

## DISTRICT OF COLUMBIA CONTRACT APPEALS BOARD

**URBAN SERVICE SYSTEMS CORPORATION**

Solicitation No: DCKT-2010-B-0136 and  
DCKT-2008-B-0160

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) CAB No. P-0845  
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For the Protester, Urban Service Systems Corp.: Joanne Doddy Forte, Esq., For the  
District of Columbia Government: Robert Schildkraut, Esq., Assistant Attorney General.

Opinion by Administrative Judge Warren J. Nash, with Administrative Judge Jonathan D.  
Zischkau, concurring.

### **OPINION**

*Filing ID 32948535*

Urban Service Systems Corporation protests the contracting officer's decisions (1) to cancel Solicitation DCKT-2008-B-0160 for hauling and disposal of combustible and non-combustible municipal solid waste, and (2) to issue new Solicitation DCKT-2010-B-1036, for the same services. Urban Service requests that the Board find that the 2008 solicitation was improperly cancelled and that the 2010 solicitation is fatally flawed. The District asserts that the contracting officer properly cancelled the 2008 solicitation and that the 2010 solicitation is not flawed. After carefully considering the documentary record, we conclude that the contracting officer did not violate law or regulation in cancelling the 2008 solicitation. We also conclude that Urban filed its protest regarding the cancellation of the 2008 solicitation more than 10 days after it knew or should have known of the grounds for the protest. Additionally, we conclude that the contracting officer did not violate law or regulation in issuing the 2010 solicitation. Accordingly, we dismiss the protest of the cancellation of the 2008 solicitation and we deny the protest of the 2010 solicitation.

### **BACKGROUND**

#### **A. Invitation for Bids DCKT-2008-B-0160**

On December 2, 2008, the Office of Contracting and Procurement ("OCP"), on behalf of the Department of Public Works ("DPW"), issued IFB DCKT-2008-B-0160 (the 2008 IFB), in the open market, for a contractor to haul and dispose of combustible and non-combustible municipal solid waste including tires and white goods. (Agency Report ("AR") at 3). The IFB required the contractor to (1) transfer the solid waste from the Fort Totten and Benning Road solid waste transfer stations and dispose of it at a licensed solid waste disposal facility, (2) enter into disposal agreements with a solid waste disposal facility and a metal recycling facility, and (3) transport leaves to a composting facility each year from November through January. OCP anticipated awarding a multiyear contract for a period of 5 years. The District estimated its

waste tonnage to be 1,021,000 tons per year and its leaf tonnage to be 8,000 tons per year. (AR Ex. 1; *Goel Services, Inc.*, CAB No. P-0804, February 2, 2010 (“P-0804 Opinion”), at 1).

The District had estimated its requirements for disposal of combustible solid waste at 180,000 tons per year. (AR Ex. 14, Declaration of Hallie Clemm, Deputy Administrator for Solid Waste Management, DPW).

Under the 2008 IFB, prospective bidders were required to submit prices for the hauling and disposal of four types of solid waste set forth in the IFB:

- a. 100,000 tons per year of combustible solid waste to the Fairfax County Energy Resource Recovery Facility (“E/RRF”) where it would be disposed, at the District's cost, under an Agreement between the District and Fairfax County (Contract Line Item Number (“CLIN”) 001);
- b. 180,000 tons per year of combustible solid waste to a licensed disposal facility selected by the prospective contractor, with disposal to be at the contractor's cost by its agreement with its chosen facility (CLINs 002A and B);
- c. 24,000 tons per year of non-combustible solid waste (CLINs 003A and B) and up to 1,500 tons per year of white goods, each at a licensed disposal facility selected by the prospective contractor, with disposal to be at the contractor's cost by its agreement with its chosen facility; and
- d. Leaves and yard waste would be hauled to a District designated composting facility for disposal at the District's cost.

(AR Ex. 1, IFB §§ B.5, H.9 and H.10; see Protest, at 2-3). The 2008 IFB included in CLIN 0001 the hauling of an estimated 100,000 tons per year of combustible solid waste to the Fairfax County E/RRF, and in CLIN 0002A, the hauling of an estimated 180,000 tons per year of combustible solid waste to a licensed disposal facility selected by the contractor, as provided in IFB section H.10.1. (AR Ex. 1, at 3, 23-24). Under CLIN 0001, the contractor would deliver up to 100,000 tons per year to the E/RRF as allowed by the District's agreement with Fairfax County. CLINs 0001 and 0002A in the 2008 IFB provided two options for disposal of the estimated annual District requirements of 180,000 tons of combustible solid waste.

On January 23, 2009, OCP received and opened thirteen bids. The three lowest evaluated bidders were Goel Services, Covitta, and Urban. (AR Exhibit 3, P-0804 Opinion, at 3). By his May 19, 2009 Determination and Finding of Non-Responsibility, the contracting officer found Goel to be nonresponsible. (AR Exhibit 3, P-0804 Opinion, at 3 and 8). On May 18, 2009, before the District had made an award to another bidder, Goel filed with the Board a protest (CAB No. P-0804) challenging the District's nonresponsibility determination. The District did not award a contract under the 2008 IFB while awaiting the decision of the Board. (P-0804 Opinion).

While the Goel protest in CAB No. P-0804 was pending, the District continued to obtain solid waste hauling and disposal services from TAC Transport, LLC, under Contract No. POKY-2004-B-0056-NJ. (AR Ex. 7).

In August, 2009, the Chief Procurement Officer (“CPO”) approved a Determination and Findings to Proceed with Award under the 2008 IFB. When Goel challenged the determination to proceed, the District withdrew the determination and instead extended the existing solid waste hauling and disposal contract with TAC Transport. That extension kept the TAC contract in effect through December 2009. (AR Ex. 13, ¶ 6).

From December 2009 up to the filing of the protest here in P-0845 on March 19, 2010, the District continued to extend the existing hauling and disposal contract with TAC Transport so that solid waste hauling and disposal services could continue without interruption. (AR Exs. 11A and 11B).

#### B. The Fairfax Agreement and Cancellation of the 2008 IFB

In October and November 2009, DPW program personnel began re-reviewing the solid waste hauling and disposal requirements and researching other options for obtaining the necessary services. DPW was exploring an option that would change the requirements in terms of volume by directing most of the District’s solid waste, estimated now for the combustible solid waste component to be up to 200,000 tons annually, to the Fairfax County E/RRS, And, if necessary, to an alternate disposal site. (AR Exs. 13, ¶ 6-7, and 14, ¶ 8).

Compared to the 2008 IFB, under which only part of the combustible solid waste would have been disposed of at the Fairfax County E/RRF, this new option included the following major differences:

- a. Use of the E/RRF was limited to 125,000 tons per year by the Waste Delivery/Disposal Agreement, between Fairfax County, Virginia, and the District of Columbia (Fairfax Agreement), in effect since December 5, 2008. (Fairfax Agreement, ¶ 5, Attachment to AR Ex. 7, at 5-9).
- b. Under the 2008 IFB, the combustible solid waste that was not hauled to the E/RRF would be disposed of by the contractor at a licensed facility of its choosing and at the contractor’s cost. The contractor was required to pay the disposal cost (and therefore was deemed to have bid a price that included the costs of such payment). (AR Ex..1, 2008 IFB §§B.5, C.2, H.9, and H.10).

As a result, the contracting officer determined that the bid prices and responsibilities of the District and the contractor would be significantly affected by the different requirements that would be included in a new solicitation because of the amendment to the Fairfax County Agreement. [AR Ex. 13, ¶ 8]. Therefore the District decided to issue a new solicitation in lieu of awarding a contract under the now-obsolete requirements of the 2008 IFB.

In late December 2009, the DPW Program Manager, Hallie Clemm, contacted Fairfax County officials to discuss potential changes to the terms of the Fairfax County Agreement. Negotiations with the Fairfax County Division of Solid Waste Disposal and Resource Recovery began in January 2010 and District contracting and project management personnel came to final agreement on terms with Fairfax officials in February 2010. This agreement is embodied in the Amended Waste Delivery/Disposal Agreement, between Fairfax County, Virginia, and the District of Columbia ("Amended Agreement") (AR Ex. 10.A). (AR Exs. 14, ¶¶ 10-11, and 13, ¶ 9). This Amended Fairfax Agreement is subject to formal approval by both the District and Fairfax County governments and, as of the date of the District's Agency Report in P-0845, had been approved and executed by the District.

In the Amended Fairfax County Agreement, the District agrees to send up to 200,000 tons per year of its combustible solid waste to the E/RRF. The District will divert all waste under its control to the E/RRF unless requested not to by Fairfax County. The parties to the agreement anticipate that Fairfax County will be able to accommodate up to 200,000 tons per year of "Acceptable Waste" (a term defined in the agreement). (AR Ex. 10.C, Amended Agreement, ¶ 5; AR Ex. 14, ¶ 14).

In paragraph 6 of the Amended Agreement, Fairfax and the District have also agreed that when the E/RRF is unable to accept the District's acceptable waste, Fairfax will redirect the District's waste to an alternate facility and will bill the District for these diverted loads at the price set in the Amended Agreement for waste disposed of at the E/RRF. (AR Ex. 10.C, ¶¶ 5-6, Amended Agreement, at 2; AR Ex. 14, ¶ 14). In paragraph 11 of the Amended Agreement, the District and Fairfax have further agreed that the new annual ceiling cost is \$7,000,000, replacing the annual cost ceiling of \$4,000,000 in the original agreement. (Compare AR Ex. 10.C, Amended Fairfax Agreement, ¶ 11, with Attachment to Ex. 7, Fairfax Agreement, ¶ 11).

The contracting officer forwarded the proposed Amended Agreement with Fairfax County to the Mayor, who then submitted the Agreement to the Council of the District of Columbia for approval. As of March 29, 2010, under Council No. CA 18-276, the Council was considering the proposed award of the Amended Agreement under the approval standard stated in CA 18-276. Under this standard, the Agreement was deemed approved by the Council on April 8, 2010 and executed by the CPO on April 9, 2010. (AR Exs. 14 (¶ 12), 13 (¶ 10), 10.C, and 10.B, Council action number CA 18-276).

This Board denied Goel's protest in P-0804 on February 2, 2010. (AR Ex. 3). By Determination and Findings for Cancellation of a Solicitation ("Cancellation D&F"), the contracting officer proposed cancelling the 2008 IFB, DCKT-2008-B-0160. The Chief Procurement Officer approved the cancellation on February 22, 2010. (AR Exs. 13 (¶ 11), 4.A, and 4.B).

In the Cancellation D&F, the contracting officer found that cancelling the 2008 IFB was in the best interest of the District due to changed circumstances that occurred during the one-year period after the original bid closing date of January 23, 2009, until the Goel protest was decided by the CAB on February 2, 2010:

- a. The District will no longer require the contractor to have an agreement with a licensed disposal facility to dispose of combustible waste.
- b. Instead, the contractor under a new solicitation would haul the District's full volume of combustible solid waste to a facility designated by the District (the Fairfax County E/RRS facility), predicated upon the pending revision to the District's Agreement with Fairfax County.
- c. The proposed changes to the District's Agreement with Fairfax County do not change the Agreement's five-year term, measured from December 5, 2008, and therefore, for a new contract commencing by mid-2010, would allow a base term of three years for a new multi-year contract that substantially coincides with the remaining term on the Fairfax County Agreement.

(AR Ex. 4.A; see AR Ex. 14, ¶ 9). Apparently, in the 2008 IFB, the District overstated, by some 55 percent (280,000 tons versus 180,000 tons), its annual requirements for hauling combustible solid waste. In preparing to issue the 2008 IFB, the District had determined that it generated 180,000 tons per year of combustible solid waste (SOF ¶ 2). In Section B.3.1 of the 2008 IFB, the District split the requirements for hauling combustible solid waste between CLIN 001 (to the E/RRF) and CLIN 002-A (to the contractor-chosen licensed facility). (AR Ex. 1, at 3). In the 2008 IFB, the District incorrectly included as "Estimated Tons Per Year" a total of 280,000 tons of combustible solid waste, of which 100,000 tons were in CLIN 0001 and 180,000 tons were in CLIN 0002-A. (AR Ex. 1, 2008 IFB, § B.5; see AR Exs. 14, ¶¶ 3-6, and 13 (¶ 12)).

On February 23, 2010, the District notified the other bidders, including Urban, of the cancellation. (AR Ex. 4.B).

#### C. 2010 IFB DCKT-2010-B-0136

On March 5, 2010, OCP, on behalf of DPW, issued in the open market IFB No. DCKT-2010-B-0136 seeking sealed bids from prospective contractors for a requirements contract under which the contractor would provide hauling and disposal of municipal solid waste, including white goods and tires, to a licensed disposal facility, the Fairfax County E/RRF (IFB §§ B.1 and B.2, AR Ex. 5). According to the District, the District intends to award one requirements contract for performance of the DPW requirements and the contract is to have a base term of three years with provision for the District to exercise two option years. (AR Ex.1, IFB §§ F.1 and F.2, at 13; AR Ex. 13, ¶¶ 12-13).

The 2010 IFB includes estimated requirements for each of the several categories of solid waste that the contractor will haul. Relevant to the protest, the District estimated an annual requirement of 200,000 tons of combustible solid waste and included this amount in the applicable CLINs in the IFB (AR Ex. 5, IFB, CLINs 001 (3 Base Years); and 1001 and 2001 (Option Years), at 3). DPW's estimate was based upon the historical records. As the District informed the bidders in Amendment 02 to the 2010 IFB (AR Ex. 7, IFB Amendment 0002, Question and Answer 1, page 2 of 4), the average yearly volume for years 2005-2009 was 173,967.07 tons. In the judgment of DPW, the actual tonnage is expected to increase over the next several years. On this basis, DPW used an annual estimated requirement of 200,000 tons per year for hauling of combustible solid waste. (AR Ex. 14, Declaration of Hallie Clemm, ¶ 15). A prospective bidder had asked for monthly historical waste hauling data and, in response, the District provided annual tonnage for five fiscal years (through 2009), in each of the four categories of waste to hauled under the IFB. (AR Ex. 7, page 2 of 4).

In the 2010 IFB, the District also included a new CLIN 0005 to accommodate the provision in paragraph 6 of the Amended Fairfax Agreement, that Fairfax might divert District waste from the E/RRF to an alternate disposal site. In IFB § B.3.4, Additional Hauling Service, the District provided CLIN 0005 for such diversions and provided that the bidders must submit unit hauling prices per mile based on an assumption that each diversion trip will add 98 miles to the trip (over and above the round trip from the District facility to the E/RRF). Under the 2010 IFB, for the actual additional miles of hauling (for diversions of waste from the E/RRF), the District then will pay the contractor at the bid rate per mile in the CLINs in § B.3.4. (AR Ex. 14, ¶ 16).

In Amendment No. 2, the District informed the prospective bidders in response to a question, that, for bid evaluation purposes, for CLINs 0005-2005, the District would use the price of one round trip under CLINs 0005-2005. (AR Exhibit 7, IFB Amendment 002, Questions and Answers 11 and 2, pages 2-4 of 4; see AR Ex. 9, Bid Tabulation Sheet for the 2010 IFB).

The bid submission and opening date for the 2010 IFB, as extended by Amendment 003, was March 19, 2010. (AR Exs. 8 and 13, Declaration of Gena Johnson, ¶ 13).

Urban Service filed this protest on March 19, 2010, alleging that the 2010 IFB is defective and ambiguous, and that the grounds for the protest did not become apparent until the District issued Amendment No. 3 to the 2010 IFB on March 17, 2010.

On March 19, 2010, five bidders responded to the 2010 IFB. TAC Transport had the lowest evaluated bid at \$ 14,560,646.02 for the base period and two option years. In addition, two other bidders offered substantially lower prices than Urban Service's bid of \$19,447,586.61. S.T.S. Inc. had an evaluated bid of \$18,354,480.96 and Copeland Trucking had an evaluated bid of \$18,153,864. (AR Ex. 9, Bid Tabulation; see AR Ex. 13, ¶ 14).

On March 22, 2010, in a Determination and Findings to Proceed with Contract Performance While a Protest is Pending ("D&F to Proceed"), the DPW Director and the

contracting officer made and certified requisite findings and thereupon recommended that the District proceed with award of the contract under the 2010 IFB to TAC Transport. (AR Ex. 12).

On April 7, 2010, upon review of the D&F to Proceed, the Chief Procurement Officer determined, in accordance with D.C. Code § 2-309.08 (c)(2) and based upon the findings by agency officials, that “urgent and compelling circumstances that significantly affect interests of the District will not permit waiting for the final decision of the Board concerning the protest ...[and that] ... it is in the best interest of the District of Columbia to proceed with contract award and performance while the protest is pending.” (AR Exs. 12 and 13, ¶ 14). On April 7, 2010, the District filed with the Board the Chief Procurement Officer’s Determination to proceed with award and performance of the contract pursuant to the 2010 IFB. The District awarded the contract under 2010 IFB to TAC Transport on June 4, 2010, after Council approval. (AR Ex. 18).

## **DISCUSSION**

Urban Service alleges that at the time of the filing of the protest, the 2010 solicitation is defective and ambiguous and contains an impropriety because it seeks to acquire services that legally cannot be provided in the requested quantities under the terms of the existing agreement that DPW has executed with Fairfax County for the use of the Fairfax Energy Resource Recovery Facility (“Fairfax Incinerator”). Urban Service alleges that the 125,000 ton ceiling set forth in the old agreement renders any possible change in the solicitation that contemplates a higher ceiling defective and ambiguous. In the Agency Report, the District set forth its rationale for cancelling the 2008 solicitation and replacing it with the 2010 solicitation, regarding the increased use of the Fairfax Incinerator. Additionally, the District of Columbia and the Fairfax County Board of Supervisors both approved the new agreement regarding the District’s trash disposal at the Fairfax Incinerator, thereby rendering moot Urban’s first protest ground.

Urban next alleges that the 2010 solicitation is defective and ambiguous and contains an impropriety because it seeks to evaluate the bid prices based in part on the price of one roundtrip haul to a yet-to-be-finalized alternative disposal site. Urban alleges that the contracting officer’s decision regarding the evaluation of a 96-mile roundtrip haul is at odds with the District’s existing agreement for the use of the incinerator. Urban further alleges that because the District has not changed the solicitation to match the terms of the District’s current agreement with Fairfax, the solicitation remains defective. The District in its Agency Report asserts that the evaluation for one annual round trip to the alternative disposal site was reasonable because Fairfax County had not redirected any waste from the incinerator to an alternative site since December 2008. We find that the District reasonably used, as an evaluation criteria, an estimated one round trip per year to an alternative site.

Urban further alleges that the 2010 solicitation is deficient because it does not contain sufficient information to allow a prospective bidder that is not the incumbent to competitively price the solicited services and thereby gives a competitive advantage to the incumbent contractor. In support of this allegation, Urban alleges that the District’s refusal to provide monthly tonnage data for the materials hauled from the District’s two transfer stations, including the amount of combustible solid waste hauled to Fairfax and to an alternate disposal facility, keeps the District from providing a realistic picture of the amount of combustibles being hauled

in each month on a regular basis. The District in its Agency Report replies that the District provided estimated hauling tonnage requirements for the three-year base term and the two option years and that the data were reasonably based upon historical annual performance data. Additionally, Urban Service does not show how monthly tonnage data could impact any bidder's ability to respond to the IFB.

Urban alleges that the 2008 solicitation was improperly cancelled because DPW's factual reasons for cancellation were false or pre-textual. As a threshold matter, the Board notes that the District cancelled the 2008 solicitation on February 23, 2010, and Urban filed this protest on March 19, 2010. Urban's protest of the cancellation occurred more than 10 days after the cancellation, or more than ten days after the protester knew, or should have known, of the grounds of the protest. *See* D.C. Code § 2-309.08(b)(2); *CNA Corp.*, CAB No. P-0810, Oct. 7, 2009. Therefore, Urban's protest of the cancellation of the 2008 solicitation is untimely, and we must therefore dismiss its challenge of the cancellation. Even if we were to reach the merits, we could not sustain Urban's challenge as the District's revision to the solicitation specifications were reasonably based on an intended modification of its agreement with Fairfax County. *See First Federal Corp.*, CAB No. P-0311, Sept. 4, 1992, 40 D.C. Reg. 4520 (failure of an IFB [for a requirements contract] to contain estimates based on the most current information available clearly evinces a compelling reason for cancellation).

### CONCLUSION

For the reasons discussed above, we deny in part and dismiss in part Urban Service's protest.

**SO ORDERED.**

DATED: August 31, 2010

/s/ Warren J. Nash  
Warren J. Nash  
Administrative Judge

CONCURRING:

/s/ Jonathan Zischkau  
JONATHAN ZISCHKAU  
Administrative Judge