

## **DISTRICT OF COLUMBIA CONTRACT APPEALS BOARD**

PROTEST OF:

Community Bridge, Inc.	)	
	)	CAB No. P-0848
Under RFP No: DCKT-2009-R-0120	)	

For the Protester, Warner H. Session, Esq. For the District of Columbia Government: Robert Schildkraut, Esq., Assistant Attorney General.

Opinion by Administrative Judge Warren J. Nash, with Chief Administrative Judge Marc D. Loud, Sr., concurring.

### **CORRECTED OPINION**

*Filing ID 35350990*

Community Bridge, Inc., (“Community Bridge”) on April 9, 2010, protested the award of any contract from the above solicitation to any bidder other than Community Bridge. On April 27, 2010, the District of Columbia filed its motion to dismiss the protest, alleging that Community Bridge had filed an untimely protest more than 10 days after it knew, or should have known, of the grounds of its protest. The District on April 12, 2010, executed a Determination and Finding to proceed with contract performance. Community Bridge filed its opposition to the D&F on April 15, 2010. Since we have determined that the protest was untimely filed, there is no need to determine the adequacy of the D&F. The Board agrees with the District and the Board hereby dismisses the protest with prejudice.

### **BACKGROUND**

The Office of Contracting and Procurement (“OCP”) of the District Government issued solicitation DCKT -2009-R-0120 in the open market for grounds maintenance and landscaping services on September 23, 2009. (Exhibit 2). The solicitation required a prospective contractor to provide grounds maintenance, landscaping services and other related services to several District agencies. (Exhibit 2). The District contemplated award of multiple contracts, and the District wanted to award single contracts to one contractor in each ward of the city. (Exhibit 2). Community Bridge submitted a proposal to provide services under the RFP, and was awarded a contract on April 3, 2010. (Exhibit 8). Community Bridge is protesting the award of contracts to Lorenz for services in Wards 3 through 8. The District awarded a contract to Lorenz, Inc., on April 13, 2010. Community Bridge filed this protest on April 9, 2010.

### **DISCUSSION**

In the motion to dismiss, the District alleges 1) that Community Bridge lacks standing to protest because the protest was filed after March 17, 2010, and was therefore

untimely, and that 2) alternatively, the protest is untimely because it was filed more than 10 days after the district submitted the Lorenz and Community Bridge approval resolutions on March 12, 2010, and that Community Bridge knew about the adverse action taken against its interest by March 16, 2010, the date that Community Bridge's attorney submitted an email message to Councilmember Jim Graham that outlined the reasons for Community Bridge's support of a disapproval resolution submitted by Councilmember Harry Thomas, Jr. The District alleges that Community Bridge knew that the award resolution had been sent to the Council, and that Community Bridge actively lobbied against award of the companion contract to Lorenz. The District further alleges that since Community Bridge knew of the Lorenz award by March 16, 2010, any protest of the award to Lorenz should have been earlier than April 9, 2010, or by March 30, 2010. Therefore, this protest is untimely.

The District correctly cites *Sigal Construction Corporation*, DCCAB No. P-0690, P-0693, P-0694 (Consolidated)(2004) to support the proposition that in certain cases of active lobbying of the DC Council by a protester, the timeliness of a protest may be affected by the actions of the protester. In *Sigal*, the protester actively worked to convince the Council to disapprove a proposed award to a competing contractor. However, *Sigal's* protest was untimely because it was filed more than 10 business days after *Sigal's* actual notice that a proposed award had been submitted to the Council. *Sigal* did not receive a formal notice of the proposed award, but it actively lobbied the council against approving the award.

In *Sigal*, the Board set forth the parameters to be used when considering the timeliness of a protest that involves active council lobbying by the protester:

The Procurement Practices Act provides the following in D.C. Code § 2-309.08 with regard to an award protest:

(a) This section shall apply to a protest of a solicitation or award of a contract addressed to the Board by any actual or prospective bidder, offeror, or contractor who is aggrieved in connection with the solicitation or award of a contract.

. . . .

(b)(2) In cases other than those [based upon alleged improprieties in a solicitation] . . . , protests shall be filed not later than 10 business days after the basis of protest is known or should have been known, whichever is earlier.

The correct principle of law on timeliness of a protest in connection with an award is that the 10-business day period stated in D.C. Code § 2-309.08 begins when the bidder or offeror knows or should have known the basis of its protest and the party has become aggrieved in connection with the award by an official action adverse to that party. JLTJV (Jair

Lynch/Tompkins Joint Venture) misconstrues our decision in *Micro Computer*. That case addressed the issue of the timeliness of a protest filed against the presumptive low bidder even though no award had been made. *Micro Computer* simply stands for the proposition that the Board may entertain jurisdiction over a protest which technically is premature because there has been no formal action taken by the contracting officer adverse to the protester. There is no difficulty in such an approach because if the presumptive low bidder does not receive award or the protester receives the award, the protest will be moot and voluntary dismissal will follow. See, e.g., *Consolidated Waste Industries*, CAB No. P-0300, Oct. 8, 1992, 40 D.C. Reg. 4570. If the protester does not receive award, the Board can then resolve the protest based on an actual decision adverse to the protester. Further, it may be useful for the contracting officer and government legal counsel to learn of a protest ground even if prematurely filed because the agency may be expected to take a more informed contract action based on the issues raised in the protest.

Usually, the contracting officer's official action adverse to the party will be a notice of award, a notice of intent to award, a notice that the party did not receive award, a notice that the party's bid or offer will not be further considered in the procurement, a notice that the party's offer is not within the competitive range, or a notice that the bid or offer is rejected for some other reason. It is well settled in our cases that a bidder or offeror does not have to file a protest in connection with an award until it has received notice of an official action by the contracting officer which is adverse to it. See, e.g., *Unfoldment, Inc.*, CAB No. P-0447, Aug. 2, 1996, 44 D.C. Reg. 6488, 6490-91 (protester's challenge to an anticipated award to the incumbent and an affirmative determination of the incumbent's responsibility status is premature and speculative); *Consolidated Waste Industries*, CAB No. P-0430, June 12, 1995, 42 D.C. Reg. 4983 (protester merely surmises that the District intends to award the IFB to another bidder; since the District had not yet completed its responsibility determination nor awarded a contract; protest was premature). In *Alexandria Scale*, CAB No. P-0361, Mar. 25, 1993, 40 D.C. Reg. 5055, the facts showed bid opening on June 12, 1992, that protester notified the contracting officer by letter of June 23 that the low bidder could not meet the specifications, and that between June 18 and December 14, 1992, the contracting agency made inquiries to the low bidder seeking responses to protester's June 23 letter. On January 7, 1993, after a partial award was made to the low bidder, the protester filed its protest on January 14, 1993, 7 days after award, but months after being on notice of the underlying basis for the protest. The Board held that the protest was timely filed because the operative date for starting the 10-day filing period was the date on which the bidder was notified of the adverse agency action -- January 7, 1993, in that case. In *Koba Associates, Inc.*, CAB Nos. P-0344, P-0359, Mar. 3, 1993, 40 D.C. Reg. 5003, we held that the 10-day period

for filing a protest begins to run when the District takes adverse action to the concerns of the offeror, not when the offeror raises the issues in a letter to the contracting officer seeking clarification. In *Koba*, the protester sought clarification by letter of August 27, 1992, challenging a direction given by the contracting agency during discussions, but the 10-day time for filing its protest began to run when protester received the September 24, 1992 notice terminating negotiations. Thus, *Koba's* protest was timely filed on October 7, 1992. See also *Fort Myer Construction Corp.*, CAB No. P-0261A, Jan. 28, 1992, 39 D.C. Reg. 4400 (although Fort Myer was aware of low bidder's bid mistake at the time of bid opening on October 10, 1990, it was not aggrieved until November 1, 1990, when the District informed Fort Myer that the low bidder's error was not disqualifying).

Under these principles of timeliness, we conclude that Community Bridge untimely raised the protest grounds on April 9, 2010. The documents submitted by the protester clearly show that the Community Bridge knew on March 16, 2010, that Lorenz would be awarded the contract after the contract was approved by Council. Further, Community Bridge lobbied the Council by attempting to stall, or end, the approval of the contract. Community Bridge filed this protest more than 10 days after it attempted to lobby the Council to disapprove the contract. Accordingly, we dismiss this protest as untimely.

**SO ORDERED:**

DATED: January 13, 2011

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

CONCUR: /s/ Marc D. Loud, Sr.  
MARC D. LOUD, SR.  
Chief Administrative Judge

Electronic Service to:

Robert Schildkraut, Esq.  
Office of the Attorney General  
441 Fourth Street, NW, Seventh Floor  
Washington, DC 20002

Warner H. Session  
Session Law Firm  
150 Connecticut Ave., NW, Suite 900  
Washington, DC 20036