

GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

PROTEST OF:

TRICON OF WASHINGTON, D.C., INC.)	
)	CAB No. P-408
Under Contract No. DCPL 94-0001)	

For the Protestor: Ira A. Moss, President. For the Government: Anne Cauman and Howard S. Schwartz, Assistants Corporation Counsel.

Opinion by Administrative Judge Cynthia G. Hawkins-León, with Administrative Judges Zoe Bush and Terry Hart Lee, concurring.

OPINION AND ORDER ON MOTION TO DISMISS

On April 29, 1994, Tricon of Washington, D.C., Inc. ("Protestor" or "Tricon") filed a protest of the award of Contract No. DCPL 94-0001 to Drew Water Services for the District of Columbia Public Library's ("District" or "DCPL") annual water treatment program.¹ Protestor requests that the contract be declared void by the Board and that the Board award the contract to Tricon in compliance with the provisions of IFB No. DCPL 94-0001. The Protestor alleges that the contract was awarded in error because the DCPL: (1) made the award considering only the bid price for the base year and not the combined bid price for the base year and two option years as required by the bid specifications; and (2) failed to consider the fact that Protestor is a certified small disadvantaged business and adjust its bid accordingly (i.e., grant Tricon a "5% preference for award").

¹ The DCPL is an independent agency within the government of the District of Columbia. D.C. Code §§ 37-101 through 37-110 (1990 Repl.). As an independent agency, the DCPL is exempt from the provisions of the Procurement Practices Act of 1985 ("PPA"). D.C. Code § 1-1181.4 (a), (b) (1992 Repl.).

The Board and the DCPL executed an agreement on September 11, 1992 engaging the Board "to hear and decide appeals from the Chief Procurement Officer's or Library's final decision or failure to issue a timely decision on: (1) any protest by a party aggrieved in connection with the solicitation or award of a contract by the Library;" This protest of an action of an independent agency is properly before the Board pursuant to this agreement and to Board Rule 101.8, 36 DCR 2686 (April 21, 1989).

- 4354.11 A protestor intending to file an appeal from the CCO's decision shall file the appeal with the Contracts Review Committee. The protestor must appeal the CCO's decision within five (5) working days after receipt of the CCO's decision.

...

- 4354.13 The Contracts Review Committee shall issue a written decision within forty-five (45) calendar days after receipt of the filing of the appeal. Any failure by the Contracts Review Committee to issue a written decision within the forty-five (45) calendar days shall be deemed to be a denial of the protest and shall authorize the contractor to appeal the protest to the Contract Appeals Board.

...

- 4354.15 Each protestor intending to file an appeal of the Contracts Review Committee's decision shall file an appeal to the District of Columbia Contract Appeals Board ('CAB'). In order for the CAB to consider the appeal, the protestor shall file the appeal within ten (10) working days after the protestor receives a written decision from the Contracts Review Committee.

- 4354.16 The CAB shall have exclusive jurisdiction to hear and decide appeals from written decisions of the Contracts Review Committee; provided, however, that no appeal may be taken to the CAB unless and until all administrative review procedures provided for in this chapter have first been fully and properly complied with and exhausted.

Id. at 7992 - 7993.

Protestor was notified by the CCO by a letter dated April 20, 1994 (received on April 28, 1994) that it had not been awarded Contract No. DCPL 94-001. Protest, Attachment 2. Protestor filed its protest of the contract award with the Board on April 29, 1994. DCPL's CCO is listed as having received a copy of the protest as filed.

The Board received a written response to Tricon's allegations directly from the CCO on May 11, 1994.² Although the letter was addressed directly to the Board, there is an indication that Tricon was sent a copy. The Board finds that the DCPL intended this letter to serve as the CCO's official written response to the protest in accordance with 19 DCMR § 4354.2 (*Id.* at 7992).

In his May 9, 1994 letter, the CCO stated the reasons for the award to Drew, rather than Tricon, as follows: (1) the contract award was for the initial period only, with optional extension(s); (2) there was no provision in the IFB for a preference to Small and Disadvantaged Businesses; (3) the DCPL has designated certain construction projects to meet the goals of the Small Business Enterprise Set-Aside Program; (4) Drew Water Services was the low bidder for the initial contract term; and (5) Tricon was the low overall bidder when calculating for the initial period and the optional extension period(s).

Although it appears that the Protestor failed to strictly comply with the filing requirements outlined in 19 DCMR §§ 4354.2, 4354.3 and 4354.5 (*Id.*), there is no indication in the record that Protestor was ever aware of or provided a copy of the DCPL's procurement regulations. We note that the IFB neither makes reference to these regulations nor apprises potential protestors of their appeal rights. Further, the protest specifically states that it is filed pursuant to the Board's Rules. Therefore, the Board shall not impute to Protestor constructive notice of DCPL's procurement regulations and procedures.

The Board has no evidence in the record before it that Tricon has filed an appeal of the CCO's decision with the Contracts Review Committee as required by 19 DCMR § 4354.11 (*Id.* at 7993). Therefore, there is neither an appealable decision by the Contracts Review Committee nor an opportunity for the protestor to deem its appeal to have been denied by the Committee. 19 DCMR § 4354.13 (*Id.*). The regulations clearly state that an appeal may not be brought before this Board without the protestor first having fully exhausted its administrative remedies. 19 DCMR § 4354.16 (*Id.*). By not first appealing the CCO's written decision to the Contracts Review Committee (and either awaiting a decision from the Committee or waiting the appropriate amount of time) before filing an appeal with the Board, Tricon has failed to exhaust its administrative remedies. 19 DCMR §§ 4354.15 (*Id.*).

The CCO's May correspondence to the Board does not appear to meet the letter of the requirements pertaining to a CCO's written decision on a protest of an award as set out in 19 DCMR § 4354 (*Id.* at 7992 - 7993). However, the Board has deemed this correspondence as such, and, in light of the fact that the Board finds it imperative that all protestors be afforded their complete appeal rights, Tricon shall have five (5) working days from the date of this

² It should be noted that this response was filed prior to the Office of the Corporation Counsel's having filed an appearance in this case -- apparently without coordination with counsel.

decision to file an appeal with the Contracts Review Committee. 19 DCMR § 4354.11 (Id. at 7993); Board Rule 301.2, 36 DCR at 2710.

In light of Protestor's failure to exhaust its administrative remedies, as required by the procurement regulations promulgated by the DCPL, the Board is without jurisdiction to hear Tricon's protest. See Impex Industries, Inc., CAB No. D-953, April 15, 1994, 7 P.D. 5807; District Paving Corporation, CAB No. D-954, April 6, 1994, 7 P.D. 5789; Impex International Industries, Inc., CAB No. D-890, May 15, 1992, 40 DCR 4400.


Therefore, it is hereby

ORDERED, that the Motion of the District of Columbia to Dismiss the Protest is **GRANTED**, and it is


FURTHER ORDERED, that Protestor shall have five (5) working days from the date of this Order to file an appeal of the CCO's decision dated May 9, 1994 with the Contracts Review Committee of the DCPL, and it is


FURTHER ORDERED, that the protest is **DISMISSED**, without prejudice.

DATE: July 13, 1994


CYNTHIA G. HAWKINS-LEÓN
Administrative Judge

CONCUR:


ZOE BUSH
Chief Administrative Judge


TERRY HART LEE
Administrative Judge