

GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

PROTESTS OF:

WILLIAMS, ADLEY & COMPANY, LLP)	
and MVS, INC.)	
)	CAB Nos. P-0666, P-0667
Under Solicitation No. DCAE-2003-T-0010)	

For the Protester Williams, Adley & Company, LLP: Frederick D. Cooke, Jr., Esq., Rubin, Winston, Diercks, Harris & Cooke, LLP. For the Protester MVS, Inc.: Stephen M. Seeger, Esq., Quagliano & Seeger, P.C. For the District of Columbia Government: Howard Schwartz, Esq., and Warren J. Nash, Esq., Assistants Corporation Counsel.

Opinion by Chief Administrative Judge Jonathan D. Zischkau, with Administrative Judge Matthew S. Watson, concurring.

OPINION

Williams, Adley & Company, LLP (“WAC”), and MVS, Inc., have protested the District of Columbia’s award of contracts to Thompson, Cobb, Bazilio and Associates (“TCBA”) and Digital Safetynet for project management and related services for the District-wide Health Insurance Portability and Accountability Act (“HIPAA”) Implementation Project. The protesters contend that TCBA was ineligible to compete in the procurement, TCBA had an unfair competitive advantage through access to HIPAA information not available to other offerors, TCBA had a potential organizational conflict of interest, the contracting officer improperly amended the solicitation after receiving best and final offers, and the contracting officer improperly failed to conduct debriefings after the awards. The District has moved to dismiss both protests on the ground that they are moot because the District’s Chief Procurement Officer cancelled the solicitation and letter contract awards because the proposed definitized contract awards would significantly exceed the \$999,999 maximum contract amount permitted for task orders under the District of Columbia Supply Schedule. When canceling the solicitation, the District also issued a new solicitation for the same services but using GSA’s federal supply schedule rather than the District’s supply schedule. The protesters oppose dismissal, arguing that the protest issues are not moot because the new solicitation and awards will lead to the same protest grounds which are raised in these existing protests and that the protesters are entitled to proposal preparation costs incurred in responding to the now cancelled solicitation.

We conclude that the protesters can raise appropriate protest grounds under the new solicitation and awards and there is no good reason to address issues where the underlying solicitation has been cancelled. Finally, the protesters have not demonstrated that the District’s actions toward the protesters in connection with the cancelled solicitation were arbitrary or capricious as required by D.C. Code § 2-309.08(f)(2) to authorize award of proposal preparation costs. Accordingly, we dismiss the protests as moot and deny the request for proposal preparation costs.

BACKGROUND

On October 22, 2002, the District of Columbia's Office of Contracting and Procurement ("OCP") on behalf of the Office of the Deputy Mayor for Children, Youth, Families and Elders issued Solicitation No. DCAE-2003-T-0010 for project management and related services for the District-wide Health Insurance Portability and Accountability Act ("HIPAA") Implementation Project. (District's Motion to Dismiss, filed February 19, 2003). OCP issued a request for task order proposals to seven contractors on the District of Columbia Supply Schedule. OCP received five proposals in response to the solicitation. After an evaluation of the technical proposals and best and final offers, the contracting officer awarded, on January 7, 2003, letter contracts to TCBA for contract line item numbers 0001, 0003, and 0004, and to Digital Safetynet for item number 0002.

On January 21, 2003, WAC filed its protest of the award to TCBA, which was docketed as CAB No. P-0666. WAC contended that TCBA was ineligible to compete in the procurement pursuant to an OCP directive, because TCBA had participated in a preliminary assessment report underlying the solicitation. It also alleged that TCBA had an unfair competitive advantage through access to HIPAA information not available to other offerors because of its work under a prior District contract. WAC also contends that TCBA has a potential organizational conflict of interest with Chartered Health Plan which is a health provider allegedly affiliated with TCBA. WAC claims that the contracting officer improperly amended the solicitation to waive the 50 percent LSDBE subcontracting requirement after receiving best and final offers but never gave offerors another opportunity to update their BAFOs. Finally, WAC states that the contracting officer improperly failed to conduct a debriefing after the awards.

On January 22, 2003, MVS filed its protest of the awards, which was docketed as CAB No. P-0667. MVS complained that the contracting officer initially set a date for debriefing but then cancelled the debriefing and has never rescheduled it despite repeated requests from MVS.

On February 19, 2003, the District moved to dismiss both protests on the ground that they are moot because the District's Chief Procurement Officer cancelled the solicitation and letter contract awards. The cancellation was necessary, according to the District, because the proposed definitized contract awards significantly exceeded the \$999,999 maximum contract amount permitted for task orders under the District of Columbia Supply Schedule. Paragraph 5 ("Ordering Limitations & Information") of the terms and conditions of the District of Columbia Supply/Service Schedule, effective March 2002, provides in relevant part:

MINIMUM ORDER: The District guarantees the minimum order for each awardee in an amount of \$50.00 for the base year only.

MAXIMUM ORDER: For any task or delivery order, the maximum order limitation shall be no greater than the maximum contract ceiling amount.

MAXIMUM CONTRACT CEILING: The maximum contract ceiling for each year is \$999,999.00.

(MVS Submission, filed Mar. 12, 2003, Ex. 4). The Determination and Findings to cancel the solicitation, dated February 4, 2003, states in relevant part:

Solicitation Number DCAE-2003-T-0010, Request for Task Order Proposal (RFTP) was issued on October 22, 2002. According to the solicitation, awards would be made against the DC Supply Schedule contracts. Evaluations were complete on December 30, 2002 and an award recommendation was made and approved. Two letter contracts were executed to allow the selected contractors to begin work immediately to meet the fast-approaching compliance deadlines for HIPAA.

After award of the letter contracts, it was brought to the Contracting Officer's attention that the proposed contract award amounts, \$10M[illion] to Thompson, Cobb, Bazilio and Associates (TCBA) and \$1.5M[illion] to Digital Safetynet (DSI), exceeded the maximum contract amount of \$999,999.99 for task orders under the DC Supply Schedule terms and conditions. Therefore, the definitized contract awards could not be made against the DC Supply Schedule.

Based on this, the letter contracts are voidable. The services will be resolicited through a combination of orders from the GSA Federal Supply Schedule and one sole source contract pursuant to D.C. Official Code 2-303.05(a)(3A). New statements of work are to be developed to reflect the current requirements. The effective date of the cancellation of the letter contracts is February 28, 2003.

. . . .

The District has a compelling reason to cancel the RFTP because definitized contracts can not be awarded against the DC Supply Schedule as indicated in the solicitation. An award could not be made based on this mistake in the solicitation.

In accordance with D.C. Code § 2-303.07, 27 DCMR Section 1615.3, and the findings contained herein, it is hereby determined that the cancellation of the RFTP is in the best interest of the District. . . .

(District of Columbia Motion to Dismiss Protest, Ex. 1).

On February 4, 2003, OCP issued a Request for Task Order Proposals No. DCAE-2003-T-0046 for HIPAA Remediation and Implementation Project under GSA's federal supply schedule to four contractors: Ernst & Young, First Consulting Group, TCBA, and WAC. (District's Motion to Dismiss, at 3, in CAB No. P-0671). The scope of work was changed somewhat from the original

solicitation. It appears that contract line item 0002 from the original solicitation was not included in the new solicitation because the District gave a sole source award to Digital Safetynet for that work. The record of the protests does not indicate any other specific changes. (See MVS Submission, at 1, filed Mar. 12, 2003). On February 12, 2003, OCP received proposals from First Consulting Group, TCBA, and WAC. The contracting officer selected TCBA as the highest scored offeror. The contracting officer also determined that TCBA did not have a conflict of interest based on its response to an Organizational Conflict of Interest and Non-Disclosure of Information form that all offerors were required to submit with their proposals. On February 28, 2003, the contracting officer awarded a GSA letter task order to TCBA. (*Id.*, Exs. 4-5).

Responding to a Board request made at a status conference on March 5, 2003, MVS submitted on March 12 its request for proposal preparation costs and costs of pursuing its protest pursuant to D.C. Code § 2-309.08(f)(2).

On March 14, 2003, WAC protested the award to TCBA under the new solicitation, alleging that an organizational conflict of interest precluded TCBA from receiving the GSA letter task order. (Protest, CAB No. P-0671). The District filed a motion to dismiss the protest in CAB No. P-0671 on April 7, 2003. On April 8, WAC filed a consent motion to dismiss the protest and the Board dismissed the protest on April 9.

DISCUSSION

MVS and WAC do not contend that the cancellation of the original solicitation under the District supply schedule was improper. Rather, they argue that the cancellation did not moot the protest grounds raised by their protests and that they are entitled to proposal preparation costs because the District clearly violated the law by issuing a solicitation and conducting a procurement when the value of the procurement substantially exceeded the District's supply schedule maximum ceiling amount. Alternatively, the protesters argue that we should recognize an exception to the mootness doctrine where the protest issues are ended by a procurement cancellation but the same issues will likely be raised again, especially in the present situation where the District procures essentially the same services but changes the contracting vehicle from the District supply schedule to the GSA supply schedule.

By canceling the solicitation and the resulting letter contract awards, the District mooted the protest grounds raised by the protesters in P-0666 and P-0667. We do not agree with the protesters that we should recognize an exception to the mootness doctrine under the present circumstances. Requiring a protester to file a new protest for a new solicitation or award following the cancellation of an earlier solicitation and award does not unreasonably prevent the Board from meaningfully resolving protest issues in a timely manner. By addressing a live procurement rather than a cancelled one, the parties will better focus on the actual issues in controversy and the Board avoids providing advisory opinions. WAC and MVS had an opportunity to challenge the subsequent solicitation under the GSA supply schedule and resulting award to TCBA. WAC filed an award protest and raised one of the five issues it had raised in its earlier protest, the organizational conflict

of interest issue. However, WAC agreed to a voluntary dismissal of that protest prior to the Board making a decision on the merits. Thus, in hindsight, it becomes even clearer that there was no need for the Board to address the protest issues raised in the cancelled procurement.

The protesters argue that they are entitled to proposal preparation costs and costs of pursuing their protests in CAB Nos. P-0666 and P-0667. That argument is not mooted by the cancellation because if the District acted in an arbitrary or capricious manner toward the protesters, then D.C. Code § 2-309.08(f)(2) provides that a protester may receive its reasonable proposal preparation costs and costs of pursuing the protests. Section 2-309.08(f)(2) provides:

The Board may, when requested, award reasonable bid or proposal preparation costs and costs of pursuing the protest, not including legal fees, if it finds that the District government's actions toward the protester or claimant were arbitrary and capricious.

We do not find that the District acted in an arbitrary or capricious manner toward the protesters. The District reasonably determined to cancel the solicitation when it discovered that the contract value would exceed the maximum contract ceiling amount permitted for a District supply schedule contract. Thus, when faced with the two protests, although raising different issues, the District took corrective action and made the contracting officer available to address the protest issues during a status conference attended by the parties. We agree with the District that any negligence or lack of due diligence by the agency in preparing the solicitation and failure to realize that the District supply schedule could not be used for a procurement in excess of \$999,999 does not rise to the level of arbitrary and capricious conduct toward the protesters. The protesters received copies of the solicitation, as did other offerors, but never questioned the agency about the District supply schedule ceiling amount. Thus, it seems that neither the District nor any of the offerors realized the ceiling limitation problem during the procurement and that the problem was first identified only during the District's legal review of the proposed definitized contracts for TCBA and Digital Safetynet.

In comparable situations, the GAO has denied claims for bid or proposal preparation costs where the protest record demonstrated nothing more than agency negligence or lack of due diligence leading agencies to cancel solicitations. *E.g.*, *Special Systems Services, Inc.*, B-238168, Apr. 4, 1990, 90-1 CPD ¶ 359 (inadequate showing of arbitrary or capricious conduct where the agency had to cancel its solicitation because it had negligently prepared specifications which "drastically failed to include many requirements necessary to meet the agency's actual minimum needs"); *Computer Resource Technology Corp.*, B-218292.2, July 2, 1985, 85-2 CPD ¶ 14 (lack of due diligence or carelessness on the agency's part in allowing the solicitation to be issued or in not canceling it at an earlier date does not entitle protester to bid preparation costs since conduct did not rise to level of arbitrary or capricious action).

MVS, in its proposal preparation costs submission, also raises an argument that the District improperly proceeded under a sole source procurement with Digital Safetynet for the work formerly

required under contract line item number 0002 of the now canceled solicitation. This issue was not raised as a ground for protest and is irrelevant to the question of recovering proposal preparation costs.

CONCLUSION

By canceling the solicitation and awards, the District has rendered the protests of WAC and MVS moot. We have considered all of the protesters' arguments for recovering proposal preparation costs and costs of pursuing their protests, but conclude that the protesters are not entitled to recover those costs. Accordingly, we dismiss the protests as moot.

SO ORDERED.

DATED: April 14, 2003

/s/ Jonathan D. Zischkau
JONATHAN D. ZISCHKAU
Chief Administrative Judge

CONCURRING:

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