

GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

PROTEST OF:

DK&R COMPANY)
) CAB No. P-422
Under IFB No. 3184-AA-76-2-CW)

For the Protestor: David Kissi, *pro se*. For the Government: Nancy Hapeman, Esquire and Warren Nash, Esquire, Assistants Corporation Counsel.

Opinion by Administrative Judge Cynthia G. Hawkins-León, with Administrative Judges Lorilyn E. Simkins and Jonathan D. Zischkau, concurring.

OPINION AND ORDER ON MOTION TO DISMISS

On September 28, 1994, DK&R Company ("DK&R" or "Protestor") filed both a letter of protest and a document titled "Motion to Protest Against Contract Award" with the Board. DK&R is protesting the award of Invitation for Bids No. 3184-AA-76-2-CW ("IFB").

The Board dismisses this protest due to its untimely filing.

I. Statement of Facts

On October 21, 1993, the IFB was issued in the small business enterprise ("SBE") set-aside market by the Department of Administrative Services ("DAS") on behalf of the Office of Financial Management for various types of computer paper, computer print-out paper, bond paper and copier paper. The IFB was for a firm fixed-unit price, estimated requirements contract. Addendum No. 1 to the IFB was issued on October 26, 1993. This addendum extended the bid opening date from November 23, 1993 to December 1, 1993 at 2:00 p.m. District's Motion to Dismiss, Exhibit 1.

The IFB consisted of an aggregate award group with eight (8) separate, specific items. In addition to the type of paper required (*i.e.*, computer print-out paper, continuous feed, plain, white bond paper for laser only, size 12" x 8½" inches, one (1) part, right and left perforations, basis weight sub. 20 lbs.) each item stated requirements for both the quantity of paper per carton of paper supplied and the total number of cartons (*i.e.*, 4,000 sheets per carton; quantity -- 3,600; unit -- carton). In addition, the quantity of paper per carton varied among the items whose unit measure was a carton. *Id.*

The bid opening date was December 1, 1993. *Id.*, Addendum No. 1. The District received bids from twelve (12) bidders, including DK&R. *Id.*, Exhibit 3.

Although the bids were opened on December 1, 1993, DAS' Determination and Findings for Award to Other Than the Lowest Bidder ("D&F") was not preliminarily executed by the Contracting Officer until April 21, 1994 -- more than four months later. On May 23, 1994, the D&F was executed by the Director of DAS. After reviewing the bids, DAS had determined in turn that the four (4) apparent low bidders were non-responsive to the IFB and, therefore, ineligible for award. *Id.*

The fifth apparent low bidder was determined to be responsive to the IFB. In accordance with 27 DCMR §1531.1, the Director of DAS recommended that, in the best interests of the District, award should be made to the fifth lowest bidder.

By letter dated February 28, 1994, DAS requested and received an extension of time for the acceptance of District Healthcare's bid. In toto, DAS requested and received six time extensions. The final extension of time to accept the bid expired on September 2, 1994. District's Motion to Dismiss, Exhibit 4.

Accordingly, on September 2, 1994, Contract No. 3184-AA-76-2-CW was awarded to District Healthcare. *Id.* On that date, Protestor was notified by a letter from the Contracting Officer of the award of the solicitation to District Healthcare. *Id.*, Exhibit 5.

II. Procedural History

In its letter filing, Protestor alleged that DAS "bent over backwards to accommodate [the awardee] by postponing the award on numerous occasions for about a year." In its "Motion," Protestor further alleged that the contract was improperly awarded "in violation of 12 C.F.R. §121.1603(a)(2)." Protestor requested that the Board "freeze and void the [contract] award immediately and resubmit the bid...."

On October 31, 1994, the District filed a Motion to Dismiss the Protest. The District stated that the protest should be dismissed, with prejudice, on the following grounds: (1) Protestor failed to set forth a clear and concise statement of the legal and factual grounds of its protest as required by Board Rule 302.1(c), 36 D.C. Reg. 2711 (April 21, 1989); and (2) Protestor's bid was deficient and non-responsive to the IFB, thus, Protestor was not in a position to be awarded the contract should the protest be sustained, and therefore, since DK&R is not an aggrieved or interested party, it has not filed a sustainable protest of the contract award. D.C. Code §§ 1-1189.3(1) and 1-1189.8(a).

On November 7, 1994, Protestor filed a Motion to Compel Discovery. Protestor stated that it needed, among other requests, "an abstract of the price quotes of the four top finalist[s]"

to enable it to determine whether the awardee, District Healthcare, was "in good standing" when it was awarded the contract in question. In addition, Protestor alleged that the D & F issued by DAS (see discussion above) had been "back dated" by DAS officials which allowed District Healthcare to, in effect, be pre-selected for the contract award. Protestor, citing inapplicable Federal regulations, also requested a hearing on this matter. In addition, Protestor apparently intended this filing to serve as its response to the District's Motion to Dismiss. In response to the District's Motion to Dismiss, Protestor stated that it should not have been determined non-responsive for failing to return the entire bid package. *See* Protestor's Motion to Compel Discovery.

On November 14, 1994, Protestor submitted a memorandum to the Office of the Corporation Counsel, with a copy to the Board, clarifying Protestor's discovery request. Protestor sought: (1) copies of delivery tickets from the awardee's deliveries under the contract; (2) a copy of the awardee's "Certificate of Good Standing" issued by the District; and (3) a log of communications up to and including September 2, 1994, both written and oral, between the District and the awardee regarding the contract at issue. On November 16, 1994, Protestor filed a "Memorandum" suggesting options for the resolution or settlement of the instant protest.

The District filed its response to Protestor's Motion to Compel Discovery on November 18, 1994. First, the District opposed Protestor's request by asserting that the discovery request does not meet the Board's criteria as established in Board Rule 112.3, 36 D.C. Reg. 2693 (1989) and Board Rule 309.2, *Id.* at 2713. The District contends that, until the jurisdictional issues raised in its Motion to Dismiss are considered and resolved by the Board, Protestor's discovery request would be premature. Second, the District pointed out that Protestor has based its motion on Federal regulations that do not apply to protests before the Contract Appeals Board. Third, the District asserted that the Protestor has raised issues of contract administration that are not subject to the Board's review. Fourth, the District asserted that, by alleging that officials at DAS "back dated" the D & F, the Protestor has misinterpreted the plain meaning of the D & F document.

On January 3, 1995, Protestor filed a Response to the District's Opposition to Compel Discovery in which Protestor restated the grounds for its discovery request.

III. Discussion

As indicated in the Statement of Facts above, on September 2, 1994, DAS issued a letter notifying all bidders of the award of Contract No. 3184-AA-76-2-CW to District Healthcare and Janitorial Supply, Inc. On September 28, 1994, Protestor filed a protest of the award with the Board. This protest is dismissed with prejudice based upon the fact that it was untimely filed.

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Section 908 (b) of the PPA, D.C. Code § 1-1189.8 (b), states that "the aggrieved person shall file a protest with the Board within 10 working days after the aggrieved person knew or should have known of the facts and circumstances upon which the protest is based." *Chesapeake Bus & Equipment Company*, CAB No. P-404, June 30, 1994, 7 P.D. 5887; *Emerald Eviction Services*, CAB No. P-343, November 10, 1992, 40 D.C. Reg. 4700; *Eastern Shield Security Systems, Inc.*, CAB No. P-369, March 2, 1993, 40 D.C. Reg. 5001; *CUP Temporaries, Inc.*, CAB No. P-263, August 31, 1993, 41 D.C. Reg. 3615. The Board's rules, which serve to implement the PPA, require that a protest be filed not later than ten working days after the basis of the protest is known or should have been known, whichever is earlier. Rule 301.1, 36 DCR 2710 (1989); *Anne Robertson Sellin*, CAB No. P-238, July 2, 1991, 39 D.C. Reg. 4247.

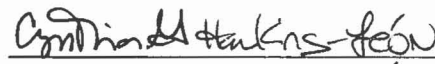
This ten-day filing requirement is a prerequisite to this Board's jurisdiction and cannot be waived. *Macton Construction, Inc.*, CAB No. P-203, December 19, 1991, 39 D.C. Reg. 4368 citing *MTI Construction Co., Inc.*, D.C. CAB (June 1, 1987) and *Southern International Corp.*, D.C. CAB (February 27, 1987).

Even adding in six total days for mailing purposes (three days for both the mailing of the notice to Protestor from DAS and for the mailing of Protestor's filing with the Board), Protestor does not meet the 10-day filing requirement.

Due to Protestor's untimely filing of its protest, the Board is without jurisdiction to consider the merits of this protest.

ACCORDINGLY, based upon the facts, legal precedent and reasoning set forth above, the protest is hereby **DISMISSED**, with prejudice.

DATE: February 8, 1995


CYNTHIA G. HAWKINS-LEÓN
Administrative Judge