

GOVERNMENT OF THE DISTRICT OF COLUMBIA  
CONTRACT APPEALS BOARD

PROTEST OF:	)	
	)	
DIXON’S TERMITE AND PEST CONTROL, INC.	)	CAB No. P-0659
	)	
Under RFQ No. 2048	)	
WATER AND SEWER AUTHORITY	)	

For the Protester: Dixon’s Termite and Pest Control, Inc., Bob Dixon President, *pro se*.  
For the Government: Nicole C. Mason, Esq., Leftwich and Douglas, P.L.L.C.

Opinion by Administrative Judge Matthew S. Watson, with Chief Administrative Judge  
Lorilyn E. Simkins, concurring.

**OPINION**

*(Courtlink Filing ID 848171)*

The District of Columbia Water and Sewer Authority (“WASA”) filed a Motion to Dismiss the instant protest on the grounds that the protester had failed to exhaust administrative remedies prior to appealing to the Board<sup>1</sup>, or, in the alternative, that the Board lacks jurisdiction to consider protests against WASA contract awards. The Board finds that it is without jurisdiction over WASA procurements and dismisses the protest.

**BACKGROUND**

On April 12, 2002, WASA issued Request for Quotations (“RFQ”) No. 2048 for pest control services at WASA locations for the five-month period from May 1, 2002 through September 30, 2002. (Motion, *Courtlink Filing ID 828163*, Ex. A). The RFQ was a best value, small purchase procurement. Four quotations were received by the due date of April 29, 2002. Award was made to the firm determined to be the best value offeror on June 6, 2002. *Id.* On June 28, 2002, Dixon’s Termite and Pest Control, Inc. filed the instant protest alleging that it had not been informed of the award.

**DISCUSSION**

This Board is an administrative agency created by the Procurement Practices Act of 1985 (“PPA”) which is codified as Chapter 3 of Title 2 of the D.C. Code (2001 ed.), (§§2-301.01 to 2-327.03), and particularly, Subchapter IX (*id.* at §§2-309.01 to 2-309.08). Jurisdiction of the

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<sup>1</sup> If, as argued by WASA, the Board lacks jurisdiction over protests of WASA contracts, it is not apparent how the Board could consider the issue of whether the protestor had exhausted administrative remedies. In light of the Board’s determination that the Board does, in fact, lack jurisdiction, the issue of exhaustion of remedies has not been considered

Board shall be consistent with the coverage of . . . [the PPA] and [the exceptions provided in] §2-303.20. . . .” D.C. Code §2-309.03(b). and the Board shall have only those powers conferred on it by statute, either expressly or by necessary implication. *See e.g., Black Entertainment Television*, CAB No. P-436, Oct. 2, 1995, 44 D.C. Reg. 6394; *Xerox Corp.*, CAB No. D-979, Nov. 6, 1995, 44 D.C. Reg. 6406.

Section 3-303.20(j) of the codified PPA provides:

Nothing in this chapter [, the Procurement Practices Act,] shall affect the District of Columbia Water and Sewer Authority's powers to establish and operate its procurement system and to execute contracts pursuant to Chapter 22 of Title 34. 10.<sup>2</sup>

In the absence of the applicability of our organic statute to WASA procurements, the Board lacks jurisdiction to consider a protest against a contract award by WASA. Appellee's Motion to Dismiss is GRANTED and the protest is DISMISSED for lack of jurisdiction.

**SO ORDERED**

August 7, 2002

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

CONCURRING:

/s/ Lorilyn E. Simkins  
LORILYN E. SIMKINS  
Chief Administrative Judge

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<sup>2</sup> Similarly D.C. Code §34-2202.14 provides that the Procurement Practices Act. D.C. Code, “§ 2-301.01 *et seq.*, shall not apply to the [Water and Sewer] Authority.”

NOTE<sup>3</sup>

Although the Board finds that it does not have jurisdiction to consider protests against award of WASA contracts, it notes that the absence of any administrative protest mechanism outside of the Authority creates the appearance of lack of independence in considering protests by prospective WASA contractors and does not enhance the perception of integrity in the procurement system. The WASA procurement regulations provide only for a protest to WASA's Contracting Officer (21 DCMR §5330.12), and, if the protester is not satisfied with the relief obtained, an appeal of the Contracting Officer's decision to the WASA General Manager. (21 DCMR §5330.15). This is not in keeping with the best practices both in the Federal Government, where administrative protests may be made to the independent General Accounting Office, or in general in the District government, where protests may be made to the Board. In addition, award of contracts, or performance of awarded contracts will generally be stayed in protest to the GAO and the Board, *see* D.C. Code §3-309.08(c)(2), which is not the case pursuant to the WASA procedures. 21 DCMR §5330.10.

In addition, the Board is also concerned that WASA's procedures for bid protests do not meet the best practices in the Federal and District governments and further, in particular cases, may not meet basic due process standards. For example, "[b]id protests directed to the terms, conditions or form of a proposed procurement action must be received . . . not later than ten (10) working days before the date established for opening of bids and proposals. . . ." *Id.* at §5330.4. "A person protesting an award decision is required to file the protest with the Contracting Officer within five (5) working days if when the protester knew or should have known of the facts and circumstances upon which the protest is based." *Id.* at §5330.3. In general, in both the District and Federal governments protest regarding the solicitation may be filed up to the time of opening, *see* D.C. Code §2.309.08(b)(1), and protests against award decisions may be filed within 10 working days of knowledge. *See Id.* at (2).

Based on the record submitted to the Board in this matter, there may be question as to whether the solicitation was properly solicited under "small purchase" procedures. WASA small purchases are limited to contracts not exceeding \$100,000. 21 DCMR §5304.2. "Procurement requirements shall not be artificially divided to circumvent . . . procedures made applicable to procurements of greater value. (*Id.* at .4). The award price in the instant matter was \$40,000 (Motion, Ex. C) which appears to be far below the maximum small purchase limitation. However, since the award was for only 5 months service, the price is on an annualized basis is \$96,000, quite close to the small purchase limit. WASA's regulations made it impossible, as a practical matter, for any prospective contractor to raise this issue in this procurement.

As noted in our decision, the RFQ was issued on Friday, April 12, 2002, with a response date of Monday, April 29, 2002. Since a protest concerning the propriety of using the small purchase procedures must, pursuant to WASA's regulations, be filed 10 business days prior to

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<sup>3</sup> The Contract Appeals Board has a unique opportunity to review procurements arising from the entire range of District of Columbia Government activity. Where we see problem areas in procurement practices which might be considered by other agencies we will report on these practices as Notes appended to protest and appeal decisions. These Notes are for information only and are not binding on agencies or to be considered precedent of any sort.

the RFQ response date, such a protest, to be timely, would have had to have been filed no later than Monday, April 15, 2002. If the RFQs were mailed on April 12th, April 15<sup>th</sup> would have been the day the requests were received. Even if the RFQs were faxed or hand-delivered, and delivery occurred the same day as the RFQ was issued, there would have been only one business day following receipt to file a protest. A requirement to protest immediately upon receipt of a solicitation is clearly unreasonable. A prospective contractor which was not solicited by WASA, but which learned of the solicitation in some other way, could not even theoretically have filed a timely protest.

Although WASA is exempt from coverage of the PPA, and from the mandatory jurisdiction of the Board, District of Columbia agencies, such as WASA, not covered by the PPA may enter into agreements with the Board permitting the Board to hear and decide procurement disputes. D.C. Code §2-309.03(b). Adoption by WASA of dispute resolution procedures comparable to the generally accepted Federal and District procedures and the submission of disputes to an independent third-party, such as the Board, would, in our opinion, improve the confidence of contractors and the public in the WASA procurement system.