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**GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD**

PROTEST OF:

CTA MANAGEMENT GROUP, INC.)	
)	CAB No. P-71
Under RFP No. CF-004-87)	

For the protester: Charlotte Taylor, President. For the Government: Howard Schwartz, Assistant Corporation Counsel, D.C.

Opinion by Administrative Judge Marlin with Administrative Judges Booker and Davis concurring.

BACKGROUND

CTA Management Group, Inc. (CTA), filed this protest^{1/} with the Board on October 22, 1987, challenging the evaluation rating of the proposal it submitted in response to Request for Proposals No. CF-0004-87 (RFP). The Department of Employment Services (DOES) issued the subject RFP on June 15, 1987, seeking proposals from organizations regarding work training programs for District residents under the District of Columbia Youth Employment Act of 1979 (YEA). The RFP closed on July 6, 1987, and twelve proposals, including that of CTA, were received. See Agency Report at 2.

The RFP set out the criteria by which the proposals were to be evaluated. A list of factors, each followed by a numerical value for maximum points available, was designated. The evaluation criteria included the following: Technical Review--possible 45 points; Past Performance--possible 40 points; Cost Review--possible 15 points; Performance Based Subgrants--possible 10 points. Id. at 3 and exh. A.

^{1/} This case originated during a period of time when the District of Columbia Contract Appeals Board was functioning pursuant to Commissioner's Organization Order No. 9, D.C. Code, Supplement V (1978), as amended by Mayor's Order 82-224, 30 DCR 497 (January 28, 1983). Pursuant to the District of Columbia Procurement Practices Act of 1985, D.C. Code § 1-1189.1, a new independent agency denominated as the Contract Appeals Board was created. This new Board became operational on August 1, 1988, and succeeded to jurisdiction of all contract dispute cases pending before the previously established Board.

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A committee of five DOES officials evaluated each proposal. CTA received a rating of 71.7 points. This score was based on the following break-down of points: Program Review--41.7 points; Cost Review--15 points; Past Performance--15 points; Performance-Based Subgrant Preference--0 points. Id. at 3.

The twelve proposals were then ranked according to total points received, the proposal receiving the highest rating being ranked as number one and that scoring the lowest points as number twelve. CTA's proposal was ranked as number eleven. Id. at 4.

Awards were made based on availability of funds for the program. Award was made to the first ranked offeror, then to the second ranked and so on until program funds were depleted. CTA did not receive an award as the available funds were exhausted after contracts were awarded to the top ten ranked offerors. Id. at 4. The ten awards were all made by October 1, 1987. Id. at 5. On October 8, 1987, CTA received a letter from DOES indicating that CTA had not received an award. Protest Letter at 1.

CTA'S PROTEST

CTA's protest of its evaluation score focuses on one specific item, the rating it received for its past performance. CTA alleges that the DOES failed to properly evaluate its performance under a previous contract with the department.^{2/} In support of this allegation, CTA states that the evaluation committee judged CTA to have fallen short in the number of participants it placed in unsubsidized employment under the previous contract but did not take into consideration that CTA still had another three months to perform under that contract at the time of evaluation and that its contract was for a ten-month period, not a twelve-month period. Protest Letter at 1.

In its protest letter, CTA also contends that consideration was not given to the detrimental effect on the project of the DOES' loss of an initial job referrals list which, argues CTA, had caused virtually no participants to be referred to its project until late March. Id. at 1.

CTA also contends that in the evaluation of its past performance, consideration was not given to the fact that DOES, under its previous contract, had failed to assign CTA an effective contract manager until late February, two and one-half months after the contract was signed. Id. at 2.

^{2/} The evaluation was based on CTA's performance under Contract No. ELL-190 which was executed on Dec. 1, 1987 and was to expire on Sept. 30, 1987.

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THE DISTRICT'S RESPONSE

In its Agency Report filed with the Board on March 7, 1988, the District argues that CTA's protest is without merit. Regarding CTA's contention that the DOES' evaluation was defective in that it failed to take into consideration the fact that CTA still had three more months to perform under the contract and that its previous contract was for only a ten-month period, the District argues that, in order to insure continuity of services, proposals must be sought and award must be made prior to the expiration of existing contracts. Therefore, it was not possible to wait until CTA had completed performance under contract ELL-190; evaluation had to be based only on the performance CTA had rendered as of July 1987.

CTA's second contention, that the evaluation committee did not make note of the impact on CTA's performance of DOES' loss of a referral list, is also meritless, argues the District. According to an Exit Interview summary for the month of February, 1987, which DOES and CTA officials both signed, the CTA project was not scheduled to enroll participants until March, 1987. Agency Report, exh. E. In addition, the Exit Interview for March, 1987, states:

. . . According to the Contractor, there was, briefly, a problem in locating some job-orders that apparently were submitted and missing. . . . They [the job-orders] were expedited the moment that they were located and the contractor is now 340% ahead of planned enrollment. [Agency Report, exh. H.]

The District argues that these statements, signed by a CTA official, indicate that CTA itself had conceded that the loss of the referral list had no significant adverse effect on CTA's performance under its previous contract.

The District also points out that the Exit Interview forms CTA signed for January and February, 1987, listed numerous activities that were accomplished by CTA during those months. CTA did not indicate in the Exit Interview forms for January or February, 1987, that its program progress was unsatisfactory or that lack of a contract manager was detrimental to its program. Therefore, the District contends, there is no factual basis for the conclusion that the lack of a contract manager until February 1987 adversely affected CTA's performance. Agency Report at 8.

OPINION

In our decision of the protest of Pinnacle Corp. (D.C. CAB, Nov. 18, 1988; 36 D.C. Reg. 3965, June 2, 1989), we noted that the Procurement Practices Act of 1985 (PPA) confers on this Board jurisdiction to hear and decide all protests on a de novo basis. Based on the language of the PPA, all that is required for a protester to prevail in its

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claim is that it demonstrate, by a preponderance of the evidence, that the District has committed a material violation of an applicable law, regulation or term or condition of a solicitation. Pinnacle at 6.

This standard of review differs sharply from the standard exercised by the General Accounting Office (GAO) in its review of protest cases. GAO requires a protester to show that the challenged agency action or decision was arbitrary, unreasonable or an abuse of discretion. There is a presumption of agency correctness and the GAO limits its role to examining "whether the agency's evaluation was fair and reasonable and consistent with the stated evaluation criteria." The City of Spartanburg, B-214161, November 2, 1984, 84-2 CPD ¶ 487.

Both this Board and the General Services Board of Contract Appeals (GSBCA), on the other hand, have de novo review authority. See 41 U.S.C. § 605 (a) (1982) for GSA's authority. Both boards impose upon a protester the burden of establishing the adjudicative facts in support of its case by a preponderance of the relevant evidence. The presumption of agency correctness is not permitted.

In the instant case, the protester is challenging discretionary judgments in evaluating proposals. Our standard is whether the actions of the contracting agency are clearly defective. We will "grant deference to the agency's technical judgment but...will not slavishly follow it," an approach consistent with that of the GSBCA. International Systems Marketing, Inc., GSBCA No. 7948-P, 85-3 BCA ¶ 18,196 (1985).

In this protest, the Protester does not allege that the contracting agency deviated from the evaluation criteria set out in the RFP. Instead, CTA alleges that the reviewing committee's evaluation was unreasonable as it failed to consider various factors in assessing the Protester's past experience. Our analysis follows.

(1) Protester's first allegation is that CTA was prejudiced by not having its full (10) ten-month performance evaluated. The District admits that only seven months of performance were appraised but correctly contends that the RFP's schedule was necessary in order to solicit new proposals before the expiration of the preceding contracts.

In soliciting services, such as the job-training program involved in this protest, it is often necessary to solicit new contract proposals to insure the continuity of ongoing programs. This RFP was designed to continue work training programs for District youth without interruption. It was not possible to tailor the RFP requirements to fit CTA's particular contracting history.

When the evaluation was conducted, the committee reviewed all performance data available. DOES has provided documentation indicating how CTA's performance under the previous contract was reviewed. According to these documents, the evaluating

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committee compared the number of program participants CTA had successfully placed in jobs to the program goal number. The statistics employed show that while CTA's contract period was 70% completed, only one program participant had been placed in unsubsidized employment. This one participant represented approximately 3% of the project figure goal. Although CTA still had three months to complete its contract, the evaluating committee gave CTA a low performance rating, reasoning that a 3% placement rate at a point in time when 70% of the contract period had already expired did not constitute satisfactory performance.

The Board finds that the committee acted reasonably in conducting its evaluation in that it took into consideration all information regarding CTA's past performance that was available at the time the evaluation was carried out.

(2) CTA's second contention is that the DOES evaluating committee did not take into consideration the detrimental effect upon CTA's past performance caused by the loss of a job referral list by DOES. CTA argues that this caused a delay in its receipt of enrollments. However, according to records supplied by DOES, no enrollments were actually scheduled for CTA's program until March, 1987. In the monthly interview for February 1987, signed by both DOES and CTA representatives, it is indicated that CTA's program was not scheduled to enroll participants until March, 1987.

Also, the yearly program planning calendar indicates that CTA was scheduled to have ten participants enrolled in March, 1987. In March, 1987, CTA actually received thirty-four enrollments. This was far in excess of those tentatively scheduled. Based on the fact that CTA received more enrollments for the month than were originally anticipated, its allegation that the loss of a referral list caused it to not receive participants is factually groundless. The Board therefore must find that the DOES was reasonable in not taking into account the "detrimental" effects of the loss of a list where there was no evidence to indicate such detrimental effects actually resulted.

(3) CTA's final contention is that the lack of a contract manager until February, 1987, adversely affected its performance under the previous contract. While it is possible that CTA's lack of a DOES contract manager could have adversely affected CTA's performance, CTA has offered no evidence to support this allegation. DOES has, however, submitted CTA's monthly reports for January and February, 1987, which list several activities that were completed by CTA in those months. Absent any evidence to the contrary, it does not appear that the lack of a contract manager hindered CTA's performance and the DOES evaluation committee acted reasonably when it did not take special consideration of this fact in evaluating CTA's past performance.

The Board finds that DOES acted reasonably in evaluating CTA's past contract performance. CTA has failed to offer any evidence to document its allegations, while, in

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response to each of CTA's allegations, DOES has produced documentary evidence demonstrating that it had a reasonable basis for its evaluation rating.

For the foregoing reasons, it is

ORDERED, that the protest is DENIED.

DATE: June 9, 1989

David H. Marlin
DAVID H. MARLIN
Administrative Judge

CONCUR:

Claudia Booker
CLAUDIA D. BOOKER
Administrative Judge

William L. Davis
WILLIAM L. DAVIS
Chief Administrative Judge