

DISTRICT OF COLUMBIA CONTRACT APPEALS BOARD

PROTEST OF:

VICTOR STANLEY, INC.)	
)	CAB No. P-0842
Solicitation No: DCKT-2007-C-0007)	

For the Protester, Victor Stanley, Inc.: Mr. Stan Skalka, *pro se*. For the District of Columbia Government: Robert Schildkraut, Esq., Assistant Attorney General, Office of the Attorney General.

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

OPINION

Filing ID 31032910

Victor Stanley, Inc., challenges the failure of the District to exercise its option to renew its contract. The District's decision not to exercise the option stemmed from Victor Stanley's failure to return a tax affidavit certification form prior to the contract expiration date. On the record presented, we conclude that the decision not to exercise the option was a matter of contract administration and not a proper subject for protest. Accordingly, we dismiss the protest.

BACKGROUND

On November 20, 2006, the District awarded Victor Stanley a requirements contract to furnish metal trash receptacles. (Agency Report ("AR") Ex. 2). The term of the contract was for a period of one year from the date of award. (AR Ex. 2, Section F.1). The contract stated that the District may extend the term of the contract for a period of up to four one-year option periods, or fraction thereof by written notice to the contractor before the expiration of the contract, provided that the District give the contractor a preliminary written notice of its intent to extend at least thirty days before the contract expires. (AR Ex. 2, Section F.2). The preliminary notice did not commit the District to an extension. (AR Ex. 2, Section F.2). Further, the contractor could waive the thirty day preliminary notice requirement by providing a written waiver to the contracting officer prior to expiration of the contract. (AR Ex. 2, Section F.2).

On November 14, 2007, the District issued Amendment M0001 extending the term of the contract from November 20, 2007, through November 19, 2008. (AR Ex. 3). On September 25, 2008, the District issued Amendment M0002 extending the term of the contract from November 20, 2008, through November 19, 2009. (AR Ex. 3).

On November 4, 2009, the District sent a preliminary notice to Victor Stanley indicating the District's intent to exercise option year three from November 20, 2009, through November 19, 2010. (AR Ex. 4). The notice requested a waiver of the 30-day notice requirement and requested that a tax affidavit form be completed and returned. (AR Ex. 4). The letter also noted that the then current term of the contract expired on November 19, 2009. (AR Ex. 4).

Victor Stanley returned the signed waiver of the 30-day notice requirement on November 13, 2009. (AR Ex. 4). On the same November 13 date that it submitted its signed waiver, Victor Stanley had several email exchanges with the contracting agency in which it stated that it was not required to submit a tax affidavit certification form and alternatively requested that it be able to use an older tax certification form and simply sign and notarize it rather than complete the new form. (AR Ex. 5; Victor Stanley March 17, 2010 Response to Motion to Dismiss, attachment). In an email dated November 13, 2009, Victor Stanley was told that it needed to complete the new tax form. (AR Ex. 5). The new tax affidavit form was not received by the District until December 4, 2009. (AR Ex. 6). Since the tax affidavit form was not received before November 19, 2009, the District did not exercise the option and thus the existing contract expired by its terms.

In a February 1, 2010 email, the contracting officer stated:

I have reviewed the file again and the circumstances that caused the option not to be exercised. Unfortunately the contract has expired at this point. The notice that you received indicated that it could not be construed as a commitment to exercise the option. We were not able to exercise the option because we did not receive confirmation of your company's compliance with the tax filing requirements of the District until after the contract had expired. For each contract year we must make a determination of a contractor's responsibility. One factor is the contractor's compliance with the tax filing requirement of the District.

I also looked at the order history. The District did not place an order during the last contract term (11/20/08- 11/19/09). After speaking with the program office, there was no intent to place an order this fiscal year due to budgetary constraints. They do however anticipate a need in the next fiscal year beginning 10/1/10. Please note that the awarded contract was a requirements contract and that no orders were guaranteed.

The program office is currently reviewing its specifications for a new solicitation. We can include your company on the bidders list for that solicitation.

On February 19, 2010, Victor Stanley protested the District's "cancellation" of the contract. The District responded with a motion to dismiss, to which Victor Stanley replied.

DISCUSSION

In its protest, Victor Stanley states that the contracting officer acted improperly when she "cancelled" the contract. The contracting officer did not cancel the contract. The contracting officer determined that she would not exercise option year three of the contract because Victor Stanley had not submitted a completed tax verification affidavit. The District was under no obligation to exercise option year three of contract. Although Victor Stanley is correct that the District did not clearly state in the November 4 notification letter that the tax verification was required prior to contract expiration on November 19, Victor Stanley also failed to seek

clarification on the point. We see no basis for finding that the District acted in bad faith because the tax certification affidavit is used by the contracting officer to document contractor responsibility. The decision to exercise an option is committed to the discretion of the contracting officer. The Board, as well as the GAO, has repeatedly held that the government's decision not to exercise an option is a matter of contract administration and not subject to protest review. See *Terry M. Banks, Esq., et al*, CAB Nos. P-0743, P-744, Dec. 27, 2006, 54 D.C. Reg. 2060; *Brooks & Brooks Services, Inc.*, CAB No. P-0605, Jan. 6, 2000, 48 D.C. Reg. 1477; *Advanced Elevator Services, Inc.*, B-272340, Sept. 26, 1996, 96-2 CPD ¶ 125.

CONCLUSION

We dismiss the protest of Victor Stanley because its challenge to the District's failure to exercise a contract option is not a proper basis for protest.

SO ORDERED.

DATED: May 11, 2010

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

CONCURRING:

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