

GOVERNMENT OF THE DISTRICT OF COLUMBIA  
CONTRACT APPEALS BOARD

PROTEST OF:

JHARBO LIMITED, INC.

Under RFP No. DC-RP-97-09

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CAB No. P-527

For the Protester: Donald M. Temple, Esq. For the Government: Mark D. Back, Esq.,  
Deputy General Counsel, D.C. Lottery & Charitable Games Control Board.

Opinion by Administrative Judge Jonathan D. Zischkau, with Chief Administrative Judge  
Lorilyn E. Simkins and Administrative Judge Phyllis W. Jackson, concurring.

**OPINION**

JHARBO Limited, Inc., protests the cancellation of the request for proposals made by the District's Chief Procurement Officer. The Chief Procurement Officer determined that cancellation was necessary because the contracting agency failed to meet privatization requirements set forth in D.C. Code § 1-1181.5b (1997 Supp.). JHARBO contends that cancellation determination is legally insufficient because the Chief Procurement Officer had no authority to cancel the RFP or to conduct a pre-execution review of any proposed award under the RFP. We conclude that the Chief Procurement Officer has statutory authority to cancel a solicitation, under the proper legal standards, and to conduct a pre-execution review of any procurement action subject to the Procurement Practices Act. The Lottery concedes that the privatization requirements were not satisfied here and JHARBO does not challenge the factual basis upon which the cancellation was based. Accordingly, we deny the protest.

**FACTS**

On June 9, 1997, the District of Columbia Lottery and Charitable Games Control Board issued an open market Request for Proposals ("RFP") No. DC-RP-97-09 soliciting sealed competitive proposals for (1) production and/or broadcast services for the Lottery's mid-day and evening draw programs, and (2) broadcast of the Multi-State Lottery Association's game drawings. (Agency Report ("AR") Ex. 1). The Lottery issued an Amendment No. 1 to the RFP which cancelled sections 5 and 6 of the solicitation related to broadcast of the Lottery's mid-day and evening draw programs and the Multi-State Lottery Association's game drawings.

After receipt of initial proposals and best and final offers from the D.C. Office of Cable Television, the incumbent contractor, and JHARBO, the Lottery requested pre-execution review by the District's Chief Procurement Officer ("CPO") who is the Director of the Office of Contracting and Procurement. On November 1, 1997, the CPO executed a determination and findings cancelling the RFP on the ground that the solicitation violated the privatization requirements of D.C. Code § 1-1181.5b (Supp. 1997). The CPO noted that the production

services are currently being performed by District employees and consequently any initiative to privatize these functions should comply with the privatization requirements of subsection (a) of D.C. Code § 1-1181.5b. That section provides in relevant part:

Any contract, including a lease or other agreement, or any contracting policies and procedures relating to such contracts, to provide goods and services to or on behalf of the District government shall provide that:

(1) With respect to contracting out to provide goods or services to or on behalf of the District government that currently are provided by employees, department, or agencies of the District government, a cost-benefit analysis comparing the in-house costs of providing the service with the costs associated with contracting for the service shall be completed for each contract proposed pursuant to this section;

(2) Contracting out will provide savings over the duration of the contract of at least 5%;

(3) Any contractor who is awarded a contract that displaces District government employees shall offer to any displaced employee a right-of-first-refusal to employment by the contractor, in a comparable available position for which the employee is qualified, for at least a 6-month period during which the employee shall not be discharged without cause;

(4) Any District employee that is displaced as a result of a contract, and is hired by the contractor which was awarded the contract which displaced the employee shall be entitled to the benefits provided by the Service Contract Act  
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(5) If the employee's performance during the 6-month transition employment period required by paragraph (3) of this section is satisfactory, the new contractor shall offer the employee continued employment under terms and conditions established by the new contractor;

(6) Any solicitation for proposed contracts issued pursuant to this section shall include information concerning the procedure by which current District government employees may exercise the right to bid on the contracts;

(7) An assessment of the economic impact on the District shall be completed for each contract proposed pursuant to this section;

(8) Prior notification shall be provided to affected District government

employees 30 days prior to any adverse impact on the employees . . . .

The Lottery agrees that it has not complied with any of these requirements in connection with the subject RFP. JHARBO does not challenge the fact of noncompliance.

### DISCUSSION

We exercise jurisdiction over the protest pursuant to D.C. Code § 1-1189.3(a)(1) (Supp. 1997).

A request for proposals may be cancelled only if the CPO determines in writing that the action is taken in the best interest of the District government and there is a reasonable basis for cancellation. D.C. Code § 1-1183.7 (1992); *Singleton Electric Co.*, CAB No. P-411, Nov. 15, 1994, 42 D.C. Reg. 4888, 4893; *Shannon & Luchs*, CAB No. P-415, Sept. 21, 1994, 42 D.C. Reg. 4851, 4859 & n.12; *McMillan Limited Partnership*, CAB No. P-301, Oct. 22, 1992, 40 D.C. Reg. 4647, 4654 n.6.

JHARBO argues that the Lottery's Executive Director, as the contracting officer for this procurement, not the CPO, is the only one authorized to cancel the solicitation. In a related argument, the protester claims that the CPO had no authority to conduct a pre-execution review of a proposed award pursuant to the RFP because the regulations authorizing his pre-execution review were published after the RFP was issued. We do not agree with either argument.

A contracting officer may recommend cancelling a solicitation, but the Procurement Practices Act requires the CPO to approve any cancellation through the procedure provided in D.C. Code § 1-1183.7. *See Singleton Electric Co.*, 42 D.C. Reg. at 4894. In the present case, the CPO himself initiated the cancellation action in his determination and findings that the solicitation had to be cancelled. Under the Procurement Practices Act, the CPO has the authority to cancel a solicitation, where the circumstances warrant cancellation, even if another contracting officer issued the solicitation. The CPO's power to cancel is independent of any delegated authority to conduct pre-execution contract reviews. In this case, the CPO properly followed the requirements of D.C. Code § 1-1183.7. He made a written determination that cancellation was in the best interest of the District government. His determination cancelling the RFP adequately explains the reason for the cancellation -- *i.e.*, the RFP was cancelled because the Lottery had not complied with the privatization requirements of D.C. Code § 1-1181.5b (Supp. 1997). The Lottery concedes that it had not complied with the privatization requirements and the protester does not challenge that fact.<sup>1</sup> Clearly, the CPO has stated a reasonable basis for cancelling the

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<sup>1</sup> On more than one occasion, the Board advised JHARBO to respond to the issue of whether the CPO was correct in concluding that the solicitation was subject to the privatization requirements of D.C. Code § 1-1181.5b. JHARBO has never addressed the issue in its submissions. On

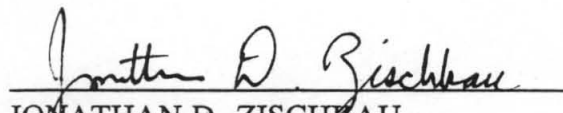
RFP. Finally, the CPO forwarded his determination to the Inspector General for review within 72 hours of the action.

As for the CPO's pre-execution review, JHARBO fails to appreciate the powers vested in the CPO by the Procurement Reform Amendment Act of 1996 which amends the Procurement Practices Act. The CPO's authority to conduct a pre-execution review does not depend on the regulations issued by the CPO at 27 DCMR § 8030.1, 44 D.C. Reg. 3520-21 (June 20, 1997). By virtue of the statutory delegation of exclusive contracting authority to the CPO, and his responsibility for procurements subject to the PPA, the CPO has the statutory authority to conduct a pre-execution review of any procurement covered by the PPA. See D.C. Code § 1-1181.5 (Supp. 1997). Thus, JHARBO's contention that the CPO's pre-execution review here was improper and violated due process is without merit. The Lottery, in its Agency Report, points out that in September 1997 the District of Columbia Financial Responsibility and Management Assistance Authority ("Authority") expressly delegated to the CPO pre-execution review authority for approving new contracts under \$1 million. (AR at 2-3 n.2). An express delegation of pre-execution review authority by the Authority augments the CPO's statutory authority. The delegation harms no interest of the protester. The pre-execution review delegated to the CPO by the Authority is meant to assist the Authority in fulfilling its financial and management assistance responsibilities and to provide additional procedural safeguards that a procurement action is proper. It deprives offerors of no substantive rights.

Citing our decision in *McMillan Limited Partnership*, JHARBO also argues that the cancellation is legally insufficient because RFP Amendment No. 2 which notified the offerors of the cancellation does not set forth reasons for the cancellation. Unlike the situation in *McMillan*, where the Director of the Department of Administrative Services never prepared a valid determination supporting the cancellation action, here the CPO executed a cancellation determination and the Lottery's subsequent cancellation notice to offerors simply notified offerors of the cancellation without identifying the reasons or that the action was taken by the CPO. Because the CPO's cancellation meets the requirements of D.C. Code § 1-1183.7 and the legal standard of reasonableness, we discern no legal infirmity in the Lottery's notice to offerors.

Accordingly, JHARBO's protest is denied.

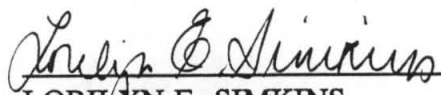
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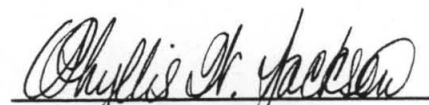
  
JONATHAN D. ZISCHKAU  
Administrative Judge

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January 9, 1998, JHARBO sought reconsideration of the Board's December 23, 1997 order, which denied its request for certain documents for which the Lottery has claimed a deliberative process privilege. The Board previously reviewed the documents *in camera*. JHARBO's motion for reconsideration is untimely. See Board Rule 313.2.

CONCURRING:

  
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LORILYN E. SIMKINS  
Chief Administrative Judge

  
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PHYLLIS W. JACKSON  
Administrative Judge