

**GOVERNMENT OF THE DISTRICT OF COLUMBIA  
CONTRACT APPEALS BOARD**

717 14th STREET, N.W., Suite 430  
Washington, D.C. 20005

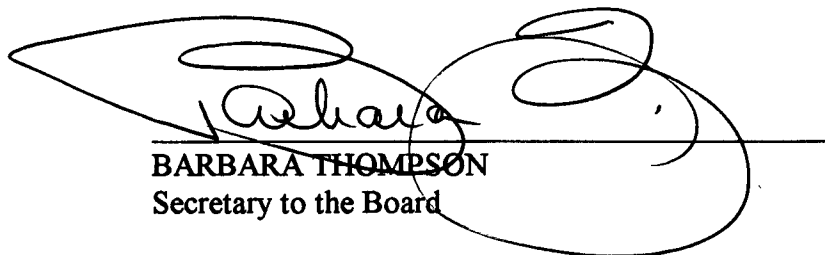
July 3, 1997

**TO: James R. Haynes, President  
CUP Temporaries, Incorporation  
1511 K Street, N.W  
Washington, DC 20005**

**Anne Cauman, Esquire  
Howard Schwartz, Esquire  
Office of the Corporation Counsel  
Assistants Corporation Counsel  
441 4th Street, N.W., 10th Fl.  
Washington, DC 20001**

**SUBJECT: CAB No. P-474, CUP TEMPORARIES, INC.**

Attached is a copy of the Board's Opinion and Order in the above-referenced matter.



**BARBARA THOMPSON**  
Secretary to the Board

GOVERNMENT OF THE DISTRICT OF COLUMBIA  
CONTRACT APPEALS BOARD

PROTEST OF:

CUP TEMPORARIES, INC.

Under RFP No. JA-SC-CP-70017-01

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CAB No. P-474

For the Protester: James R. Haynes, President, CUP Temporaries, Inc. For the Government: Anne Cauman, Esquire, and Howard S. Schwartz, Esquire, Assistants Corporation Counsel.

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

### OPINION AND ORDER

CUP Temporaries, Inc., ("CUP" or "Protester") has protested the award decision by the District's Department of Human Services ("DHS") under Emergency RFP No. JA-SC-CP-70017-01 ("RFP"). The District has filed a motion requesting that the Board dismiss the protest on the grounds that the Protester lacks standing and that the protest fails to provide a clear and concise statement of its factual and legal grounds. In the alternative, the District argues that the award was properly made to Trifax Corporation ("Trifax") and the protest should be denied on its merits. We conclude that the Protester does have standing, and does provide a clear and concise statement of its factual and legal grounds. However, for the reasons stated herein, we deny the protest.

### BACKGROUND

On November 29, 1996, DHS issued the emergency RFP for nursing services for the D.C. Public Schools. (Agency Report ("AR"), Exhibit 1). The closing date for proposals was December 2, 1996, at 10:00 a.m. DHS received timely offers from CUP, National Nurses Services, Inc. ("National") and Trifax on the closing date.<sup>1</sup> (AR).

Each offeror's technical and price points were summarized as follows:

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<sup>1</sup>The record also references a proposal from Riverside Health Care which was determined to be late although the exact time of receipt cannot be determined from the record. (Memo, dated 1/6/97, Attachment of Chronology).

Technical Factors:	Trifax	CUP	National
Technical Approach	29	17	21
Technical Experience	43	32	33
Technical Expertise & Capability	98	55	65
Total Technical	170	104	119
Average Technical	56.66	34.66	39.66
SBE Preference	5	0	0
Estimated Price	\$511,875	\$472,712.50	\$495,625
Price Points	36.8	40.0	38
TOTAL	98.46	74.66	77.66

(AR, p.3).

Trifax was determined to have the highest overall score; National was determined to have the second highest overall score; and CUP was ranked third.

On December 3, 1996, the contracting officer awarded Trifax the contract. (AR, Exhibit 5).

On December 13, 1996, CUP filed the subject protest with the Board seeking that the contract be recompeted and/or its reasonable proposal preparation costs.

On January 6, 1997, the contracting officer filed with the Board certain documentation from the contract file including a chronology of the contract, a list of offerors and copies of notices to interested parties.

On January 13, 1997, the District filed a motion to dismiss the protest or, in the alternative, Agency Report. To date, the Protester has not filed comments or responded to the District's motion to dismiss or the Agency Report.

## DISCUSSION

The Protester alleges that the day after the proposals were due, "the contract was executed 'arbitrarily and capriciously' without due regard for the herculean task of preparing and submitting a technical proposal and a separate cost proposal within seventy-two (72) hours" and that "the Department of Human Services did not thoroughly review these proposals for technical approach, experience, expertise and tax compliance." CUP further alleges that in violation of District procurement and solicitation law and regulations, the District awarded a contract without due evaluation of CUP; that points were awarded to Trifax arbitrarily and capriciously; and that points were withheld from CUP. CUP identifies itself as an aggrieved party pursuant to Board Rule 300.2<sup>2</sup> and

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<sup>2</sup>Board Rule 300.2, 36 D.C. Reg. 2710 (Apr. 21, 1989), states:

seeks remedies for its alleged injury pursuant to Board Rule 314<sup>3</sup>. However, beyond its general allegations, CUP does not identify specific statutory or regulatory provisions of which the District is allegedly in violation.

The District argues that the Board should dismiss the protest because: (1) the Protester lacks standing to protest the contract award to Trifax because the Protester is not next in line for award; and (2) the protest lacks a clear and concise statement of legal and factual grounds.

### Standing

The Board's protest jurisdiction is governed by D.C. Code §§1-1189.3(1) and 1-1189.8(a)-(c). In pertinent part this section provides that the Board shall be the exclusive hearing tribunal for, and shall have jurisdiction to review and determine de novo: (1) Any protest of a solicitation or award of a contract addressed to the Board by any actual or prospective bidder or offeror, or a contractor who is aggrieved in connection with the solicitation or award of a contract.

This Board has consistently held that in order for us to have jurisdiction over a protest, a protestor must be an aggrieved or interested party. In other words, the protestor must have a direct economic interest in the procurement. See *Wayne Mid-Atlantic*, CAB No. P-227, August 12, 1993, 41 D.C. Reg. 3594, 3595. Accordingly, this Board has held that a protester lacks standing where it would not be in line for award, even if its protest were upheld. *Roy's Towing Corp.*, CAB No. P-468, June 13, 1997, 8 P.D. 7282, 7283; *Crawford/Edgewood Managers, Inc.*, CAB No. P-424, March 22, 1995, 42 D.C. Reg. 4957; *Commando K-9 Detectives, Inc.*, CAB No. P-405 & 406, May 6, 1994, 42 D.C. Reg. 4597; *Unfoldment, Inc.*, CAB No. P-358, September 17, 1993, 41 D.C. Reg. 3656. This is consistent with GAO precedent holding that a party would not be in line for award if its protest is sustained. *Flight Resources, Inc.*, 65 Comp. Gen. 619, 86-1 CPD ¶ 518; *Zinger Construction Co., Inc.*, B-220203, Oct. 31, 1985, 85-2 CPD ¶ 493. Whether a party is sufficiently interested, depends on the party's status in relation to the procurement and the issues involved and how these circumstances show the existence of a direct or a substantial economic interest on the part of the protester. *Id.*,

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For purposes of this chapter, an aggrieved person means an actual or prospective bidder or offeror who has suffered a loss or injury or has had a legal right violated as a result of adverse agency action.

<sup>3</sup> Board Rule 314.1, in pertinent part, states:

If the Board determines, in sustaining a protest, that the solicitation, proposed award, or award does not comply with the applicable law, regulations or terms and conditions of the solicitation, the Board may order the contracting agency to do one or more of the following:

- (c) Recompete the contract;
- (f) Take such other action, except enjoining a contract award, as the Board may direct.

*Flight; Neff Instrument Corp.*, B-216236, Dec. 11, 1984, 84-2 CPD ¶ 649.

Based on the final rankings of the evaluators, it is clear that the Protester is ranked third among the offerors on the RFP. Nevertheless, since the Protester challenges the integrity of the manner in which the agency officials scored all the offerors the Protester meets standing requirements.

### **Adequate Factual or Legal Basis**

The District argues that CUP fails to provide an adequate factual or legal basis for its allegations since (1) CUP bases its protest essentially on the fact that award was made quickly and it was not made to CUP; (2) CUP's allegations appear to be based on conjecture and speculation without evidentiary underpinnings; (3) CUP's allegations are based on conclusory statements; and (4) CUP fails to meet the mandate of Board Rule 302.1(c), 36 D.C. Reg. 2711, which provides in pertinent part:

All protests shall be in writing, addressed to the Board, and shall include the following:

- (c) A clear and concise statement of the legal and factual grounds of the protest, including copies of relevant documents, and citations to statutes, regulations or contract provisions claimed to be violated:

The Board's consideration of the issue of whether a protest fails to state a claim must be considered with regard to the Board's statutory mandate to "promptly decide whether the solicitation or award was in accordance with the applicable law, regulations and terms and conditions of the solicitation. D.C. Code Section 1-1189.8." *Unfoldment, Inc.*, CAB No. P-435, September 12, 1995, 8 P.D. 7030, 7034. The Board's consideration of this mandate is likewise applicable to its consideration of the issue of whether a claim is unsupported by the facts. Where the District believes that a protest ground fails to state a violation of procurement law or regulation or is unsupported by the facts, the matter should be addressed through the Agency Report on the merits in the first instance and the absence of detailed facts concerning an alleged procurement deficiency in the initial protest filing does not necessarily dictate a dismissal. *Id.* at 7033, 7034. In the present case, based on a review of the record, the Board finds that the protest is sufficient to meet the standard established by Board Rule 302.1(c) as the allegations do make reasonably clear the alleged improprieties in the award decision and the applicable law and regulations. The District provides sufficient evidence to rule on the merits through the relevant documents presented as exhibits to its motion, i.e., the RFP, proposals from CUP and Trifax, the technical/price evaluation package, and the contract. Therefore, the District's Motion to Dismiss on the ground that CUP fails to provide an adequate factual or legal basis for its allegations is denied and the Board will consider the merits of CUP's protest.


### **Merits**

CUP suggests that the fact that a contract was executed the day after proposals were due somehow colors the District's award as arbitrary and capricious. The Board does not agree. This was an emergency RFP that by its nature suggested immediate action. Protester's allegation that there was a lack of due regard for the fact that the preparation and the submission of the technical and cost proposal was required within seventy-two hours is not relevant. From our review of the evaluation and


award documentation, we are not persuaded that DHS failed to thoroughly review these proposals and that the award was made without due evaluation of CUP. Although, CUP alleges that points were awarded to Trifax arbitrarily and capriciously, and that points were withheld from CUP, CUP has not pointed to a single evaluation or scoring error. It did not do so in its protest and, more importantly, by failing to respond to the evaluation and award record established by the Agency in the Agency Report, the record remains devoid of any evidence to support finding any material evaluation error.

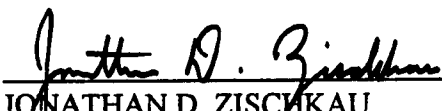
Therefore, the Board concludes that CUP clearly has not met its burden of proof on its allegations. The protest is therefore DENIED.

DATE: July 3, 1997

  
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PHYLLIS W. JACKSON  
Administrative Judge

CONCURRING:

  
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LORILYN E. SIMKINS  
Chief Administrative Judge

  
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JONATHAN D. ZISCHKAU  
Administrative Judge