENTERPRISES, INC.)	
MANHATTAN CONSTRUCTION CO.)	
JOINT VENTURE)	
)	CAB No. P-0689
Under Solicitation No. POAM-2003-B-0025-RS)	

OPINION AND ORDER

Lexis-Nexis Filing ID 4270909

The Board held a telephone conference call on September 8, 2004, regarding the District of Columbia Motion to Dismiss as Moot, filed August 20, 2004. Forney Enterprises, Inc./Manhattan Construction Co. Joint Venture ("Forney") filed its opposition to that motion on August 30, 2004. In its motion, the District asserts that the contracting officer is no longer considering awarding the contract to the proposed awardee, Capital Technology Services, Inc. ("CTSI"), and that the protest is therefore moot. Forney argues that the protest is not moot because the District has not awarded the contract to Forney, the only other offeror. Forney argues that the Board should not dismiss the protest until the District awards the contract to Forney.

In support of its argument, the protester cites *Washington Freightliner, Inc.*, CAB No. P-0122, Feb. 1, 1989 (36 D.C. Reg. 4038). In *Freightliner*, this Board declined to dismiss a protest in which the District had decided that the protester's bid was nonresponsive. In that opinion, the Board stated:

The protest of *Freightliner* is not moot because *Freightliner* is asserting that its bid entitled it to be awarded the contract and, further, that the District erred in determining that its bid was nonresponsive. *Roofers [Roofers Incorporated, I.P.D. 48 (D.C. CAB 1986)]* is inapplicable here and in other cases in which a protester is seeking to have its rights established.

In the current protest, because the District has not yet determined that Forney submitted a nonresponsive or ineligible bid, Forney cannot assert that the District has caused Forney any harm.

In its protest dated June 29, 2004, Forney did not request the District to award the contract to the Forney joint venture. More importantly, Forney does not allege that the District determined Forney to be a nonresponsive or nonresponsible bidder. Forney did assert, and the contracting officer has subsequently determined, that CTSI was not eligible for award. Therefore, the protester has received all of the relief that it requested.

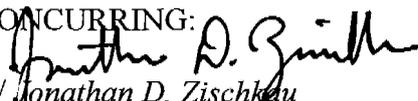
The Board conducted the telephone conference call of September 8, 2004, to determine the status of the award. During that conference call, the contracting officer stated that the

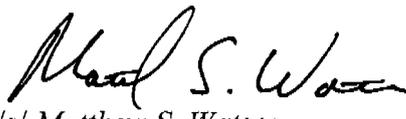
District had not yet determined whether it would award the contract to Forney, but that the District did not intend to award the contract to CTSI. This Board cannot order the District to award the contract to Forney if the District has not yet completed the post-bid, pre-award process set forth in the statute and regulations. Therefore, it is appropriate for this Board to dismiss this protest. If Forney discovers new protest grounds after this dismissal, Forney may file the appropriate protest within the statutory time limits.

SO ORDERED.DATE: September 24, 2004


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

CONCURRING:


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


/s/ Matthew S. Watson
MATTHEW S. WATSON
Administrative Judge

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Assistants Attorney General, D.C.
441 Fourth Street, N.W., 6th Floor North
Washington, D.C. 20001

GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

PROTEST OF:

Arrow Construction Co., LLC/)	
W.M. Schlosser Co., Inc., Joint Venture)	
1111 Good Hope Road, S.E.)	
Washington, D.C. 20020)	CAB No. P-0692
)	
Under Solicitation No. GAGA-2004-1-0131)	
District of Columbia Public Schools)	

For the Protester: Michael J. Cohen, Esq. For District of Columbia Public Schools: Erika L. Pierson, Esq., Attorney Advisor.

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

OPINION AND ORDER

Lexis-Nexis Filing ID 4337999

Arrow Construction Co., LLC/W.M. Schlosser Co., Inc., Joint Venture ("Arrow/Schlosser JV") filed a protest on July 16, 2004, requesting that the District reject the bid of Washington Sprinkler Co./Tompkins Builders Joint Venture ("Washington/Tompkins JV") for Solicitation No. GAGA-2004-1-0131, the modernization of J.P. Sousa Middle School, and award the contract to the Arrow/Schlosser JV. On August 18, 2004, the District of Columbia Public Schools ("DCPS") filed a "Dispositive Motion in Lieu of Answer" asserting that the protest failed to state a claim. On the same date, DCPS attempted to file with the Board a request that the Board allow DCPS to proceed with performance while the protest is pending. D.C. Code § 2-309.08 (a)(c)(1) and (2) provide as follows:

(c) (1) Within one business day of receipt of the protest, the Contract Appeals Board shall notify the contracting officer that the protest has been filed. Except as provided in this chapter, no contract may be awarded in any procurement after the contracting officer has received this notice and while the protest is pending. If an award has already been made but the contracting officer receives this notice within 11 business days after the date of award, the contracting officer shall immediately direct the awardee to cease performance under the contract and to suspend any related activities that may result in additional obligations being incurred by the District under that contract. Except as provided in this chapter, performance and related activities suspended pursuant to this section may not be resumed while the protest is pending.

(2) Performance under a protested procurement may proceed, or award may be made, while a protest is pending only if the CPO makes a written determination, supported by substantial evidence, that urgent and compelling circumstances that significantly affect interests of the District will not permit waiting for the decision of the Board concerning the protest. A copy of the determination shall be provided within one business day of issuance to both the Board and the protester.

See also Board Rule 304, Automatic Stay, 49 D.C. Reg. 2115 (Mar. 8, 2002).

The Board reviewed the DCPS request to proceed and noted that the request did not appear to be supported by substantial evidence. The Contracting Officer, Glorious Bazemore, had attached to the request her declaration asserting that DCPS should be allowed to proceed with performance. However, the Board noted that there was no evidence from any program official showing “urgent and compelling circumstances that significantly affect interests of the District [that] will not permit waiting for the decision of the Board concerning the protest.”

The Board conducted a telephone conference call with the parties on August 20, 2004, to discuss the DCPS request to proceed with performance during the protest. During the conference call, the Board noted that D.C. Code § 2-309.08 required the Chief Procurement Officer (CPO) of the District of Columbia to make a written determination, supported by substantial evidence, that urgent and compelling circumstances that significantly affect interests of the District will not permit waiting for the decision of the Board concerning the protest. The Board further noted that the DCPS Chief Procurement Officer did not have the power to prepare the written determination set forth in D.C. Code § 2-309.08. The Board also noted that the DCPS Contracting Officer may not be the appropriate person to provide the “substantial evidence” upon which the District’s CPO could base a determination to proceed with performance.

By motion dated September 2, 2004, DCPS submitted to the Board its “Amended Motion for Performance Under a Protested Procurement.” In that motion, DCPS asserts that independent contracting authority granted to DCPS under D.C. Code § 2-301.04(d) allows it to make its own determination that performance of a contract may proceed notwithstanding a protest. Section 2-301.04 provides as follows:

(a) Except as provided in § 2-303.20, this chapter shall apply to all departments, agencies, instrumentalities, and employees of the District government, including agencies which are subordinate to the Mayor, independent agencies, boards, and commissions, but excluding the Council of the District of Columbia, District of Columbia courts, the District of Columbia Financial Responsibility and Management Assistance Authority, and District of Columbia Advisory Neighborhood Commissions.

(b) This chapter shall apply to any contract for procurement of goods and services, including construction and legal services, but shall not apply

to a contract or agreement receiving or making grants-in-aid or for federal financial assistance.

(c) The Council of the District of Columbia, the Corporation Counsel, Inspector General, Auditor, and Chief Financial Officer may contract for the services of accountants, lawyers, and other experts when they determine and state in writing that good reason exists why such services should be procured independently of the CPO. During a control year, as defined by § 47-393(4), the Office of the Chief Financial Officer of the District of Columbia shall be exempt from the provisions of this chapter, and shall adopt, within 30 days of April 12, 1997, the procurement rules and regulations adopted by the District of Columbia Financial Responsibility and Management Assistance Authority. During years other than control years, the Office of the Chief Financial Officer shall be bound by the provisions contained in this chapter.

(d) This chapter shall apply to the Board of Education, except that the Board of Education shall have the authority to solicit, award, and execute contracts independently of the Office of Contracting and Procurement and the Chief Procurement Officer.

DCPS contends that D.C. Code § 2-302.04(d) essentially substitutes the Board of Education for the District CPO for all statutory findings and determinations committed to the District's CPO. Under that reasoning, the Board of Education is authorized by the PPA to make the determination under D.C. Code § 2-309.08(c)(2) to proceed with performance under a protested procurement. Since the Board of Education has delegated such determinations to the Superintendent of Schools, who in turn has delegated such determinations to the Chief Procurement Officer for DCPS, DCPS argues that its CPO is authorized to make the determination to proceed. We do not agree. Although § 2-301.04(d) provides contracting authority to the Board of Education, it simply does not provide the statutory override power of 2-309.08(c)(2) to anyone other than the District's CPO. It is significant that the Council, in enacting the Procurement Reform Amendment Act that included the override power, did not provide the CPO authority to delegate the override power to any other District official. Without a specific and express assignment of that power to anyone other than the District's CPO, we conclude that only the District's CPO has the override authority. If the Board of Education lacks such authority, then the DCPS Chief Procurement Officer also lacks such authority.

DCPS further argues that the CPO of the District is not in a position to render findings and determinations regarding the urgency of the contract in question because he is not involved with DCPS contracting and procurement. First, D.C. Code § 2-306.04(d) does not negate the District CPO's contracting authority, it merely provides independent and concurrent contracting authority to the Board of Education. As a matter of intra-District comity, the District's CPO will generally respect the Board of Education's primary contracting authority for DCPS. Second, DCPS fails to note that the statute requires the CPO to make his determination based upon substantial evidence. Under the statutory scheme, the user agency (here, DCPS) provides the evidence to the CPO, and the CPO, after reviewing that evidence, decides whether performance under the contract

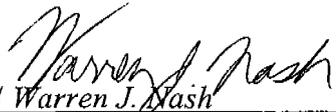
should proceed. The statute requires the CPO to take whatever steps he deems appropriate for making an informed determination based on a review of the evidence presented by the user agency.

Accordingly, for the reasons set forth above, the Board denies the DCPS motion requesting performance under a protested procurement.

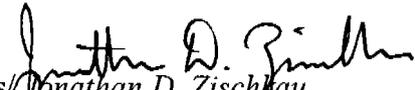
By motion dated August 18, 2004, DCPS filed a "Dispositive Motion in Lieu of Answer," requesting that the Board dismiss the protest for "failure to state a claim." However, the DCPS motion does not set forth any reasons why the protest fails to state a claim. In any event, after reviewing the protest, the Board finds that the protest sets forth allegations regarding DCPS representative Mr. Eugene Slater and representations made by Mr. Slater regarding award of the contract. The protest sets forth a claim, and DCPS should respond to the claim. The Board notes that the protester's request to review bid documents that should have been revealed at a public bid opening is not unreasonable. Accordingly, for the reasons set forth above, the Board denies the DCPS motion to dismiss the protest for failure to state a claim. In accordance with Board Rule 306, DCPS should file its Agency Report no later than October 18, 2004.

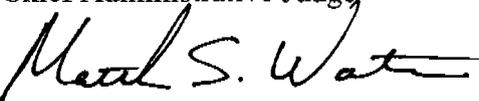
SO ORDERED

October 6, 2004


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

CONCURRING:


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


/s/ Matthew S. Watson
MATTHEW S. WATSON
Administrative Judge

GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

APPEAL OF:

THE PRINCIPALS of)
 FORT MYER CONSTRUCTION CORPORATION)
)
 JOSE RODRIGUEZ,)
 President)
)
 and)
)
 LEWIS SHRENSKY,)
 Executive Vice President)
)
 Decision of the Debarment and Suspension Panel)
 To Debar Messrs. Rodriguez and Shrensky)

CAB No. D-1235

For the Appellant: Joe Robert Caldwell, Jr., Esq., and O. Kevin Vincent, Esq., Baker Botts L.L.P. For the Government: Keith D. Coleman, Esq., Assistant Attorney General.

Opinion by Administrative Judge Matthew S. Watson with Chief Administrative Judge Jonathan D. Zischkau, concurring.

OPINION

(LexisNexis Filing ID 4664236)

This matter is an appeal from a final decision dated April 2, 2004, of the Debarment and Suspension Panel ("Panel") created by the Debarment Procedures Emergency Act of 2003, (D.C. Act 15-153, 50 D.C. Reg. 8730), debarring Appellants Jose Rodriguez and Lewis Shrensky, president and vice president, respectively, of Fort Myer Construction Corporation¹ ("Fort Myer" or "the Company") for a period of six months² on the basis of a conviction of the Company of a scheme to defraud the District. Appellants contend first, that the debarment decision is defective because the Appellants were not given notice as to the grounds for their proposed debarment

¹ The decision also debarred the company; however, that portion of the decision has not been appealed.

² The decision provided that the debarred parties be given credit for the time they were suspended during the pendency of the debarment procedures, thus resulting in the parties' immediate eligibility to receive contract awards. Although, as to being eligible for awards, the debarment is now moot, the fact of a past debarment may have a continuing detrimental effect on the reputation of the parties and their success in carrying on their business and may therefore be appealed notwithstanding that the disqualification from receiving contracts has expired. *Caiola v. Carroll*, 851 F.2d 395, 401 (D.C. Cir. 1988).

prior to the Panel's hearing of the matter; and second, that the District failed to meet its burden of proof that the Appellants participated in, knew of, or had reason to know of the company's unlawful scheme. The Board finds that, in the particular circumstances of this matter, sufficient notice was given to the Appellants, however, the Board further finds that the Panel's decision as to the Appellants is not supported by adequate evidence. Accordingly, the Panel's debarments of Jose Rodriguez and Lewis Shrensky are vacated.

BACKGROUND

By letter dated April 25, 2003, the District proposed debarring Fort Myer based on its March 14, 2003 guilty plea to "conspiracy to commit bribery in connection with [the Company's] role in distributing cash bribes to District Department of Public Works (DPW) officials in exchange for the DPW officials agreeing to accept inflated job tickets for asphalt materials that were never provided to the District." (Complaint, Ex. 8). Neither of the Appellants was charged or otherwise named in the criminal action. The notice of proposed debarment advised the Company that it was suspended immediately. The Company appealed the suspension to the Board on the basis that it was not afforded an opportunity to respond before the suspension was imposed. The Board denied the appeal holding that a contractor may be suspended without a hearing. *Fort Myer Construction Corp.*, CAB No. D-1206, June 6, 2003, 50 D.C. Reg. 7505.

The April 2003 notice of proposed debarment to the Company advised that "[a]ccording to D.C. Official Code §2-308.04(f), the debarment or suspension of any person or business shall constitute a debarment or suspension of any affiliate of that person or business." (Complaint, Ex. 8). Although principals are defined as affiliates by the cited code section, separate notice was not given to Fort Myer's principals, Mr. Rodriguez and Mr. Shrensky, as required by 27 DCMR §§ 2213.3 and 2214.1. On July 8, 2003, after a hearing, the Chief Procurement Officer ordered the debarment of Fort Myer and its two principals. On appeal of the July 8 debarment order, the Board held the debarments of the individual principals to be void *ab initio* for failure to have given written notice to each principal by certified mail. *Fort Myer Construction Corp.*, CAB No. D-1223, Dec. 9, 2003. The Board further vacated and remanded the debarment of the Company for failure of the CPO to make a finding supported by substantial evidence that the company lacked "present responsibility." *Fort Myer Construction Corp.*, CAB No. D-1223, Jan. 16, 2004.

In October 2003, a temporary Debarment and Suspension Panel was authorized with jurisdiction over pending debarments. (D.C. Act 15-153). On remand, the debarments of the Company and its principals were heard by the newly established panel. Separate notice of the Panel hearing was sent by certified mail to the Company and each of the two individual affiliated principals on December 24, 2003. (Complaint, Ex. 2). The notice by the Debarment and Suspension Panel incorporated the cause for proposed debarment by reference to the notice given by the CPO in the initial debarment proceeding:

The reasons for the proposed debarment and the causes relied upon for the proposed debarment are set forth in the attached letter dated April 25, 2003 from

Jerry Carter to [Fort Myer], the letter dated May 30, 2003 from [the CPO] to [Fort Myer] and the letter dated June 24 2003, from [the CPO] to [FMC Civil].³

In a final decision dated April 2, 2004, the Debarment and Suspension Panel debarred the Company and its principals, Mr. Rodriguez and Mr. Shrensky, for a period of six months. (Complaint, Ex. 1). The individual principals have appealed their debarments.

DISCUSSION

We exercise jurisdiction over the appeal of these debarment actions pursuant to D.C. Code § 2-308.04(d).

Notice of cause for debarment

While admitting that the District gave notice of the rehearing by certified mail addressed individually to each of the Appellants as required by the regulations, Appellants assert that the notices did not meet the complete requirements of the regulations because the notices failed to advise the Appellants of the grounds upon which their individual debarments were proposed. 27 DCMR § 2214.1(a). The December 23, 2003 Panel notices (directed separately to the Company and each of the principals individually) incorporated by reference the causes stated in the notice letter of April 25, 2003. The grounds for debarment were stated in the earlier notice as follows:

The CPO is proposing the debarment of Fort Myer for conviction for bribery and for submitting false tickets to facilitate payment for asphalt materials not provided to the District. Such actions provide a significant indication of Fort Myer's lack of business integrity. Moreover, Fort Myer's action was sufficiently serious and compelling to affect Fort Myer's responsibility as a District government contractor.

Notice of proposed debarment need only be given "in sufficient detail to put the [party] on notice of the conduct or transaction(s) upon which the proposed debarment is based." 27 DCMR § 2214.1(a). "Sufficient detail" is a matter of due process.

The content of the due process requirement in a particular instance is determined on the facts specifically involved. The adequacy of the procedures are not to be based on the validity of general regulations, but upon the facts of the case. *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 903, 47 L. Ed. 2d 18 (1976). Due process, unlike some legal rule, is not a technical conception with a fixed content unrelated to time, place and circumstances. *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895, 81 S. Ct. 1743, 1748, 6 L. Ed. 2d 1230 (1961). Due process is flexible and calls for such procedural protections as the particular situation demands. *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S. Ct. 2593, 2600, 33 L. Ed. 2d 484 (1972).

³ FMC Civil Construction, LLC, is a company formed by the Fort Myer principals and certain of their family members. FMC Civil was subsequently reorganized to remove Mr. Rodriguez and Mr. Shrensky from any management, ownership or control. Final Decision of the Panel, 14.

Electro-Methods, Inc. v. United States, 3 Cl. Ct. 500, 509 (1983), *quoted with approval, but reversed on other grounds*, 728 F.2d 1471, 1476 (Fed. Cir. 1984).

Although better practice would be to specifically state the grounds for the proposed individual debarments of the affiliated principals, the Board believes that the only reasonable interpretation of the notices sent specifically to the individuals, although referring only to the Company's criminal conviction and without any reference to any specific action of the individuals, is that the notices advise the individuals that they may be debarred if they had reason to know of the Company's criminal conduct referenced in the notice as provided in 27 DCMR § 2217.3. As such, the individuals were on notice of the grounds being considered for their possible debarment.

Evidence supporting debarment

A corporation acts only through the individuals who are its officers, employees or agents. With regard to debarment, a corporation is vicariously liable for the actions of the individuals who act in its behalf. 27 DCMR § 2217.2 provides:

The fraudulent, criminal, or other seriously improper conduct of any officer, director, shareholder, partner, employee, or other individual associated with a contractor may be imputed to the contractor when the conduct occurred in connection with the individual's performance of duties for or on behalf of the contractor, or with the contractor's knowledge, approval, or acquiescence. The contractor's acceptance of the benefits derived from the conduct shall be evidence of knowledge, approval, or acquiescence.

A corporation clearly may be debarred if persons controlling the corporation are involved in or have knowledge of and acquiesce to the wrongdoing. But knowledge by those in control of a corporation is not an essential element to proceed with debarment of a corporation. To debar a corporation, it is only necessary that the suspect action have been taken in the course of performance of corporate duties by any individual acting for the corporation. No person other than the wrongdoer is required to have had knowledge of the wrongdoing. To support the debarment of a corporation, it is only necessary to show that the wrongful act was taken on behalf of the corporation. Liability, and indeed knowledge, will be imputed to the corporation if the corporation accepts benefits derived from the wrongful action. *Dowling Group v. Williams*, 1982 U.S. Dist. LEXIS 18121 (D.D.C. 1982). (Parent corporation debarred as an affiliate of a subsidiary whose general manager submitted false claims to the government.)

Similarly, an individual affiliated with a corporation may be subject to debarment based on the actions of others acting on behalf of the corporation. The evidence, however, necessary to support debarment of an individual based on actions of others within a corporation is significantly different than the evidence necessary to debar a corporation based on conduct of its agents. To debar an individual based on affiliation with a culpable corporation, however, requires a showing that the individual "participated in, knew of, or had reason to know of" the wrongful conduct. 27 DCMR § 2217.3 provides:

The fraudulent, criminal, or other seriously improper conduct of a contractor may be

imputed to any officer, director, shareholder, partner, employee, or other individual associated with the contractor who participated in, knew of, or had reason to know of the contractor's conduct.

The Panel did not find that either of the Appellants participated in, or had actual knowledge of, the conduct which led to the Company's guilty plea. (Final Decision of Panel 16-17). Nevertheless, the District argues that the Appellants had reason to know of the unlawful conduct because of their official positions in the Company. The District's answer to the complaint states:

Messrs. Rodriguez and Shrensky had reason to know of the false tickets produced by Fort Myer for asphalt never provided to the District. Messrs. Rodriguez and Shrensky were managing members of Fort Myer during the time of Fort Myer's misconduct. Mr. Rodriguez was responsible for field operations and Mr. Shrensky was responsible for the financial and administrative operations of the company. Messrs. Rodriguez and Shrensky had reason to know of the misconduct because they became aware of certain activities that raised their suspicions. See Appellants Ex. 1. p.16. "These activities included the provision of vehicles to District government officials in the course of performance of contracts, use of Fort Myer gas pumps by [District] inspectors, and [District] inspectors [improperly] being on the premises of the Fort Myer plant." *Id.* As such, the [Debarment and Suspension Panel] found that Messrs. Rodriguez and Shrensky had reason to know of the improper conduct occurring at Fort Myer. Resolution of this issue requires a full hearing on the merits. Therefore, to the extent Appellants seek to reverse and vacate the DSP's debarment decision based on this issue, the District respectfully requests a hearing on the merits

Answer, 7.

Essentially, the Panel relied on Rodriquez' and Shrensky's status as officers in concluding that the Appellants had reason to know of the specific unlawful conduct for which the Company plead guilty and was debarred. Even accepting that the Appellants, because of their knowledge of some other improper conduct by their employees,⁴ should have been wary of other unlawful schemes, it cannot logically be concluded that this constitutes evidence that they had reason to know of the specific bribery scheme which resulted in the Company's conviction. In order to hold an individual liable for specific wrongdoing by fellow employees, there must be some evidence connecting the individual proposed to be debarred to the wrongdoing, or some showing that the individual had information from which wrongdoing could reasonably be inferred. Status is an impermissible basis for an imputation of knowledge to an individual. *Novicki v. Cook*, 946 F.2d 938, 942 (D.C. Cir. 1991). In *Novicki*, the court held that a connection to the wrongdoing more than Mr. Novicki's merely being president of the corporation was required to support his personal debarment and vacated the debarment of Mr. Novicki as an individual. (*Id.*)

We now address the District's request for a hearing before the Board on the merits of whether the principals had reason to know of the bribery scheme. Although it is not clear that

⁴ It should be noted that the Company was not prosecuted for the alleged separate misconduct, nor did it form the basis of the Company's debarment.

the Board, even in a *de novo* review, has authority to receive new evidence from the District which was not presented to the debarring authority to support a debarment, the District requested a hearing on the merits. (Answer, 7). Without determining the extent to which the District may supplement the debarment record, the Board requested a proffer of evidence, other than the status of the Appellants, which might be presented at a hearing showing any relationship of the Appellants to the Company's misconduct or any reason for the Appellants to have known of the misconduct. Such evidence could have been, for instance, a showing that Company funds over which the officer had control were used in furtherance of the unlawful scheme or that the officer had received complaints relating to the unlawful conduct.

In a telephone conference with the parties held by the Board on October 15, 2004, the District advised the Board that there was no evidence supporting debarment of the Appellants other than the inferences referenced in the Panel decision. As a result, there is no basis to hold an evidentiary hearing because the District has no additional evidence. Because we have concluded that those inferences relied upon by the Panel alone do not constitute substantial evidence that the Appellants had reason to know of the bribery scheme for which the Company pled guilty, we vacate the Panel's debarments of Jose Rodriguez and Lewis Shrensky.

November 23, 2004

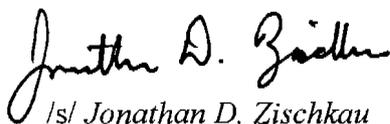


/s/ Matthew S. Watson

MATTHEW S. WATSON

Administrative Judge

CONCURRING:



/s/ Jonathan D. Zischkau

JONATHAN D. ZISCHKAU

Chief Administrative Judge

BACKGROUND

On December 19, 2003, the District of Columbia's Office of Contracting and Procurement issued Solicitation No. POAM-2004-B-0014-BS, requesting bids for the construction of a new Unified Communications Center ("UCC") to consolidate the District's 911 and various non-emergency call centers, emergency communications, and traffic management functions. (Agency Report ("AR"), Ex. 1). The state-of-the-art UCC will serve as the District's Emergency Operations Center and the Regional Incident Communications and Command Center.

The Solicitation

Article 10 of the solicitation provided for bidders to receive a preference in the evaluation of their bids pursuant to the LSDBE Act. Thus, a bidder certified by the LBOC as a local business enterprise ("LBE") would receive a 4 percent reduction in its bid price in the evaluation of bids. A bidder certified as a disadvantaged business enterprise ("DBE") would receive a 3 percent reduction in the evaluation of its price. A bidder certified as a resident business ownership entity ("RBO") would receive a 3 percent reduction in its price in the evaluation of bids. Finally, a bidder located in an enterprise zone would receive a 2 percent price reduction for evaluation purposes. Article 10 of the solicitation stated in relevant part:

10.1 Preference for Local Businesses (LBE), Disadvantage Businesses (DBE), Resident Business Ownerships (RBO) or Businesses Operating in an Enterprise Zone

10.1.1 General Preferences: Under the provisions of DC Law 13-169, "Equal Opportunity for Local, Small, or Disadvantaged Business Enterprises Amendment Act of 2000" (the Act), The District shall apply preferences in evaluating bids from businesses that are local, disadvantaged, resident business ownership or located in an enterprise zone of the District of Columbia. For evaluation purposes, the allowable preferences under the Act for this procurement are as follows:

- 10.1.1.1 Four percent reduction in the bid price for a local business enterprise (LBE) certified by the Local Business Opportunity Commission (LBOC);
- 10.1.1.2 Three percent reduction in the bid price for a disadvantaged business enterprise (DBE) certified by the LBOC;
- 10.1.1.3 Three percent reduction in the bid price for a resident business ownership (RBO), as defined in Section 2(a)(8A) of the Act, and certified by the LBOC; and
- 10.1.1.4 Two percent reduction in the bid price for a resident business ownership (RBO), as defined in Section 2(5) of DC Law 12-268 and in 27 DCMR § 899, 39 DCR § 9087-9088 (December 4, 1992).

The solicitation stated that bidders must be certified by the LBOC, or they must submit a self-certification as an LBE, DBE or RBO firm, in order to receive preferences as an LBE, DBE or RBO firm. It also stated that preferences would not be given simply for subcontracting with such firms and that a maximum of 12 preference points would be allowed. (Solicitation ¶ 10.2.2, AR Ex. 1).

The solicitation also contained specific provisions regarding requirements for preferences for bidders who are joint ventures. It required that joint ventures be certified by the LBOC and that the joint venture meet the requirements for status as an LBE, DBE, or RBO firm in order to receive preferences in the evaluation of its bid. Under the solicitation, a joint venture would receive the same number of preference points as the firm that "owns and controls at least 51 percent of the venture." Solicitation ¶¶ 10.3 - 10.6 state:

- 10.3 Preferences for Certified Joint Ventures Including Local or Disadvantaged Businesses or Resident Business Ownerships: When an LBOC-certified joint venture includes a LBE, DBE or a RBO, and the LBE, DBE or RBO owns and controls at least 51 percent of the venture, the joint venture will receive the preferences as if it was a certified LBE, DBE or RBO.
- 10.4 Preferences for Joint Ventures including Businesses Located in an Enterprise Zone: When a joint venture includes a business located in an enterprise zone, and such business located in an enterprise zone owns and controls at least 51 percent of the venture, the joint venture will receive the preference as if it were a business located in an enterprise zone.
- 10.5 Bidder Submission for Preferences: Any Bidder seeking to receive preferences must submit as a part of the Subcontracting Plan the following documentation, as applicable to the preference being sought:
 - 10.5.1 Evidence of Bidder's, subcontractor's, or joint venture partner's certification or self-certification as a LBE, DBE, or RBO, to include either:
 - 10.5.1.1 A copy of relevant letters of certification from the LBOC; or
 - 10.5.1.2 A copy of any sworn notarized Self-Certification Form prescribed by the LBOC along with an acknowledgement letter issued by the Director of the LBOC. Businesses with principal offices located outside of the District of Columbia must first be certified as LBEs before qualifying for self-certification.

All Bidders are encouraged to contact the Local, Small and Disadvantaged Business Enterprises Certification Program at the Office of Local Business Development (OLBD), 441 Fourth Street, NW, Suite 970N, Washington, DC 20001, (202) 727-3900 if additional information is required on certification procedures and requirements.
 - 10.5.2 Evidence that the Bidder or any subcontractor is located in an enterprise zone.
- 10.6 Penalties for Misrepresentation: Any material misrepresentation on the

sworn notarized self-certification form could result in termination of the Contract, the Bidder's liability for civil and criminal action in accordance with the Act, DC Law 12-268, and other District laws, including debarment.

The solicitation also required the successful contractor to perform at least 50 percent of the contract work with its own forces. Article 10.7.1 provided in relevant part:

When a prime Bidder is certified by the OLBD as a LBE, DBE, or RBO, the prime Bidder shall perform at least 50 percent of the contracting effort, excluding the cost of materials, goods, and supplies with its own resources

Jair Lynch/Tompkins Joint Venture Formation and LBOC Certification

On February 12, 2004, a joint venture was formed between "The Jair Lynch Companies" and Tompkins Builders, Inc. Intervenor JLTJV asserts that the reference to Jair Lynch Companies is simply a trade name for JLC Construction, LLC. JLC Construction, LLC, was originally incorporated in 1999 as Jair Lynch Consulting, LLC. Jair Lynch Consulting received initial LBOC certification as an LSDBE. On January 1, 2002, the Articles of Organization of Jair Lynch Consulting, LLC, were amended to state that the entity "will also do business as 'The Jair Lynch Companies.' The Company is not officially changing its name" (Sigal Proposed Finding of Fact, Ex. 1, Attachment K). This amendment was never filed with Department of Consumer and Regulatory Affairs ("DCRA"). Nor was a trade name registration filed with DCRA. On April 9, 2002, Jair Lynch Consulting, LLC, changed its name to JLC Construction, LLC, and filed the name change with DCRA. (District Submission, filed Oct. 1, 2004, Ex. 2). In a OLBD recertification application, dated June 5, 2002, for JLC Construction/Jair Lynch Consulting, the name of the company is listed as "The Jair Lynch Companies." (AR Supplement, filed Aug. 24, 2004, Ex. 11). The LBOC recertified JLC Construction on March 12, 2003, as an LBE, SBE, DBE, RBO, and Development Zone Enterprise, for a period of two years. (District Submission, Oct. 1, 2004, Ex. 2).

The February 12, 2004 joint venture agreement between Tompkins and the Jair Lynch Companies has a cover page entitled:

Document T101
Agreement Between Joint Venturers
1996 Edition

On the second page of the agreement, Article 1, entitled "Agreement," provides:

AGREEMENT made this 12th day of February between the PARTIES to the Joint Venture: TOMPKINS BUILDERS, INC. ("Tompkins"), with an office at 1333 H Street, NW, Suite 200, Washington, DC 20005 and THE JAIR LYNCH COMPANIES ("JLC"), with offices at 1508 U Street, NW, Washington, DC 20009, to provide certain services to the OWNER, who is: the Government of the

District of Columbia, Washington, DC, in connection with the following
PROJECT: Unified Communications Center, Washington, DC

The name of the JOINT VENTURE is Jair Lynch/Tompkins Joint Venture

Article 3, entitled "Interests of the Parties," provides:

3.1 The respective interests of the parties (the "Parties Interests") in the profits arising from the Work and in all property accruing from or acquired in connection with the Work and their respective (a) obligations for contributions to and disbursements from working funds and (b) liabilities and obligations in connection with the Work, are:

THE JAIR LYNCH COMPANIES	51%
TOMPKINS BUILDERS, INC.	49%

Article 4, entitled "Management of the Joint Venture", provides that the contract work will be under the direction and control of a Management Committee consisting of two members from each party. The article requires that actions and decisions of the Management Committee be taken by unanimous vote, and that in the event of a tie, William Brennan of Turner Construction Company (the parent company of Tompkins) will cast the tie-breaking vote. The Management Committee exercises control over the joint venture funding, accounting, expenses, property, services, and personnel.

Article 13, entitled "Services and Personnel", provides:

The contract for the Project shall be carried out and performed on behalf of the Joint Venture under the direction and management of a Management Committee composed of Ed Small and Greg Druga of TOMPKINS BUILDERS, Inc., and Jair Lynch and Jonathan Weinstein of THE JAIR LYNCH COMPANIES. The executive committee shall work cooperatively in the determination of matters affecting the Joint Venture. The executive committee of Tompkins and JLC will share responsibility (JLC: 51%, Tompkins: 49%) for the delivery of the Project through the oversight and management of subcontractors to manage the construction requirements of Owner. . . .

The signature page of the joint venture agreement identifies the "First Party" as "The Jair Lynch Companies" and is signed by Jair Lynch as its president and CEO. The "Second Party" is identified as Tompkins Builders, Inc., and is signed by Stephen Sullivan, its vice president. (Protest CAB No. P-0694, Tab 1). Nowhere does the joint venture agreement mention the name "JLC Construction, LLC."

The February 12, 2004 joint venture agreement was submitted to the LBOC the same day in order to obtain LBOC certification of this new joint venture. The joint venture had the agreement hand carried to the LBOC offices. In response to an order to submit the entire application package that was transmitted by the joint venture to the LBOC, the District states that the only item submitted to the LBOC was the actual agreement and that there was no transmittal

letter or other attachments accompanying the application. (District Submission, filed Oct. 1, 2004).

On Tuesday, February 17, 2004 (the next business day after submission on Friday, February 12), the members of the LBOC met by means of a conference call, discussed the joint venture application, and approved it. (Protest, Tab 6). The LBOC's decision that the Lynch/Tompkins joint venture was entitled to 12 preference points was based on its belief that the Lynch/Tompkins joint venture members were Tompkins Builders, Inc., and JLC Construction, LLC. The only entity within the Jair Lynch umbrella of companies to be certified by the LBOC was JLC Construction, LLC. LBOC Chairman Glymph states in a February 26, 2004 email:

On Tuesday, February 17, 2004 at 10:30 am, a conference call was convened by the Local Business Opportunity Commission to discuss the Joint Venture application of JLC Construction, LLC and Tompkins Builders, Inc. . . . During the call, the Commissioners discussed the terms and conditions of the joint venture agreement and the collective qualifications and responsibilities of JLC Construction and Tompkins Builders. In addition, we discussed the scope of work between the joint venture parties and applauded Tompkins for joint venturing with an LSDBE company.

(Protest (CAB No. P-0690), Tab 6).

Bid Opening

Five bids were opened on February 17, 2004. (D&F to Proceed, at 1). After OCP deducted for certain optional bid items from the base bid prices, but before OCP applied any applicable preferences in evaluating the bid prices, the results showed that Sigal submitted the lowest actual bid of \$41,965,977, Clark Construction was second with a bid of \$42,475,957, and JLTJV was third with a bid of \$42,890,236. (AR Ex. 7, at SL-9).

JLTJV submitted its bid with a cover letter on letterhead reading "Jair Lynch/Tompkins Joint Venture." The letter states that JLTJV's bid consisted of a Bid Form (Document 00410), a Representations and Certifications form (Document 00450), an "Assurance of Compliance with Equal Employment Opportunity Requirements", an "Equal Opportunity Policy Statement", "Tax Certification Affidavits from both Tompkins Builders and Jair Lynch Companies", and a bid bond. (Protest (CAB No. P-0694), Tab 1; *see also* Sigal Proposed Findings of Fact, Ex. 1, Attachment A, at 177-217). The letter states that "The Joint Venture of Jair Lynch/Tompkins Joint Venture meets the requirement for the 12 point preference as described in the bidding documents." The 4-page Bid Form contains the pricing information of the bidder and provides on the final page the following information about the bidding entity:

Name of Bidder must be shown in full if an individual; and if a partnership, full names of all partners must be shown. If Bidder is a corporation, impress corporate seal and furnish name of State where incorporated. If joint venture, all

parties must sign.

Bid of Jair Lynch / Tompkins Builders

a Joint Venture corporation/partnership/an individual . . .

District of Columbia (State)

doing business as Jair Lynch/Tompkins Builders Joint Venture

Date: 2/17/04

By: Edward Small /s/ Edward Small (Signature) /s/ Jair Lynch
 Management Committee member and Management Committee Member
 President of Tompkins Builders, Inc. President of Jair Lynch Co

The next document in JLTJV's bid package was the joint venture agreement of February 12, 2004. The bid also appears to contain a nearly identical version of the joint venture agreement but dated February 17, 2004. The names of the parties and the signatories in both versions of the agreement are identical. The bid package contains a bid bond dated February 17 indicating the principal is Jair Lynch/Tompkins Joint Venture. It is signed by Curtis B. Harris, Vice President – Tompkins, and Jair Lynch, President – Jair Lynch Companies. The Representations and Certifications form identifies the bidder as a joint venture, lists the name of the bidder as "Jair Lynch/Tompkins Joint Venture," and is signed by Edward Small as a Management Committee member of the joint venture. A Tax Certification Affidavit is included in the name of joint venture partner, The Jair Lynch Companies, identifying the following information: Finance and Revenue Registration No. 02.68628, Federal Identification No. 52-2250054, and DUNS No. 10-995-8426. (Sigal Proposed Findings of Fact, Ex. 1, Attachment A, at 214). These numbers correspond to the numbers of JLC Construction, LLC. (District Submission, filed Oct. 1, 2004, Ex. 1). The bid of JLTJV did not contain a copy of any LBOC certification of JLTJV under the LSDBE Act, apparently because the LBOC acted on JLTJV's request for certification the day of bid opening.

After bid opening, OCP contacted the Office of Local Business Development ("OLBD"), which supports the LBOC, to verify that JLTJV was entitled to a 12 percent preference reduction as indicated in its bid. Nicole Copeland, OLBD's Certification Manager, replied to OCP later on February 17 in a fax transmittal, stating:

This letter is to confirm that the JLC Construction/Tompkins Builders Joint Venture was approved by the Local Business Opportunity Commission (LBOC) on February 17, 2004 for twelve preference points. Their certification letter has been sent to the LBOC Chairman for signature.

(AR Ex. 4). Also, on February 17, 2004, the LBOC's Chairman, Darrin Glymph, wrote to the JLTJV that:

The District of Columbia Local Business Opportunity Commission (LBOC) during its meeting on 2/17/04, Certified Jair Lynch/Tompkins Joint Venture as a Joint Venture in the Local, Small, and Disadvantaged Business Enterprise Program as promulgated by the "Equal Opportunity for Local, Small and Disadvantaged Business Enterprises Act of 1999."

(AR Ex. 3). Based on the confirmation from the LBOC that JLTJV was certified and entitled to 12 preference points, the contracting officer evaluated JLTJV's bid by reducing the actual bid price by 12 percent based on its LBE, RBO, DBE, and enterprise zone status. The contracting officer evaluated Sigal's bid by applying a 9 percent bid reduction based on it being certified as an LBE, RBO, and being located in an enterprise zone. Applying those preference reductions to the actual bids, JLTJV had the lowest evaluated price of \$37,743,408.52 and Sigal had the second low evaluated price of \$38,189,039.07.

The contracting officer has prepared a Chronology of Procurement which was submitted as part of the proposed award package to the Council. The Chronology indicates that during late February and early March 2004, the Director of OLDB raised objections to JLTJV's initial subcontracting plan, and rejected OCP's request for a waiver of the 50 percent self-performance requirement of Solicitation Paragraph 10.7.1. (Proposed Findings of Fact, Ex. 1, Attachment B, at 250-253). Entries in the Chronology for March 10-12, 2004, state as follows:

Per conference call between Allam Al-Alami, OCTO, Karen Hester, OCP, Brenda Spriggs, on 3/10/04. Allam stated that Peter Roy, OCTO, met with J. Flowers, OLDB, to discuss the LSDBE requirements for the UCC project. The result of the meeting was J. Flowers said that Jair Lynch/Tompkins misrepresented their joint venture and that the joint venture was invalid.

Meeting with K. Hester, OCP, A. Al-Alami, OCTO [Office of the Chief Technology Officer], and B. Spriggs, OCP, reiterating J. Flowers position that Jair Lynch/Tompkins joint venture is invalid. Misrepresentation by Jair Lynch/Tompkins.

Meeting between OCP, Kevin Green, Karen Hester, Brenda Spriggs, and J. Flowers, OLDB, regarding misrepresentation by Jair Lynch/Tompkins – meeting cancelled until further notice.

(*Id.* at 253).

Waiver of the 50 percent requirement was still at issue between OCP and OLDB in early April. On April 6, 2004, at a meeting among OCP, OCTO and OLDB personnel, it was agreed "to allow J. Flowers on[e] day, tomorrow to provide Waiver of the 50% LSDBE requirement for the prime LSDBE bidder to perform." (*Id.* at 255).

On April 14, 2004, a meeting was held among Nate Frances, of the Chief of Staff's Office in the Executive Office of the Mayor, Jacquelyn Flowers and Nicole Copeland, OLDB,

and OCP representatives to discuss the pending issues. OLDB's representative stated "that the Joint Venture was invalid because Jair Lynch cannot perform 50% of the construction work and Tompkins was performing the majority of the work and the Joint Venture is invalid. . . ." (*Id.* at 256). According to the Chronology entry for this meeting, "Nate Frances stated to J. Flowers if she had what she need[ed] from OCP to verify the Joint Venture. Nicole Copeland received all the information OCP had obtained from Jair Lynch/Tompkins. N. Copeland stated she would look at the documents and get back to us tomorrow." (*Id.*). By memorandum dated April 15, 2004, the OLBD Director approved the waiver of the 50 percent self-performance requirement. (AR at 4-5; AR Ex. 6). The record does not indicate any subsequent objections being raised by OLDB to the validity of the joint venture.

On April 20, 2004, Sigal filed a complaint with the LBOC asserting that JLTJV was not entitled to a 12 percent preference because the joint venture did not satisfy the statutory requirements for certification for 12 percent because Tompkins, not Jair Lynch Companies, controls the joint venture by virtue of its control of the Management Committee. Sigal also noted that the "Jair Lynch Companies" referred to in the joint venture agreement had never been certified by the LBOC, and that only a Jair Lynch entity named JLC Construction, LLC, was certified:

OLDB's website does not list the Jair Lynch Companies nor does it indicate preference points given to the Jair Lynch Companies. OLDB's website does list a "JLC Construction, LLC / formerly The Jair Lynch Consulting LLC

On April 28, 2004, Karen Hester, the OCP contracting officer, signed a determination and findings, determining the JLTJV was a responsible contractor and that it was in the best interest of the District to award the contract to JLTJV. The findings which support the determination were signed by Brenda Spriggs, the OCP contract specialist. (AR Ex. 10).

On May 7, 2004, JLTJV returned to OCP a signed copy of the UCC construction contract. This was two months prior to Council approval of the award to JLTJV. (Proposed Findings, Ex. 1, Attachment A, at 128 - 131).

On June 8, 2004, the OCP contracting officer transmitted to the Council of the District of Columbia the proposed contract action for awarding the UCC contract to JLTJV. The proposed contract award recommendation was accompanied by a package of documents supporting the recommendation. (Proposed Findings, Ex. 1, Attachment A). Sigal became aware of the submission to the Council, and actively worked to convince the Council to disapprove of the proposed award to JLTJV, including having its president and counsel testify at a June 23 Council hearing against the proposed award. (Intervenor JLTJV Motion to Dismiss, filed July 30, 2004, at 3). On July 8, 2004 the Council approved OCP's recommendation to award the UCC contract to JLTJV. On July 16, 2004, OCP notified JLTJV that its bid was accepted and the construction contract was signed by the contracting officer on July 27, 2004. (AR, at 5-7; Intervenor JLTJV Motion to Dismiss, at 3-4).

Sigal filed its first protest (CAB No. P-0690) of the contract award to JLTJV with the

Board on July 8, 2004, alleging that: Sigal was the low evaluated bidder as the JLTJV did not qualify for a 12 percent preference (Protest Ground A); that the 50 percent self-performance waiver was prejudicial and contrary to law (Protest Grounds B and C); and that JLTJV's bid bond was defective (Protest Ground D). (Protest CAB No. P-0690, at 2-3). On July 16, 2004, the District issued a Determination and Findings to Proceed With the Award After Receipt of a Protest. The Board denied the Protestor's motion to challenge the District's D&F on August 13, 2004.

On July 27, 2004, Sigal filed a second protest (CAB No. P-0693), adding allegations that the award of 12 percent preference to JLTJV was based upon a mistake of fact regarding the identity of The Jair Lynch Companies (assumed by Sigal to refer to a corporation called Jair Lynch Companies, Inc.), which was never certified by the LBOC as an LSBDE (Protest Ground E); and that JLTJV is not a responsible bidder because Jair Lynch Companies, Inc., was not a corporation in good standing as of the contract award date (Protest Ground F). (Protest CAB No. P-0693). The Board consolidated these protests. Intervenor JLTJV filed a motion to dismiss the protests on July 30, 2004, urging that the protest grounds were not timely filed as required by D.C. Code § 2-309.08.

On August 12, 2004, Sigal filed a third protest (CAB No. P-0694), withdrawing the allegation in its first protest that the bid bond was defective (Protest Ground D), and adding the ground that JLTJV's bid was not responsive and must be rejected because of ambiguity regarding the members of the joint venture. This protest ground stems from the JLTJV statement in its July 30, 2004 motion to dismiss that "The Jair Lynch Companies" as used in the bid and joint venture agreement is a trade name for JLC Construction, LLC, and does not refer to "The Jair Lynch Companies, Inc."

On August 13, 2004, the LBOC responded to Sigal's April 20 complaint with an Order of Dismissal, stating that Sigal's complaint "does not allege a violation of the act by the registrant, but 'challenges the [alleged] improper grant of 12 preference points to Lynch/Tompkins Joint Venture' by the Commission." (AR Ex. 8). According to the LBOC, D.C. Code § 2-217.04(e) "does not authorize the Commission to hear challenges to its certifications." D.C. Code § 2-217.04(e) provides in relevant part:

Any person may file with the Commission a complaint alleging a violation of this subchapter against any applicant for registration or contractor registered pursuant to this subchapter. The complaint shall be in writing and sworn to by the complainant. The Commission may, without a hearing, dismiss a complaint which is frivolous or otherwise without merit. Any hearing shall be heard within 3 months of the filing of the complaint. The Commission shall cause to be issued and served on the person or organization alleged to have committed the violation, hereafter called the respondent, a written notice of the hearing together with a copy of the complaint If, at the conclusion of the hearing, the Commission determines that the respondent has violated the provisions of this subchapter, the Commission shall issue, and cause to be served on the respondent, a decision and order, accompanied by findings of fact and

conclusions of law, requiring the respondent's registration to be revoked or suspended, or take any other action as it deems appropriate.

Nevertheless, the LBOC did briefly address Sigal's allegation that Tompkins, not Jair Lynch Companies, controlled the joint venture. The LBOC states in its decision:

[T]he Commission determined that the language in the joint venture agreement demonstrated that the Jair Lynch Companies, which the Commission understood to mean JLC Construction, LLC, represented "at least 51% ownership and control over the venture". As a result of this certification, JTJV was entitled "to receive the preferences" granted to JLC Construction, LLC "as if it were" that entity. Since JLC Construction, LLC's certification entitles it to 12 preference points, the contracting agency must accord that same preference to JTJV.

DISCUSSION

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

JLTJV argues that all of the protest grounds raised in Sigal's first two protests, CAB Nos. P-0690 and P-0693, are untimely because Sigal knew of the bases of the protest allegations long before the protests were filed on July 8 (P-0690) and July 27 (P-0693). JLTJV points to Sigal's complaint filed with the LBOC in April 2004 raising the issues of whether JLTJV was properly entitled to a 12 percent preference and whether the 50 percent self-performance requirement was properly waived. JLTJV also urges that Sigal's efforts to convince the Council to disapprove of the proposed contract award to JLTJV in June 2004 show Sigal's knowledge of the bases of these protests well before the protests were filed with the Board. JLTJV cites our decision in *Micro Computer Co.*, CAB No. P-0226, Jan. 9, 1992, 39 D.C. Reg. 4381, *reconsid.*, 40 D.C. Reg. 4388, for the proposition that the 10-business day period begins when the protester first knows or should have known the basis of the protest, regardless of when the contracting officer makes an award. Sigal responds that the time period does not begin until there has been an official action adverse to it and that the contract award was the official action adverse to it. According to Sigal, a protest is premature until the unsuccessful bidder receives notice of award. Since the award was not made until July 16, 2004, and Sigal did not receive notice of the award until July 22, its protests in P-0690 and P-0693 were timely filed.

The Procurement Practices Act provides the following in D.C. Code § 2-309.08 with regard to an award protest:

(a) This section shall apply to a protest of a solicitation or award of a contract addressed to the Board by any actual or prospective bidder, offeror, or contractor who is aggrieved in connection with the solicitation or award of a contract.

....

(b)(2) In cases other than those [based upon alleged improprieties in a

solicitation] . . . , protests shall be filed not later than 10 business days after the basis of protest is known or should have been known, whichever is earlier.

The correct principle of law on timeliness of a protest in connection with an award is that the 10-business day period stated in D.C. Code § 2-309.08 begins when the bidder or offeror knows or should have known the basis of its protest *and* the party has become aggrieved in connection with the award by an official action adverse to that party. JLTJV misconstrues our decision in *Micro Computer*. That case addressed the issue of the timeliness of a protest filed against the presumptive low bidder even though no award had been made. *Micro Computer* simply stands for the proposition that the Board may entertain jurisdiction over a protest which technically is premature because there has been no formal action taken by the contracting officer adverse to the protester. There is no difficulty in such an approach because if the presumptive low bidder does not receive award or the protester receives the award, the protest will be moot and voluntary dismissal will follow. See, e.g., *Consolidated Waste Industries*, CAB No. P-0300, Oct. 8, 1992, 40 D.C. Reg. 4570. If the protester does not receive award, the Board can then resolve the protest based on an actual decision adverse to the protester. Further, it may be useful for the contracting officer and government legal counsel to learn of a protest ground even if prematurely filed because the agency may be expected to take a more informed contract action based on the issues raised in the protest.

Usually, the contracting officer's official action adverse to the party will be a notice of award, a notice of intent to award, a notice that the party did not receive award, a notice that the party's bid or offer will not be further considered in the procurement, a notice that the party's offer is not within the competitive range, or a notice that the bid or offer is rejected for some other reason. It is well settled in our cases that a bidder or offeror does not have to file a protest in connection with an award until it has received notice of an official action by the contracting officer which is adverse to it. See, e.g., *Unfoldment, Inc.*, CAB No. P-0447, Aug. 2, 1996, 44 D.C. Reg. 6488, 6490-91 (protester's challenge to an anticipated award to the incumbent and an affirmative determination of the incumbent's responsibility status is premature and speculative); *Consolidated Waste Industries*, CAB No. P-0430, June 12, 1995, 42 D.C. Reg. 4983 (protester merely surmises that the District intends to award the IFB to another bidder; since the District had not yet completed its responsibility determination nor awarded a contract; protest was premature). In *Alexandria Scale*, CAB No. P-0361, Mar. 25, 1993, 40 D.C. Reg. 5055, the facts showed bid opening on June 12, 1992, that protester notified the contracting officer by letter of June 23 that the low bidder could not meet the specifications, and that between June 18 and December 14, 1992, the contracting agency made inquiries to the low bidder seeking responses to protester's June 23 letter. On January 7, 1993, after a partial award was made to the low bidder, the protester filed its protest on January 14, 1993, 7 days after award, but months after being on notice of the underlying basis for the protest. The Board held that the protest was timely filed because the operative date for the starting the 10-day filing period was the date on which the bidder was notified of the adverse agency action -- January 7, 1993, in that case. In *Koba Associates, Inc.*, CAB Nos. P-0344, P-0359, Mar. 3, 1993, 40 D.C. Reg. 5003, we held that the 10-day period for filing a protest begins to run when the District takes adverse action to the concerns of the offeror, not when the offeror raises the issues in a letter to the contracting officer seeking clarification. In *Koba*, the protester sought clarification by letter of August 27, 1992,

challenging a direction given by the contracting agency during discussions, but the 10-day time for filing its protest began to run when protester received the September 24, 1992 notice terminating negotiations. Thus, Koba's protest was timely filed on October 7, 1992. *See also Fort Myer Construction Corp.*, CAB No. P-0261A, Jan. 28, 1992, 39 D.C. Reg. 4400 (although Fort Myer was aware of low bidder's bid mistake at the time of bid opening on October 10, 1990, it was not aggrieved until November 1, 1990, when the District informed Fort Myer that the low bidder's error was not disqualifying).

Under these principles of timeliness, we conclude that the protest grounds in P-0690 and P-0693 were untimely raised on July 8 and July 27, 2004. Sigal states that it was aware of LBOC's certification of JLTJV (and the consequent eligibility for a 12 percent preference) in mid-March 2004 (Sigal Opposition, filed Aug. 11, 2004), and challenged the certification and entitlement of JLTJV to a 12 percent preference in its April 20, 2004 complaint to the LBOC. Certainly, by the time that the contracting officer submitted the proposed contract award to the Council on June 8, 2004, Sigal knew or should have known the bases for all of its protest grounds in P-0690 and P-0693. That does not end the inquiry because for determining timeliness, pursuant to D.C. Code § 2-309.08, we must determine also when Sigal first learned of an official action adverse to Sigal in connection with award of the contract. We conclude that Sigal learned of an official action adverse to it in connection with award of the contract when it received notice of the June 8, 2004 submission by OCP to the Council proposing award of the UCC contract to JLTJV. For contracts in excess of \$1 million, D.C. Code § 2-301.05a requires that the Mayor shall "submit the proposed contract to the Council for review and approval in accordance with the criteria established in this section." Section 2-301.05a(c)(1) states that proposed contracts submitted to the Council shall contain a summary, including, but not limited to, the following:

- (A) The proposed contractor, contract amount, unit and method of compensation, contract term, and type of contract;
- (B) The goods or services to be provided, including a description of the economic impact of the proposed contract . . . ;
- (C) The selection process, including the number of offerors, the evaluation criteria, and the evaluation results, including price and technical components;
- (D) The background and qualifications of the proposed contractor, including its organization, financial stability, personnel, and prior performance on [contracts] with the District government;
- (E) Performance standards and expected outcomes of the proposed contract;
- (F) A certification that the proposed contract is within the appropriated budget authority for the agency . . . ;
- (G) A certification that the proposed contract is legally sufficient and has been reviewed by the Office of the [Attorney General] . . . ;
- (H) A certification that the proposed contractor is current with its District and federal taxes . . . ;
- (I) The status of the proposed contractor as a certified local, small, or disadvantaged business enterprise;

- (J) Other aspects of the proposed contract that the Chief Procurement Officer deems significant; and
- (K) A statement indicating whether the proposed contractor is currently debarred from providing services to any governmental entity

Sigal filed a copy of the documents transmitted by OCP to the Council for the section 2-301.05a review. (Proposed Findings of Fact, Ex. 1, Attachment A). That submission to the Council was a notice of intent to award to JLTJV. Accordingly, as of June 8, 2004, Sigal knew or should have known the grounds of its protests in P-0690 and P-0693 and it was aware of the OCP contracting officer's intent to award the UCC contract to JLTJV by virtue of OCP's June 8 submission of the proposed contract award to the Council. Not only did Sigal learn of the submission to the Council, but it actively lobbied the Council to disapprove of the proposed award to JLTJV.

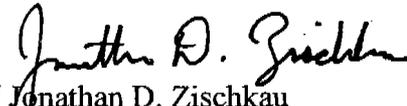
We now address Sigal's protest ground in P-0694 which was filed on August 12, 2004. Sigal alleges that the JLTJV bid was nonresponsive because the identity of one of the joint venture parties – "Jair Lynch Companies" – was ambiguous. Sigal contends that within the four corners of the bid documents and from publicly available records, it is not possible to conclude, as the contracting officer did, that "Jair Lynch Companies" referred to JLC Construction, LLC, which is the name of the corporation that the contracting officer understood as being the joint venture party which entered into the agreement with Tompkins. Sigal notes that within the Jair Lynch umbrella of companies, there is no legal entity named "Jair Lynch Companies" and JLC Construction, LLC, is not publicly registered under a trade name of "Jair Lynch Companies." Moreover, JLTJV itself states that the only Jair Lynch party to the joint venture is JLC Construction, LLC, *i.e.*, neither all of the Jair Lynch companies taken together nor any other individual Jair Lynch entity is a party to the joint venture. While there is a Jair Lynch entity named "Jair Lynch Companies, Inc.," that corporation was formed in August 2003, is not certified in any manner by the LBOC, and thus could not support the allowance of a 12 percent preference to JLTJV.

JLTJV states that this protest ground, like the protest grounds in P-0690 and P-0693, was untimely raised because Sigal knew of the basis of the protest long before August 12. We agree. Sigal states that it first learned of the protest ground when it received JLTJV's motion to dismiss on July 30, 2004, which contained the assertion that the name "Jair Lynch Companies", as used in the joint venture agreement and in the bid documents, is a trade name for JLC Construction, LLC, and not Jair Lynch Companies, Inc. We find that Sigal knew of the underlying facts by no later than April 20, 2004, when it filed a complaint with the LBOC. In the LBOC complaint, Sigal states that "OLDB's website does not list the Jair Lynch Companies nor does it indicate preference points give to the Jair Lynch Companies" but "does list a 'JLC Construction, LLC / formerly The Jair Lynch Consulting LLC.'" (Protest P-0690, Tab 9). By the time of the June 8 submission of the proposed award to the Council, Sigal knew or should have known of the basis for the protest, and, when coupled with its learning of OCP's June 8 proposed contract award submission to the Council, started the time period to file its protest within 10 business days. Because the protest in CAB No. P-0694 was not filed until August 12, the protest is untimely.

Accordingly, we dismiss the three protests as untimely.

SO ORDERED.

DATED: November 24, 2004


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

CONCURRING:


/s/ Matthew S. Watson
MATTHEW S. WATSON
Administrative Judge

substantiation shows the rationale used in arriving at the price of \$20,000 for two profession[al]s at the [pay grade 15] 5th step. PRI has been in the professional recruitment and placement business since 1974. Also, we have worked in the Washington, DC area since 1976. I would be happy to speak with you and or your officers to explain our proposal at your convenience. . . .

(AR Ex. 4). OCP apparently did not respond to Nelson's letter. On September 24, 2004, Professional Recruiters wrote to OCP, formally protesting OCP's rejection of its quote. The letter, with a subject line reading "Formal Protest to Disqualification of Proposal Submitted in Response to RFQ 158548," clearly protests OCP's September 3 rejection of its quote, arguing that its quote for professional recruitment services was reasonable under the criteria set forth in Federal Acquisition Regulation ("FAR") 31.201-3. (AR at 2, AR Ex. 5). Upon receiving a protest mistakenly sent to the OCP contracting officer, rather than to the Board, the OCP contracting officer should have immediately forwarded to us the misdirected protest. OCP erroneously notified Professional Recruiters on October 4 to file its protest with us. (AR at 2, AR Ex. 6). Professional Recruiters filed its protest directly with us on October 13, but as the District recognizes, we treat it as filed on September 24, the date the protest was received by the OCP contracting officer.

On November 3, 2004, the District moved to dismiss the protest as untimely filed. Professional Recruiters filed an opposition on December 10, 2004.

DISCUSSION

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

The Procurement Practices Act provides the following in D.C. Code § 2-309.08 with regard to an award protest:

(a) This section shall apply to a protest of a solicitation or award of a contract addressed to the Board by any actual or prospective bidder, offeror, or contractor who is aggrieved in connection with the solicitation or award of a contract.

....

(b)(2) In cases other than those [based upon alleged improprieties in a solicitation] . . . , protests shall be filed not later than 10 business days after the basis of protest is known or should have been known, whichever is earlier.

We have recently restated that this 10-business day period begins when the bidder or offeror knows or should have known the basis of its protest *and* the party has become aggrieved in connection with the award by an official action adverse to that party. *Sigal Construction Corp.*, CAB No. P-0690, *et al.*, Nov. 24, 2004. In the present case, Professional Recruiters concedes that it received notice on September 3, 2004, that its quote would not be further considered for the award because the price was not reasonable. Professional Recruiters also agrees that its letter of September 13 was not intended as a protest and that it did not in fact submit its protest until September 24. Because it filed its protest more

than 10 business days after September 3 when it received official notification of an action adverse to it in connection with an award, Professional Recruiters' protest is untimely.

We have reservations about the OCP contracting officers' determination to exclude the quote of Professional Recruiters without first requesting and evaluating the bidder's pricing information, particularly where, as here, contractors have significant latitude in how they price direct costs for these services. In addition, we have concerns that the contracting officers here did not appreciate that a bid price below the cost of performance is not objectionable for that reason alone. *M.C. Dean, Inc.*, CAB No. P-0654, July 30, 2002 50 D.C. Reg. 7447, 7449; *C.P.F. Corp.*, CAB No. P-0521, Jan. 12, 1998, 45 D.C. Reg. 8697, 8700. Whether the contract can be performed at a price below the cost of performance is a matter of bidder responsibility, but Professional Recruiters' responsibility did not seem to be considered by the contracting officers. Finally, contracting officers should notify bidders and offerors *in writing* and *without delay* when making determinations such as to award or not to consider further a firm's bid or offer.

Professional Recruiters' protest is dismissed as untimely.

SO ORDERED.

DATED: December 21, 2004


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

CONCURRING:


/s/ Matthew S. Watson
MATTHEW S. WATSON
Administrative Judge


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

GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

PROTEST OF:

PREFERRED TEMPORARY SERVICES, INC.)
) CAB No. P-0695
Under RFQ No. POCR-2004-Q-0020)

For the Protester: Barbara Posner, President, Preferred Temporary Services, Inc. For the Government: Howard Schwartz, Esq., and Talia Cohen, Esq., Assistant Attorneys General, District of Columbia.

Opinion by Administrative Judge Warren J. Nash, with Chief Administrative Judge Jonathan D. Zischkau and Administrative Judge Matthew S. Watson, concurring.

OPINION

(Lexis-Nexis Filing ID 4841443)

Preferred Temporary Services, Inc. ("PTSI") protested the award of a task order for temporary staffing services under Request for Quotations ("RFQ") POCR-2004-Q-0020. PTSI asserts that (1) the District included the wrong wage rates in the RFQ, and (2) the District failed to include evaluation factors in the RFQ necessary for determining the most qualified bidder or offeror. In its Agency Report, the District responds that (1) the contracting officer made telephone calls to the offerors to correct the wage rate mistake, and the final quotations of each bidder were based on the revised wage rates, and (2) the District was required to purchase the lowest priced services from the bidder or offeror already on the multiple award schedule. The protester did not file comments on the District's Agency Report. We deny the protest.

BACKGROUND

On July 13, 2004, the Office of Contracting and Procurement ("OCP") issued RFQ No. POCR-2004-Q-0020 to three vendors, including PTSI, listed on the District of Columbia Supply Schedule for Temporary Support Services. Multiple award supply schedules incorporate Federal Department of Labor wage rates and allow District agencies to issue task orders to vendors for services set forth on the schedule. The schedule was established by the District after competition conducted by OCP. The RFQ originally required immediate responses on the date of issue. After receiving initial quotations, the contracting officer realized that the RFQ incorporated an outdated wage rate. The contracting officer allowed the three vendors to resubmit quotes the next day using the correct wage rates. All three offerors resubmitted quotes using the correct wage rates. The contracting officer awarded the task order to Midtown Personnel, Inc. ("Midtown"), the schedule contractor that had submitted the lowest priced offer. PTSI misfiled its protest with the OCP commodity manager on July 19, 2004. The commodity manager should have immediately forwarded the protest to the Board. However, the commodity manager did not forward the protest to the Board until August 16, 2004. The Board considers the protest to be timely filed because we deem it to have been filed with us on the date it was originally filed with

the commodity manager. See *Fort Myer Construction Corp.*, CAB No. P-0452, July 23, 1996, 44 D.C. Reg. 6476, 6479; *Pro-Tech Builders, Inc.*, CAB No. P-0601, Dec. 14, 1999, 45 D.C. Reg. 1415.

DISCUSSION

We exercise jurisdiction pursuant to D.C. Code § 2-309.03(a)(1). The protester asserts that (1) the District included the wrong wage rates in the RFQ, and (2) the District failed to include evaluation factors in the RFQ necessary for determining the most qualified offeror. In answer to the first protest ground, the District responds that since all three offerors timely submitted quotations that used the same correct wage rates, there was no prejudice to any bidder. We agree. In answer to the second protest ground, the District responds that 27 DCMR § 2104.2 sets forth price as the only selection factor when the District orders products or services under a schedule, such as the District of Columbia Supply Schedule. That section states:

Except as provided in § 2104.3, when ordering from a multiple-award schedule, the contracting officer shall place orders with the schedule contractor offering the lowest delivered price available.

As the District correctly points out, an RFQ issued under an existing supply schedule requires the contracting officer to make an award to the lowest priced bidder. The supply schedule did not require the RFQ to contain criteria for a technical evaluation.

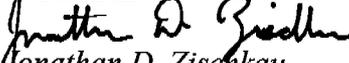
Accordingly, the Board denies the protest.

SO ORDERED.

DATE: December 27, 2004


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

CONCURRING:


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


/s/ Matthew S. Watson
MATTHEW S. WATSON
Administrative Judge

GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

PROTESTS OF:

CLW/CDM JOINT VENTURE)
) CAB Nos. P-0696, P-0697, P-0698, P-0701
 Under Solicitation No. DCAE-2004-R-0014) (Consolidated)

For the Protester, CLW/CDM Joint Venture: Laura E. Jordan, Esq. 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 Matthew S. Watson, concurring.

OPINION

LexisNexis Filing ID 5086815

CLW/CDM Joint Venture ("CLW") has filed four protests regarding the District's Request for Proposals ("RFP") for third party claims administration for the District government Worker's Compensation Program. In summary, CLW argues that (1) the RFP violates numerous provisions of procurement law and violates a court order entered in *Elizabeth Lightfoot, et al. v. District of Columbia, et al*, Civil Action No. 01-1484(CKK) (D.D.C.); (2) the District's decision not to exercise an option with CLW to continue its performance under a prior contract for third party claims administration, and the District's issuance of a flawed RFP evinces a pattern of bad faith dealings with CLW; (3) statements made by the Acting Director of the Office of Risk Management during a hearing before the City Council concerning an interim procurement solution show that the procurement process violates the law; and (4) the District violated law and regulation by disclosing CLW's confidential proposal information in a Superior Court pleading. We conclude that the District has mooted the challenges to the terms of the RFP through two subsequently issued RFP amendments, and that the record falls well short of showing bad faith by the District. Further, CLW has not demonstrated that the District violated law or prejudiced CLW in disclosing certain past performance questionnaires which were part of CLW's proposal. Accordingly, we deny in part and dismiss in part the protest grounds raised in CLW's consolidated protests.

BACKGROUND

On August 30, 2004, the District of Columbia's Office of Contracting and Procurement ("OCP"), on behalf of the Office of Risk Management, issued RFP No. DCAE-2004-R-0014 for third party claims administration and related services for the District government's Self-Insured Worker's Compensation Program, which covers approximately 33,378 District employees. (Agency Report ("AR"), Ex. 1).

On September 13, 2004 CLW filed with the Board its first protest (CAB No. P-0696) challenging the issuance and contents of the RFP. On September 24, 2004, OCP issued Amendment No. 2, which made extensive changes to the RFP in response to the issues raised by CLW in protest P-

0696. (AR, Ex. 2). Amendment No. 2 extended the closing date of the RFP until October 7, 2004.

On September 27, 2004 CLW filed with the Board a second protest (CAB No. P-0697), alleging that Mr. James J. Jacobs, Acting Director, Office of Risk Management ("ORM"), during testimony presented to the City Council, spoke of an "interim solution" for the disability program procurement but refused to provide details or to state whether CLW was included or excluded from the solution. According to CLW, Jacobs' testimony showed that the District was not conducting a transparent and fair procurement process for awarding the worker's compensation program contract.

On October 5, 2004, CLW filed a third protest (CAB No. P-0698), alleging that the RFP had to be further amended or cancelled in light of a September 24, 2004 order entered in *Elizabeth Lightfoot, et al. v. District of Columbia, et al.* In that order, the court ruled that the District had violated the D.C. Administrative Procedures Act and due process when it terminated, suspended, or modified claimants' disability compensation without having in place published rules governing the process and providing notice to the claimants. According to CLW, the court order renders it nearly impossible for offerors to construct a realistic pricing structure or legally to comply with RFP sections that are predicated on the District's ability to terminate, suspend, or modify benefits.

On October 6, 2004, the District notified the Board and the CLW that on October 4, 2004, the Interim Chief Procurement Officer signed a Determination and Findings to Proceed with Award while a Protest is Pending ("D&F"). By letter dated October 7, 2004, the contracting officer notified CLW that the District did not intend to exercise an option to renew the contract with CLW for disability compensation services. Also, on October 7, OCP issued RFP Amendment No. 3 to address the quantity of claims and related price issues raised by CLW in CAB No. P-0698. Amendment No. 3 provides:

Offerors shall identify the assumptions used regarding the quantity of claims per year used in determining its proposed fixed annual price. In addition, offerors shall state what effect on the price an increase or decrease in the amount of claims per year would have on the proposed price per year.

In addition, Amendment No. 3 extended the closing date to October 12, 2004. (AR, Ex. 2).

On October 8, 2004, OCP awarded Aon Risk Services, Inc., a sole source contract, DCRK-2005-C-0003, to provide on-site claims adjudication for disability compensation services on an interim basis to allow for evaluation and award under the protested RFP, with performance to begin on October 21, 2004, and end on February 28, 2005. On October 12, 2004, OCP issued RFP Amendment No. 4, which extended the closing time for proposal to October 12, 2004, at 2:00 p.m. (AR, Ex. 2). The District received a number of offers.

On October 14, 2004, the protester filed a motion challenging the October 4, 2004 D&F to proceed. The Board denied the motion. Also, on October 14, CLW filed a complaint and emergency petition for a temporary restraining order in D.C. Superior Court to enjoin the District from allowing performance under the interim contract with Aon. (P-0701 AR, Ex. 1).

On October 15, 2004, the District filed in Superior Court a memorandum opposing CLW's

petition for a TRO. (P-0701 AR, Ex. 2). On October 18, 2004, the District filed in Superior Court a praecipe containing an affidavit of Ms. Phyllis Dailey, in support of its opposition to CLW's TRO petition. On October 19, 2004, the Superior Court issued a TRO, with October 29, 2004, as the date of the hearing on the preliminary injunction. (P-0701 AR, Ex. 3). On October 29, 2004, the Superior Court dismissed CLW's request for a permanent injunction because CLW failed to file a bond.

On October 25, 2004, the District filed its Agency Report for the pending three protests. On November 2, 2004, the protester filed a fourth protest which was docketed as CAB No. P-0701. This protest alleges that the District illegally disclosed, in Exhibit 11 of the October 18 praecipe filed in Superior Court, confidential information from CLW's RFP proposal. Exhibit 11 consisted of CLW's proposal cover sheet, the technical proposal's table of contents, and two past performance questionnaires and addenda prepared by federal agencies evaluating CLW's performance under various federal contracts. CLW requests that the Board restore the status quo by canceling the RFP, terminating the interim award to Aon, restoring the recently expired contract with CLW, and awarding CLW its protest costs. Alternately CLW requests that, if the RFP is reissued, CLW be awarded all possible points in categories relating to the disclosed information. The Board consolidated this protest with the other three.

On November 10, 2004, CLW filed the following comments to Agency Report:

Protester CLW/CDM Joint Venture ("CLW/CDM") hereby submits its response to the Agency Report in Protest Nos. P-0696, P-0697, and P-0698 ("protests") to RFP No. DCAE-2004-R-0014 ("RFP"), as amended. CLW/CDM notes that the Agency Report does not overcome the arguments of the protests. Accordingly, in light of the facts set forth in the protests, pursuant to Board Rule 307.3, CLW/CDM respectfully requests that the protests be decided on the existing record.

The District, on November 26, 2004, filed a motion to dismiss and Agency Report for CAB No. P-0701. On December 7, 2004, CLW filed its opposition.

DISCUSSION

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

CAB No. P-0696

In CAB No. P-0696, the parties have agreed that grounds I-III of the protest are no longer at issue. We address the remaining issues seriatim.

In ground IV of P-0696, CLW contends that RFP section H.7.3 creates a conflict of interest in the event that the contractor became involved in "outside" litigation, that is, litigation not related to a disability claim. CLW also argues that the section violates D.C. Code § 2-301.01(b)(7), which sets forth one of the statutory purposes of the PPA, namely, "to insure the fair and equitable treatment of all persons who deal with the procurement system of the District government." We agree with the District

that the RFP cannot be read to create a potential conflict with "outside" litigation. Accordingly, we see no violation of law or regulation based on a conflict of interest. Concerning the ground alleging a violation of the PPA's policy of fair and equitable treatment, CLW has failed to demonstrate how section H.7.3 violates D.C. Code § 2-301.01(b)(7). In sum, we deny protest ground IV.

In ground V of P-0696, CLW contends that the Incentive - Disincentive scheme set forth in RFP section B.3 violates D.C. Code § 2-304.01(4) in that it does not provide an "unambiguous statement of the technical requirements and evaluation criteria necessary" to respond to the RFP. With regard to the various alleged deficiencies in the solicitation, including ambiguities with the composite audit score used for the incentive-disincentive scheme, the District has responded in the Agency Report that portions of Amendment 2, including sections G, VV, and Attachment 2, and RFP Attachment J.10, address the deficiencies raised by CLW. In its comments to the Agency Report, CLW has not rebutted any of the facts provided by the District as to the effect of Amendment 2 mooted the challenges, and thus those facts from the Agency Report are deemed conceded. *See* Board Rule 307.4. CLW further contends that ORM lacks the staff, resources, and competence to audit the performance of the contractor. Contract administration issues are not valid grounds for protest. CLW next contends that the measure of performance standards in the contract is improperly subjective and discretionary on the part of District officials. Having reviewed the standards, and the unrebutted facts set forth in the Agency Report, we do not agree with CLW that the amended solicitation violates law or regulation. Finally, CLW raises a number of challenges to various other specification sections. The District has responded to these grounds in its Agency Report, with references to the changes made by Amendment 2. Those facts stand unrebutted. In sum, we deny in part and dismiss in part protest ground V.

In grounds VI and VII of P-0696, CLW contends that the District issued the RFP and conducted the procurement in bad faith, violating its duties of good faith required by D.C. Code § 2-301.03. First, CLW points to OCP issuing the RFP after CLW had received a notice of intent to exercise an option on its then existing contract with the District for the same services. CLW correctly observes that a notice of intent to exercise an option does not bind the District to do so, but CLW argues that against the backdrop of its satisfactory performance, the District's issuance of the RFP "strongly implicates" D.C. Code § 2-301.03. As the District correctly observes, the issuance of an RFP after transmitting to the incumbent contractor a notice of intent to exercise an option, falls far short of evidence of bad faith dealings. Next, CLW argues that "the RFP includes many attempts to cloak an effort to circumvent D.C. Code § 2-325.01." That section provides:

The Mayor shall not enter into any new contract for goods or services the cost of which exceeds the cost of an existing contract for the same goods or services, when the current contractor is willing to continue to provide the goods or services at the price of the existing contract, as long as the contractor is providing satisfactory service; nor shall the Mayor extend any existing contract for any amount over the price agreed to in the existing contract. Nothing contained in this section shall prohibit the Mayor from putting a contract out for bid for a lower price.

CLW alleges that the District structured the RFP to hide the true (presumably, higher) costs of performance under a new contract pursuant to the RFP to avoid having to extend the then existing contract with CLW. CLW identifies aspects of performance required by the RFP that make

performance more expensive than that provided under CLW's existing contract. Since the services under CLW's existing contract and the services provided under the RFP are different in a number of significant ways, we do not see how section 2-325.01 applies here. Even if we were to find the section applicable, CLW has not convinced us from the record that the District engaged in any form of bad faith conduct.

CLW further contends that all of the protest issues taken together "strongly suggest bad faith in the procurement process." As discussed above, none of the issues raised by CLW evince bad faith on the part of District contracting officials. We also conclude that when considering all of the issues together, still there is no evidence of bad faith.

Accordingly, we deny in part and dismiss in part the protest allegations raised in grounds IV through VII of P-0696.

CAB No. P-0697

In CAB No. P-0697, CLW states the following:

Protestor . . . CLW/CDM attended and testified at a September 17, 2004 hearing of the Government Operations Committee of the District of Columbia Council to determine whether Acting Director James J. Jacobs should be confirmed as director of the Office of Risk Management ("ORM"). During his testimony, Mr. Jacobs made certain statements that provide the basis for this Protest.

Specifically, during his confirmation testimony, Committee Chairman Council Member Vincent Orange inquired of Mr. Jacobs regarding his plans for keeping the Disability Compensation Program ("DCP") operational during the pendency of the RFP. Mr. Jacobs had earlier testified about an "interim solution" which he sought to implement. Mr. Orange asked Mr. Jacobs of what his interim solution consisted. Mr. Jacobs declined to provide specifics. Mr. Orange then asked Mr. Jacobs whether his "interim solution" involved CLW/CDM. Mr. Jacobs persisted in his failure to respond, saying that, because CLW/CDM had protested the RFP, he did not want to provide further information about the interim solution.

The matters revealed by Mr. Jacobs' sworn testimony violate D.C. Code §§ 2-301.01(b) and 2-304.01(4). . . .

CLW argues that Mr. Jacobs' testimony shows that the procurement process is neither transparent nor open as required by D.C. Code § 2-301.01(b). We conclude that CLW has not articulated a valid protest ground. Jacobs' failure to elaborate on the agency's procurement plans at a Council hearing does not rise to the level of a violation of the PPA. The record does not reveal any violation of law or regulation in the manner that the RFP was issued to prospective offerors or in the on-going evaluation of offers.

CLW's other argument, that Mr. Jacob's testimony "reveals that there are technical requirements

and evaluation criteria being used in the evaluation of the RFP that are not being made public," which it says violates D.C. Code § 2-304.01(4), similarly is not well taken. Section M of the RFP identifies the evaluation criteria being used in this procurement. CLW has presented no evidence that the contracting officer has failed to follow those evaluation criteria in evaluating the offers submitted pursuant to the RFP. The merits of the emergency interim award to one of the other offerors, Aon Risk Services, is not at issue because CLW has never protested that award action.

Accordingly, we dismiss the protest grounds raised in P-0697.

CAB No. P-0698

In CAB P-0698, CLW alleges that the *Lightfoot* order of the United States District Court, dated September 24, 2004, requires the District to further amend or cancel the RFP. In the order, the court held *inter alia* that the District violated the DCAPA and due process when it terminated, suspended, or modified claimants' disability compensation without having in place published rules governing the process and providing notice to the claimants. CLW states that this court order significantly affects a number of provisions of the RFP, and requires that the RFP be revised to meet the program requirements imposed by the court order. CLW also argues that the District must cancel the RFP and continue the contract with CLW until the District corrects the deficiencies in the disability compensation program. The District responds that the District always has the ability to address any effects of the *Lightfoot* order by issuing addenda to the RFP or a change order during contract administration.

CLW claims that the *Lightfoot* order prohibiting the District from terminating, suspending, or modifying any disability benefits, until valid regulations are promulgated, renders it practically impossible for offerors to construct a realistic pricing structure or legally to comply with RFP sections that are predicated on the District's ability to terminate suspend or modify benefits. CLW identifies numerous sections. It claims that the problem permeates the entire RFP.

The District responds that RFP Addendum No. 3, section B, addresses the issue of pricing the fixed price contract based on variations in the number of claims, by requiring that the offerors identify the pricing assumptions and the effect on price if claims are decreased or increased during the year. Amendment No. 3, section B, states:

Section L.4.4 is added as follows:

Offerors shall identify the assumptions used regarding the quantity of claims per year used in determining its proposed fixed annual price. In addition, offerors shall state what effect on the price an increase or decrease in the amount of claims per year would have on the proposed price per year.

The District argues that Amendment No. 3 provides a reasonable and fair method of pricing the contract in view of the *Lightfoot* order and addresses any other variance in the number of claims. In addition, regarding the ability of a contractor to perform the contract requirements consistent with the requirements of the *Lightfoot* order, the District responds that if the order prohibits the District or the

contractor from performing a particular requirement, then the requirement will not be performed or enforced until such time as the District obtains a revised court order, a reversal of the court order, or promulgates regulations resolving the court's objections. Finally, the District notes that the RFP provisions state the District's reasonable minimum needs, subject to the dictates of the *Lightfoot* order.

CLW has not rebutted the facts articulated by the District in the Agency Report with regard to the effect of Amendment No. 3 on the ability of offerors to formulate a valid offer to the amended RFP. We are not convinced from the record that the *Lightfoot* order renders it impossible for an offeror to submit a meaningful offer in response to the RFP. With regard to the provisions in the RFP which CLW claims would be impossible or illegal to perform, it is not the Board's role to enforce programmatic requirements specified in a court order.

CLW also repeats in P-0698 its earlier allegation that the District has violated the standards of good faith and fair dealings as well as the fundamental policies set out in D.C. Code 2-301.01(b). For the reasons discussed earlier, we deny these protest grounds.

CAB No. P-0701

CLW alleges that the District violated the law when it filed in D.C. Superior Court an affidavit with exhibits containing confidential information from CLW's proposal as part of the District's opposition to CLW's TRO petition in that court. The pleading at issue, styled "Praecipe Noting Filing Declaration of Phyllis Dailey in Support of the District of Columbia's Opposition to Plaintiff's Temporary Restraining Order", was filed in Superior Court on October 18, 2004. Ms. Dailey states in paragraph 8 of her affidavit:

I further note that CLW/CDM says it will have to close its doors and that, according to Paragraph 32 of Mr. Weaver's declaration it will not be able to absorb the "hit." My review of his proposal for the new RFP issued August 30, 2004, and recently received by this office indicates, however, that there are at least two existing contracts in the millions of dollars with the Federal Transit Administration and the U.S. Department of Transportation, National Highway Safety Administration. See Exhibit 11, CLW/CDM On Site Technical Proposal, Solicitation 6FG-03-RAB-0002 Addendum to Past Performance Evaluation.

The referenced Exhibit 11 consists of a cover sheet entitled "A Proposal in Response to Solicitation # DCAE-2004-R-0014 for Third Party Claims Administration Services for the District's Self-Insured Worker's Compensation Program by CLW/CDM, JV", followed by a 2-page table of contents for the technical proposal, followed by two past performance questionnaires and addenda prepared by the Federal Transit Administration and the U.S. Department of Transportation's National Highway Transit Safety Administration evaluating CLW's performance under certain federal contracts. The questionnaires are marked at the top of each page "Source Selection Sensitive Information" and show the contract number, dollar value, period of performance, and a brief description of the type of contract work. The questionnaires also identify numerical ratings for quality of product or service, timeliness of performance, business relations, compliance with price estimates, customer satisfaction, and overall performance.

CLW claims that the District violated 27 DCMR § 1610.1 which provides:

After receipt of proposals, the information contained in them and the number or identity of offerors shall not be made available to the public or to anyone in the District not required to have access to the information in the performance of his or her duties.

CLW argues that by not filing the pleading under seal or pursuant to a protective order, the information was "made available to the public." Further, according to CLW, the filing violated section 1610.3 which prohibits releasing information to a prospective contractor that might "give the prospective contractor an advantage over others." Section 1610.3 provides:

No District employee or agent shall furnish information to a prospective contractor if, alone or together with other information, it might give the prospective contractor an advantage over others. However, general information that is not prejudicial to others may be furnished upon request.

The District argues the protest is untimely because CLW filed it on November 2, 2004, 11 days after the October 18 date the pleading was filed in Superior Court. CLW counters that its counsel did not receive the pleading until the TRO hearing on October 19. The District has not rebutted CLW's sworn statement that its counsel received the pleading on October 19, which would make the protest timely. Accordingly, we decline to dismiss the protest on timeliness.

The District argues on the merits that disclosure of the past performance questionnaires did not violate law or regulation because none of the information was proprietary and CLW never attached a protective legend to its proposal identifying the information as proprietary. In addition, the District states that CLW waived any claim of confidentiality by failing to seek a protective order either in Superior Court or before the Board. Finally, says the District, disclosure of the past performance data (ratings were either outstanding or excellent in all categories) did not competitively harm CLW. CLW responds that the information is confidential because it is not readily ascertainable by proper means and confers economic value from its disclosure or use.

D.C. Code § 2-303.17(d) states:

The District Government Procurement Regulations shall provide that information which has been designated as confidential or proprietary by a business, and which has been submitted by that business as a part of its response to an invitation for bids, a request for proposals, or competitive sealed proposals, is to be treated by the Director, an employee of that office, or any other employee of the District in a confidential manner, and is to be disclosed only to District employees for use in the procurement process and is not to be disclosed to other persons or parties without the prior written consent of that business.

We do not need to reach the question of whether the District disclosed proprietary information because it is clear that the disclosure cannot prejudice CLW in this RFP competition. There is nothing in the table of contents or past performance questionnaires that could provide an advantage to another

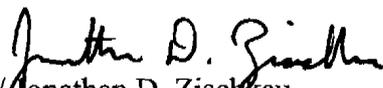
offeror or a disadvantage to CLW. In other words, the disclosure will have no effect on the District's evaluation and selection pursuant to the RFP. CLW also challenges the disclosure as a violation of the District's obligation of good faith and other policies specified in D.C. Code § 2-301.01. For the same reasons discussed above, we deny these additional protest grounds.

CONCLUSION

Based on our review of the consolidated protest record in P-0696, P-0697, P-0698, and P-0701, we deny in part and dismiss in part the protest grounds raised by CLW.

SO ORDERED.

DATED: February 4, 2005


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

CONCURRING:


/s/ Matthew S. Watson
MATTHEW S. WATSON
Administrative Judge