

Seagrave filed the present action on October 5, 2012, challenging the District's determination that its proposal was technically unacceptable for award because it did not meet the product warranty requirements in the subject Solicitation. (Protest 2-4.) By way of background, Solicitation No. DCFB-2011-R-0093A&B (the "Solicitation") was issued on behalf of the District of Columbia Fire and Emergency Services agency ("FEMS") seeking a contractor(s) to provide Pumper and Aerial Trucks to FEMS according to specifications set forth in the Solicitation. (Agency Report ("AR") 2.) The District utilized a two-step bidding process under the Solicitation whereby the District first evaluated initial proposals and then subsequently requested that offerors submit a second sealed priced bid for further evaluation, if their initial proposal was determined to be acceptable. (*Id.*) The protester responded to the Solicitation with an offer to provide the District with the required Aerial Trucks which was later rejected for award. (*Id.* at 3-5.)

The protester contends in its protest that, before the ultimate rejection of its proposal, it was originally notified by the District that it had received the contract award after completion of the two-step Solicitation process. (Protest 3.) The protester expressly requests reinstatement of that alleged original award decision. (*Id.* at 4.) Nonetheless, the protester effectively appears to concede in its protest that its proposal did not meet the Solicitation's extended warranty requirement by noting that it subsequently advised the District that it would "pick up the [warranty] coverage" through a September 24, 2012, letter to the District, after the submission of its original proposal. (*Id.* at 4.)

In response to the protest, on October 31, 2012, the District filed its Agency Report under seal due to the governing protective order in this case which does not allow the unrepresented protester to have access to the District's confidential source selection information related to this procurement. The District also provided the protester with notice that it had filed the Agency Report on October 31, 2012. The Agency Report contends that the District's ultimate decision to exclude the protester from receiving the contract award was reasonably based upon the fact that the protester's proposal took exception to, and did not comply with, the five-year warranty requirement. (AR 5-6.)

The District further asserts that, due to a minor administrative error, the protester was erroneously notified that it had received the contract award although the agency had not yet received authorization from the Office of the Attorney General ("OAG") and the District of Columbia Council to award the contract to any company.¹ (*Id.* at 4 n.2.) Additionally, the District contends that the protester's proposal should have been formally rejected for award, before the second bidding phase, because of its noncompliance with the Solicitation's warranty requirements, although this did not occur because of some other administrative error that occurred within the agency during the bidding process.² (*Id.* at 3-4.)

Board Rule 307.1 requires a protester to file comments within seven business days in response to an agency report filed with the Board in a protest. The protester, however, did not file any comments or response to the October 31, 2012, Agency Report with the Board within this required timeframe. Nevertheless, on November 15, 2012, the Board ordered the District to file a public redacted version of its Agency Report by November 19, 2012, and to provide the protester with a copy of the same. (Nov. 15, 2012, Sua Sponte Order.) The Board's Order further directed the protester to file its comments to the public redacted version of the Agency Report, if any, by November 30, 2012. (*Id.*) This was the protester's second opportunity to respond to the District's Agency Report beyond the original deadline of November 9, 2012, for the protester's comments.

¹ In particular, the District's Agency Report represents that due to an administrative error, the District's contract specialist, through the District's electronic procurement system, issued an automatic email notifying the protester that it had been awarded the contract. (AR 4 n.2.) However, because the subject procurement is valued above \$1 million, the proposed contract required a legal sufficiency review and approval by the OAG and the Council before the District could issue a formal award notification to any company. At the time of the filing of this Agency Report, the District represented that the OAG had not approved the proposed award to any offeror and, thus, the District asserts that the original notice of award was issued to Seagrave in error. (*Id.*)

² The evaluation record in this matter is consistent with the District's statement that the protester's proposal was immediately identified by the District as being noncompliant with the Solicitation's warranty requirement. (AR Ex. 3.)

The District ultimately filed a publicly available redacted version of the Agency Report on November 26, 2012, that was made available to the protester on this same date.³ The protester, however, for the second time, failed to file any comments or response to the redacted Agency Report by November 30, 2012, as ordered by the Board. Additionally, as of the date of the issuance of the present Order, the protester has failed to file any comments although over three weeks have passed since the redacted Agency Report was made available to the protester on November 26, 2012.

Under the Board's rules, upon the protester's failure to file comments to an Agency Report filed in a protest, or to file a statement requesting that the case be decided on the record, or to request an extension of time for filing, it shall result in the closing of the record for the case and may also result in dismissal of the protest. Board Rule 307.3. Further, when the protester fails to file comments on the Agency Report, and the facts in the Agency Report are not otherwise contradicted by the protest, the Board may treat the factual allegations in the Agency Report as conceded by the protester. Board Rule 307.4. Given that the protester has failed twice to respond to the Agency Report to contradict the District's assertions, the Board hereby closes the record in this matter pursuant to Board Rule 307.3, as it relates to the protester's original protest allegations and the District's response thereto.

Moreover, by repeatedly not filing a response to the Agency Report, the protester has in no way contradicted the District's assertion in the Agency Report that its proposal did not comply with the Solicitation's warranty requirements and was, therefore, properly deemed unacceptable for award by the District. Additionally, as noted above, Seagrave, in its initial protest, in at least one instance, seems to admit that it did not meet the Solicitation's warranty requirements.⁴ Thus, in light of the protester's failure to even attempt to further refute the District's evidence that its proposal was noncompliant, the Board treats these facts in the Agency Report as conceded by the protester.⁵

The protester has, however, filed a rather vague challenge to the District's recently filed Determination and Findings to Proceed with Contract Award while Protest is Pending ("D&F") pursuant to D.C. CODE § 2-360.08(c).⁶ The District contends in this document that it is necessary for the agency to proceed immediately with the performance of the present contract for Aerial and Pumper Trucks to update, and supplement, its aging fleet of vehicles to ensure the

³ The District filed proposed redactions to the Agency Report for public release, under seal, on November 21, 2012, for the Board's approval. A final publicly available version of this same redacted document was filed on November 26, 2012, by the District, after the Board's approval, and was made publicly available to the protester on this same date by service through the Board's Lexis/Nexis electronic filing system.

⁴ The pre-award evaluation record also includes correspondences from Seagrave, in response to the District's inquiry requesting more details about the extent of its proposed warranty coverage, confirming that Seagrave's proposed extended five year limited warranty would not cover any component parts once the component parts warranty expired. (AR Ex. 5.) In this regard, Seagrave provided the example of Meritor axles on its proposed Aerial Trucks, which would not have a warranty beyond two years. (*Id.*)

⁵ The Board also accepts as conceded by the protester the District's assertion in the Agency Report that, due to an administrative internal error within the agency, the protester was erroneously notified that it had received the contract award before any award decision had been approved by the OAG or Council.

⁶ The Board notes that the D&F only discusses the District's urgent need to proceed with the contract performance as it relates to the Aerial Truck portion of the contract presumably because the protester only offered to provide this particular equipment, and not the additional Pumper Trucks that could also be offered under the Solicitation at the offeror's option. (*See* D&F 1.)

reliability and continuity of fire and emergency medical services that are provided to city residents by the District through the use of these vehicles. (D&F 2-3.) The protester's primary objection to the D&F seems to be its belief that it "nullifies" the protest process at the Board, along with its somewhat confusing assertion that certain dates in the D&F are contrary to the dates in certain exhibits. (Protester's Challenge to D&F.) Nonetheless, by virtue of the explanations included in the D&F, the Board finds that the District has provided substantial evidence of its need to ensure the provision of reliable fire and emergency services, which necessarily requires the periodic, and now immediate, replacement of aging FEMS vehicles under the disputed contract, and that this is an urgent and compelling basis to proceed with its immediate performance.

Accordingly, in light of the factors discussed herein, the protest is dismissed for failure to prosecute this action by the protester beyond the initial filing of its protest. The Board, further, finds that the D&F decision was proper for the reasons set forth herein although this D&F issue is effectively rendered moot by this order of dismissal.

SO ORDERED.

Date: December 20, 2012

/s/ Monica C. Parchment
MONICA C. PARCHMENT
Administrative Judge

CONCURRING:

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