

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