GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

PROTESTS OF:

ATLANTIC TRANSPORTATION EQUIPMENT, LTD.	)	
	)	CAB Nos. P-0678, P-0680
Under Contract No. GAGA-2004-C-0014	)	(Consolidated)

For the Protester, Sean W. Glynn, Esq., William W. Goodrich, Esq., Arent Fox Kintner Plotkin & Kahn, PLLC. For the District of Columbia Public Schools: James A. Baxley, Esq., Deputy General Counsel, Lee Rideout, Esq., Office of the General Counsel.

Opinion by Chief Administrative Judge Jonathan D. Zischkau, with Administrative Judges Matthew S. Watson and Warren J. Nash, concurring.

OPINION

LexisNexis Filing ID 3676953

Atlantic Transportation Equipment, Ltd. ("ATEL"), has protested the award of a letter contract by the District of Columbia Public Schools ("DCPS") to Laidlaw Transit, Inc., for the 12 month leasing of 90 school buses for the 2003-2004 school year. ATEL argues that DCPS made an illegal sole source award to Laidlaw, that ATEL was capable of meeting the requirements for the procurement, but that DCPS only issued a solicitation to Laidlaw. DCPS does not claim that this was a competitive procurement or an emergency procurement. Rather, DCPS states that this was a "single available source" procurement authorized by 27 DCMR § 1702.1.

The Procurement Practices Act does not create an exception to competition on the basis of "single available source" as a method differing from sole source procurements. Accordingly, DCPS had to justify departing from the competition requirements by meeting the criteria for a sole source award. We conclude that DCPS has not demonstrated in the record a legitimate basis for conducting a sole source procurement. ATEL claims that the violations were so serious that the contract to Laidlaw must be declared void *ab initio*. Although DCPS violated statutes and regulations, we conclude that the DCPS violations, when considered in the context of the critical need for buses for the beginning of the school year, were not so substantial as to render the contract award to Laidlaw void *ab initio*. We conclude, nevertheless, that Laidlaw has been performing without a valid contract for over three months. DCPS never definitized the letter contract, and by late February 2004 the value of Laidlaw's performance exceeded both the not-to-exceed amount of the letter contract and the Council's statutory review threshold of $1,000,000. Because DCPS has neither requested nor received Council approval, performance by and payments to Laidlaw after late February 2004 have violated D.C. Code §§ 1-204.51 and 2-301.05a.

We sustain the protest, directing that DCPS promptly conduct a competition for its current bus requirements, and that ATEL recover its reasonable proposal preparation costs and costs of pursuing the consolidated protests.

BACKGROUND

At the beginning of the 2003-2004 school year, DCPS was required by law to transport 3,790 special education students to their school programs, which are located at over 239 sites in the District, Maryland, and Virginia. To provide appropriate transportation services, DCPS operates 566 different bus routes which requires DCPS to acquire and operate a fleet of at least 623 school buses. (Dec. 8, 2003 Determination and Findings to Proceed with Contract Performance,Gilmore Aff. ¶ 4). For prior school years, Laidlaw and ATEL had been leasing large numbers of school buses to DCPS.

On May 9, 2003, DCPS issued a Request for Quotation ("RFQ") for a 12-month lease of an additional 60 Passenger Class "C" school buses with a deadline for quotations of May 13, 2003. (Joint Ex. 1). DCPS sent this RFQ to six different vendors, including ATEL and Laidlaw. (Comisiak Dep. 22-24 (Joint Ex. 19)). The RFQ consisted of a facsimile cover page from Walter J. Comisiak, a contract specialist for DCPS's Office of Contracts and Acquisitions, and a one-page RFQ, stating in pertinent part: "Please provide the price for a 12 month lease on class C school buses." Three different size buses were specified: 35-Passenger (quantity of 40), 30-Passenger equipped with wheelchair lift (quantity of 10), and 42-Passenger (quantity of 10). The RFQ asked for the unit price of each size bus to be quoted as a monthly lease amount for the 12 months.

On May 12, 2003, Comisiak sent an email to the vendors with the subject line of "60 bus emer. sol." making a number of clarifications to the RFQ, including requesting a purchase price per vehicle, stating that DCPS prefers new buses but that 1999 or newer models with less than 60,000 miles would be satisfactory, that the vendors "use specifications from Solicitation GAGA 2003-B-0119 as a guide (doesn't have to be exact)", and that vendors "must meet the seating requirements in the RFQ." (Joint Ex. 2).

Comisiak sent ATEL an email on May 30, 2003, with the subject line "Emergency RFQ", requesting that ATEL send the quotation information to him and to another DCPS representative. ATEL's George Lowe responded minutes later by reply email providing a quotation to DCPS, with terms for the 60 buses, including a lease period of 12 months, and pricing reflecting the same unit price recently negotiated between DCPS and ATEL for a 1-year extension to an existing "200+ bus contract." Lowe added that ATEL "will require the existing one year contract to be executed and the additional 60 buses to be in a separate contract for 12 months" and that DCPS must verify "that funding for the new 60 bus contract as well as funding for the remaining duration of the 1 year extension contract is in place." (Joint Ex. 3). The record does not contain a quotation from Laidlaw but one other vendor quotation is summarized in a quote tabulation prepared by DCPS. Of the two quotations tabulated, ATEL's terms appear to be the more favorable. (Joint Ex. 21).

Over the following weeks, ATEL and DCPS representatives held numerous discussions and exchanged emails. The discussions included the clarifications sought by ATEL, such as the DCPS source of funding for the 60-bus procurement and the bus specifications set forth in the RFQ. Business terms, including pricing and length of contract were also discussed. ATEL was also concerned about significant delays in large payments due it from DCPS on other ongoing bus contracts with DCPS. (Joint Exs. 2-8, 12, 13).

On the evening of July 3, 2003, Brian Benton, the Chief Financial Officer of ATEL, received a phone call from 4 or 5 DCPS representatives including Cedran Kirksey, Kennedy Khobo, and Fitzgerald Wade. (Joint Ex. 5). DCPS said that the 60 buses that ATEL had bid on were needed right away, in fact, by Monday morning, July 7. (Joint Ex. 5). Benton reminded the DCPS representatives that ATEL was still awaiting acceptance of its terms and confirmation of the requested clarifications, and an update on the status of overdue payments owed to ATEL under its other contracts with DCPS. (Joint Ex. 5). Benton also stated that it would be difficult to dispatch a fleet of buses on such short notice. Khobo then proposed that ATEL "lend" DCPS the buses. Benton said that ATEL needed to be paid its outstanding balance. Khobo said that he would hate to see a newspaper article which indicated that children did not get picked up as a result of ATEL not providing the buses. (Joint Ex. 5, Benton Dep. 7-8 (Joint Ex. 22)).

During the following week there were further conversations and Comisiak set up a meeting on July 14, 2003. It was attended by an ATEL representative, Comisiak, and some of the DCPS representatives who had previously spoken to Benton on July 3 inquiring about the delivery of the 60 buses. At the meeting there was further discussion concerning the specifications for the buses and the funding for the contract. DCPS indicated that the specifications were being relaxed. (Comisiak Dep. 13, 26).

On July 24, 2003, it appears that Comisiak faxed to Laidlaw a hand-annotated version of the original May 9 RFQ. (Joint Ex. 27). The only difference appearing on this document was that the quantity of buses was increased as follows: the quantity of 35-Passenger buses was increased from 40 to 65, the quantity of 30-Passenger buses equipped with wheelchair lifts was increased from 10 to 15, and the quantity of 42-Passenger buses remained the same at 10. Thus, the RFQ sought a 12-month lease price for a total of 90 buses.

Comisiak and the DCPS contracting officer, Annie Watkins, recall hearing, probably from Fitzgerald Wade of DCPS, about an increased requirement of 90 rather than 60 buses, sometime in late July 2003. (Watkins Dep. 12-14; Comisiak Dep. 52-57). Watkins thought she instructed Comisiak around July 30, 2003, to send an informal request for quotation to both Laidlaw and ATEL for the new 90-bus requirement. Comisiak thought he sent the requirement to both Laidlaw and ATEL around July 30. (*Id*.).

We find from the record that Comisiak inexplicably failed to fax to ATEL the same hand-annotated RFQ that apparently he faxed to Laidlaw on July 24. Unfortunately, Comisiak was not questioned about the July 24, 2003 RFQ found at Joint Ex. 27 at the time of his deposition because DCPS could not locate any RFQ or solicitation for the 90-bus requirement until the Board ordered DCPS to obtain such documents from Laidlaw. DCPS did not obtain Laidlaw's documents until the end of the hearing on March 10, 2004, which was conducted to obtain testimony from David Gilmore, the DCPS Transportation Administrator.

In an email sent to Laidlaw representatives bearing a date of July 30, 2003, and a time of 8:27 a.m., Comisiak, stated the following: "Please provide price and delivery for 95 buses w/ maintenance. ASAP. Thanks; Walt." (Joint Ex. 29). Laidlaw responded at 8:50 a.m.:

Walt – Do you have any specs for the buses or the term of the lease (should we assume

> 1 year)? I assume we could roll these additional buses into our existing (unsigned) lease agreement. Please let me know ASAP. Thanks! -- Steve"

(Joint Ex. 29). The Laidlaw representative responding to the July 30 email apparently was unaware of the earlier July 24, 2003 hand-annotated RFQ that had been faxed to another office of Laidlaw.

Although Comisiak thought that he must have sent a similar email request to ATEL for the 90 (or 95) bus requirement, he could find no evidence of sending such an email, and ATEL states that it never received any email. We find that DCPS failed to send to ATEL the hand-annotated RFQ, or any document indicating the new requirements, at any point in July 2003.

Meanwhile, however, ATEL had arranged for a meeting on July 30, 2003, with David Gilmore, the recently court-appointed Transportation Administrator for DCPS, and Patrick Kean, Gilmore's chief operating officer, to discuss the large payments DCPS owed to ATEL on its existing bus contracts. Attending the meeting for ATEL were Brian Connolly, its CEO, and George Lowe, its consultant for the bus contracts. Gilmore had been appointed Transportation Administrator by order of the United States District Court on June 25, 2003. (Joint Ex. 25; Hearing Tr. 6-7). At the meeting, Gilmore opened by asking Connolly, "Where's my buses?" (Lowe Dep. 15). Lowe responded, "Where's our money?" (Lowe Dep. 17-18). ATEL also inquired whether DCPS had a source of funding to acquire the 60 buses it was now soliciting. (Lowe Dep. 15). Gilmore advised the ATEL representatives that the bus requirements had changed from 60 to 90 buses based on a recent DCPS report. (Lowe Dep. 14). This was the first indication ATEL had that the requirement was for 90, rather than 60, buses. During the meeting, Gilmore shared with the ATEL representatives a copy of the United States District Court order appointing him as Transportation Administrator for DCPS. (Lowe Dep. 17). Gilmore stated that he intended to use funds from the $11 million account that was established under the court order to bring DCPS's overdue account with ATEL current. (Lowe Dep. 19). The same $11 million account would be used to fund the new bus requirement. Gilmore indicated that he had authority to make procurement commitments on behalf of DCPS. (Hearing Tr. 28-29; Lowe Dep. 18; Benton Dep. 14-15). Gilmore later testified that although the court order provided him contracting authority, he would use DCPS ancillary services such as procurement and would make use of his contracting authority only if DCPS's contracting office was unable to timely execute the procurements that were needed. (Hearing Tr. 45-47).

When Connelly and Lowe indicated that ATEL was willing to proceed based upon Gilmore's assurances, the ATEL representatives and Gilmore then discussed at least one term concerning the anticipated contract, namely the length of the contract. ATEL proposed a term of 60 months. Although the testimony is conflicting, we find it more likely than not that Gilmore took no position but merely asked his associate, Kean, to "work out the details" with ATEL. Thus, it was understood by the meeting attendees that ATEL would submit a proposal after clarifying the details with Kean for the 90-bus requirement. (Lowe Dep. 22). Gilmore most likely knew about and recommended the actions taken by the DCPS contracting office starting in early to mid-July 2003. (Comisiak Dep. 64). He probably also knew about and perhaps directed that an RFQ for the 90 buses be sent to Laidlaw. He most likely gave instructions that directly or indirectly prompted Comisiak to email Laidlaw about the new bus requirement on July 30, coincidentally at the time Gilmore's meeting with ATEL was in progress.

ATEL states that it immediately began procuring (or at least identifying) the necessary 90 buses. Lowe attempted several times unsuccessfully to reach Kean by telephone after the meeting to work out the details of the proposal. Although ATEL representatives were unable to reach Kean, ATEL nevertheless submitted a letter proposal to Kean on August 4, 2003, reflecting the discussions Lowe and Connolly had with Gilmore during the July 30 meeting. ATEL quoted a price of $1,901 per month per "full-sized" vehicle for a 60-month lease-maintenance term. DCPS assumed that the price applied to a 48 passenger bus, but ATEL did not specify the size of the buses that it would be providing perhaps because it did not know the specifications for the 90 buses. That information was contained in the July 24 hand-annotated RFQ but ATEL never received that document or any other written form of solicitation or RFQ for the 90-bus requirement. (Lowe Dep. 36).

Laidlaw responded to the July 24 hand-annotated RFQ in a letter dated August 1, 2003, with a listing of the 90 specific buses that it proposed to provide. It quoted the same per vehicle per year price contained in its existing lease-maintenance agreement with DCPS. (Joint Ex. 9). On a monthly basis, the price was $1,827.43. Laidlaw modified its response by letter dated August 5, 2003, providing information about delivery, including possible delivery delays. (Joint Ex. 11).

The DCPS contracting officer, Annie Watkins, testified that the 90-bus requirement was a new and different requirement and that the prior 60-bus RFQ was "dead" as of August 1, 2003. (Watkins Dep. 34-35 (Joint Ex. 23)). Watkins understood ATEL's August 4, 2003 letter (Joint Ex. 10) to be its bid in response to the new 90-bus procurement. (Watkins Dep. 35). By emails exchanged on August 5, 2003, ATEL (Mr. Lowe) asked DCPS "when is my contract going to be available?" DCPS (Mr. Comisiak) responded, "When I say so." (Joint Ex. 12).

Gilmore and DCPS had determined that DCPS would only consider a 12-month lease. The facts show that neither Gilmore nor DCPS communicated to ATEL that its 60-month lease term proposal for the 90-bus requirement would not be considered unless the term was 12 months. Watkins testified that she never discussed with ATEL whether ATEL would have been willing to quote the 90 buses under a 12-month lease arrangement rather than the 60-month term provided in its letter proposal. (Watkins Dep. 31). It is also clear that Comisiak never discussed with ATEL whether ATEL would have been willing to price the 90 buses under a 12-month lease term. (*Id.*) We accept Lowe's testimony that DCPS never told ATEL that it would consider offers for the 90-bus procurement only if the offered term was 12 months or less. (Lowe Dep. 38). ATEL states that it would have quoted a price using a 12-month lease term if it had known that to be a requirement. Indeed, it previously had quoted a 12-month lease term for the 60-bus RFQ.

DCPS awarded Letter Contract No. GAGA-2004-C-0014 to Laidlaw on August 15, 2004. (Joint Ex. 14). The letter contract provides that Laidlaw was to lease to and maintain 90 buses for DCPS for the period August 27, 2003, through August 26, 2004, with a monthly vehicle lease/maintenance payment of $164,468.67. (Joint Ex. 14, at 4 (Section B.1)). The letter contract also states:

> DCPS intends to definitize this letter contract within 60 days from date of award of this letter contract, at which time this letter contract shall merge with the definitized contract. Before expiration of the 60 days, the Contracting Officer may authorize an additional period in accordance with [27 DCMR 2425.9] . . . . If DCPS does not definitize this letter contract within 60 days of the date of award . . . or any extension

> thereof, this letter contract shall expire. In the event of expiration of this letter contract, DCPS shall pay the Contractor for the services performed under this letter contract in an amount not to exceed $328,937.40 In no event shall the amount paid under this letter contract or any extension thereof exceed (50%) of the total definitized contract amount.
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> The duration of the definitized contract shall be from date of award through one year thereafter. DCPS shall pay the Contractor for services performed during the first year of the definitized contract in an amount not to exceed $1,973,619.90.

(Joint Ex. 14, at 1). The letter contract provided the following timeline for definitizing the contract:

September 1, 2003:	Transmit definitive contract to Contractor for signature.
September 5, 2003:	Transmit definitive contract to Board of Education for approval.
September 16, 2003:	Transmit definitive contract to City Council for Approval.
October 1, 2003:	Award definitive contract.

Also on August 15, DCPS's Chief Procurement Officer, Debor Dosunmu, and Watkins executed a determination and findings ("D&F") in regard to the award of Contract No. GAGA-2004-C-0014. The D&F cites 27 DCMR § 1702.3(b) as "authorization." That provision authorizes a procurement on a sole source basis "based on the particular source's ownership or control of limited rights in data, patent rights, copyrights or trade secrets related to the required supplies." The D&F implies that Laidlaw is the only available source capable of supplying the buses in the timeframe needed by DCPS. (Joint Ex. 15).

On Tuesday, August 19, 2003, Lowe learned that additional school buses were arriving at the DCPS lot on New York Avenue. (Lowe Dep. 38; Joint Ex. 18). On September 2, 2003, ATEL filed with the Board its initial protest of the award by DCPS to Laidlaw. (CAB No. P-0678). On October 10, 2003, ATEL filed a supplemental protest (CAB No. P-0680), alleging that DCPS had not received approval from the Council pursuant to D.C. Code § 2-301.05a (requiring Council approval for contracts in excess of $1,000,000) for the Laidlaw contract. The Board consolidated the two protests. In a January 8, 2004 filing, DCPS responded to the supplemental protest ground as follows:

> The amount to be paid to the Contractor under the definitized contract is $1,973,619.90. The letter contract has not yet been definitized. Therefore, the maximum amount that could be paid under the letter contract is $986,809.95, or 50% of the definitized amount. Thus, D.C. Code Ann. § 2-301.05a is not implicated because the amount of the letter contract can not exceed $1,000,000.

The parties attempted to settle the protests but those efforts were unsuccessful. The Board conducted a hearing on March 10, 2004, to receive the testimony of David Gilmore. The parties thereafter filed closing briefs and replies.

On June 2, 2004, the Board conducted a telephone conference with the parties to inquire about whether the letter contract with Laidlaw had ever been definitized and submitted to the Council for approval. DCPS counsel states that Laidlaw is still providing the 90 buses to DCPS purportedly under the letter contract. DCPS explains that it decided not to definitize the letter contract and intended

merely to let the letter contract expire at the end of the anticipated definitized contract term of August 26, 2004. In response to the Board's inquiries regarding any extension of the letter contract, DCPS submitted 6 modifications of the letter contract (documents that DCPS should have previously filed as part of its ongoing obligation to advise the Board of any changes to the contract at issue). Modification No. 1, dated October 13, 2003, extended the term of the letter contract through November 30, 2003, and increased the price from $328,937.40 to $581,122.04. Modification No. 2, dated November 21, 2003, extended the term of the letter contract through January 31, 2004, and increased the price to $897,146.64. Modification No. 3, dated February 26, 2004 (with an effective date of February 1, 2004), extended the term of the letter contract through February 29, 2004, and purported to increase the price to $1,048,611.90, but also contradictorily states that "the total letter contract value remains unchanged." Modification No. 4, also dated February 26, 2004 (with an effective date of February 1, 2004), purported to extend the term of the letter contract through May 31, 2004, and to increase the price to $1,529,122.38. Like Modification No. 3, it contains the statement that "the total letter contract value remains unchanged." Modification No. 5, dated March 5, 2004, "corrects the amount stated for each preceding modification" and purports to increase the price to $1,569,194.22. Modification No. 6, dated April 30, 2004 (with an effective date of March 5, 2004), purports to extend the term of the letter contract through June 30, 2004, and to increase the price to $1,736,817.11. It contains the statement that "the total letter contract value remains unchanged." All of the modifications are signed by Watkins, the DCPS contracting officer.

DISCUSSION

We exercise jurisdiction pursuant to D.C. Code § 2-309.03(a)(1).

DCPS takes the position that the contracting officers in this matter correctly determined, based on the information presented to them, that Laidlaw was the only supplier of buses that was available to supply DCPS the 90 buses it needed for a one-year lease term at that time. DCPS points out that ATEL's proposal for a 60-month lease was inconsistent with DCPS's requirement for a 12-month lease term. Laidlaw's proposal correctly quoted the buses for a 12-month lease term. The problem with DCPS's argument is that the contracting officers and the contract specialist all admitted that ATEL was capable of providing the buses. The reason ATEL did not quote a 12-month term is that it was never informed by DCPS that a 12-month term was required. ATEL never received the hand-annotated RFQ of July 24, 2003, because Comisiak and the contracting officers never followed through to make sure that both suppliers had received the same RFQ. ATEL had quoted a 12-month term for the original 60-bus RFQ and there is nothing in the record to suggest that ATEL was incapable of quoting under the same terms for the 90-bus requirement. It did not do so because Gilmore asked ATEL at the July 30 meeting what terms it wished to have for a contract and ATEL had proposed a 60-month lease. Further, when ATEL attempted to contact Kean, who was Gilmore's assistant, to work out the details of the proposal, Kean never responded and ATEL was forced to submit a proposal with no guidance as to the length of the lease term as well as the quantities of the various sizes of the 90 buses needed by DCPS. To compound the error, Comisiak sent an email request for a quote to Laidlaw on July 30 but did not send a similar email to ATEL. After Laidlaw had submitted a quote on August 1 and ATEL had submitted a quote on August 4, it had to have been clear to the contracting officers and the contract specialist that the suppliers were not quoting to the same terms and specifications. Instead of contacting ATEL and asking it to resubmit a quotation according to the desired terms and bus specifications, DCPS's contracting officials did nothing to obtain a level of competition that was easily obtainable.

DCPS ignored ATEL's inquiries and went ahead with an award to Laidlaw.

DCPS cites 27 DCMR § 1702. as its authority for making an award based on Laidlaw being the single available source. We do not agree with DCPS that the single available source authority is by nature something different from a sole source award. On the contrary, it is simply a species of a sole source award and therefore must meet the requirements for a sole source award. The Procurement Practices Act mandates fair and open competition in procurements except in very limited circumstances such as a sole source procurement authorized by D.C. Code § 2-303.05 which provides:

> (a) Procurement contracts may be awarded through noncompetitive negotiations when under rules implementing this section, the Director or the Director's designee determines in writing that one of the following conditions exists:
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> (1) There is only 1 source for the required commodity, service, or construction item;
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> (2) The contract is for the purchase of real property or interests in real property;
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> (3) The contract is with a vendor who maintains a price agreement or schedule with any federal agency, so long as no contract executed under this provision authorizes a price higher than is contained in the contract between the federal agency and the vendor;
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> (3A) The contract is with a vendor who agrees to adopt the same pricing schedule for the same services or goods as that of a vendor who maintains a price agreement or schedule with any federal agency, if no contract executed under this paragraph authorizes a price higher than is contained in the contract between the federal agency and the vendor; or
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> (4) Contracts for the purchase of commodities, supplies, equipment, or construction services that would ordinarily be purchased on a competitive basis when an emergency has been declared pursuant to § 2-303.12.

DCPS did not meet the requirements for a sole source award in this case. The DCPS contracting officers and the contract specialist conceded that the only reason for awarding to Laidlaw was that Laidlaw had proposed a 12-month lease term and ATEL had proposed a 60-month lease term. But, it is equally clear that ATEL was never given an opportunity to propose a 12-month lease term for the 90-bus requirement. Indeed, ATEL was not even provided the quantities of buses by passenger size and specifications. Watkins' reason for not issuing a solicitation under the provisions for competitive sealed proposals is that she believed that neither supplier could deliver all 90 buses on short notice and that DCPS would therefore simply negotiate a modification of their existing (and apparently unexecuted) contracts and add additional buses to those contracts. But, in fact, DCPS did not add the 90 buses to the existing Laidlaw and ATEL contracts but rather executed a single new contract with Laidlaw.

The DCPS contracting personnel stated that the procurement of the 90 buses was not an

emergency procurement as defined in D.C. Code § 2-303.12(a). DCPS contracting officials never prepared a determination declaring an emergency procurement as required by D.C. Code § 2-303.12(a)(3). In any event, even under what appeared to be emergency conditions here, DCPS could have and should have obtained competition from at least Laidlaw and ATEL. If DCPS had sent the same hand-annotated July 24 RFQ to both Laidlaw and ATEL, it would have achieved a reasonable measure of competition between these two suppliers.

In sum, DCPS violated basic procurement law by failing to justify the sole source award to Laidlaw, failing to use a competitive method for procuring the buses, failing to provide the same terms and specifications to the suppliers who were capable of competing, and failing to treat each of the suppliers in a fair and equal manner.

For the reasons discussed above, we sustain ATEL's consolidated protests. ATEL asserts that the violations were so substantial as to render the award to Laidlaw void *ab initio*. We find that the actions of DCPS were arbitrary and irrational, but we decline to conclude that the violations render the contract void *ab initio*.

Some of the errors resulted from a lack of diligence and poor contracting practices while others resulted from the unique situation of a newly court-appointed Transportation Administrator facing a critical need for additional buses with a new school year ready to begin. The contracting officer claims that she instructed the contract specialist to send the 90-bus requirement to both ATEL and Laidlaw. The contract specialist states that he thought he did send the requirement to both. The contracting officers and the contract specialist did not maintain proper records, being unable to produce any of the materials sent to Laidlaw or allegedly sent to ATEL. Only after we ordered DCPS to obtain the critical documentation from Laidlaw, which Laidlaw had in its files, were we able piece together some of the key events in the procurement. The contracting officer is responsible for making sure that procurements are properly done. The communications by the contracting office with the suppliers were vague, incomplete, replete with errors, carelessly transmitted, lacking proper instructions, and not maintained in the contract file. The contracting officer was not diligent in following up with the contract specialist to make sure that both suppliers had received the same requirements information against which to submit a quotation. And after the proposals (Laidlaw's August 1 proposal and ATEL's August 4 proposal) were submitted, the contracting officer certainly should have realized that DCPS had not provided the same information to both suppliers. At that point, the contracting officer should have contacted ATEL and discovered why it quoted a 60-month term rather than a 12-month term, and why it did not specify the quantities and specifications for the buses. With those actions, DCPS would have learned that ATEL did not receive the July 24 hand-annotated RFQ, and DCPS could have instructed ATEL to resubmit its quotation based on the RFQ rather than on the verbal and undefined terms given to ATEL by Gilmore.

As mentioned above, part of the problem also stems from the fact that the DCPS procurement personnel (contracting officer and contract specialist) were dealing with Laidlaw, while the court-appointed Transportation Administrator (Gilmore) was dealing (on a single occasion, *i.e.*, July 30) with ATEL at the critical time for the 90-bus procurement. ATEL was unable to get clear specifications from Gilmore or his assistant, Kean, the DCPS contracting office withheld vital information from ATEL, and ATEL did not know that DCPS contracting personnel were dealing with Laidlaw. Both suppliers thought that they were in individual negotiations for the 90-bus requirement. As a result,

there was confusion among not only the bus suppliers (principally ATEL) but also Gilmore and the DCPS contracting office. Gilmore testified that he did not use the contracting authority he was granted in the court order which appointed him but in fact his "recommendations" were acted upon by the contracting officers and the contract specialist. In any event, it was the DCPS contracting officer, not Gilmore, who executed the letter contract with Laidlaw.

At this point, termination as a remedy is moot. The August 2003 letter contract that DCPS signed with Laidlaw has no legal force. By its terms, it was to be effective for 60 days, subject to extensions pursuant to 27 DCMR § 2425.9, which provides:

> The contracting officer shall execute a definitive contract within one hundred and twenty (120) days after the date of execution of the letter contract or before completion of fifty percent (50%) of the work to be performed, whichever occurs first. The contracting officer may authorize an additional period if the additional period is approved in writing by the head of the contracting agency.

DCPS has submitted extensions purportedly through June 30, 2004. However, the letter contract provides that in no event shall the amount paid under the letter contract or any extension exceed 50 percent of the total definitized contract amount of $1,973,619.90. Thus, the letter contract had a not-to-exceed amount of $986,809.95, which is less than the $1,000,000 threshold for Council approval under District law. Normally, only definitized contracts are submitted to the Council. D.C. Code § 1-204.51 (formerly D.C. Code § 1-1130 (2001)) provides in relevant part:

> (b) Contracts exceeding certain amount.
>
> (1) In general. -- No contract involving expenditures in excess of $ 1,000,000 during a 12-month period may be made unless the Mayor submits the contract to the Council for its approval and the Council approves the contract (in accordance with criteria established by act of the Council).

In addition, D.C. Code § 2-301.05a (entitled "Criteria for Council review of multiyear contracts and contracts in excess of $1 million") (formerly D.C. Code § 1-1181.5a (2001)) provides in part:

> (a) Pursuant to § 1-204.51, prior to the award of a multiyear contract or a contract in excess of $ 1,000,000 during a 12-month period, the Mayor or executive independent agency or instrumentality shall submit the proposed contract to the Council for review and approval in accordance with the criteria established in this section.
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> . . . .
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> (d) After July 28, 1995, no proposed multiyear contract or lease and no proposed contract or lease worth over $ 1,000,000 for a 12-month period may be awarded until after the Council has reviewed and approved the proposed contract or lease as provided in this section.
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> (e) After July 28, 1995, any employee or agency head who shall knowingly or

> willfully enter into a proposed multiyear contract or a proposed contract or lease in excess of $ 1,000,000 without prior Council review and approval in accordance with this section shall be subject to suspension, dismissal, or other disciplinary action under the procedures set forth in § 1-616.01(d)(1) and (18). This subsection shall apply to subordinate agency heads appointed according to subchapter X-A of Chapter 6 of Title 1, and to independent agency heads.
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> (f)(1) No contractor who knowingly or willfully performs on a contract with the District by providing a product or service worth in excess of $ 1,000,000 for a 12-month period based on a contract made after July 28, 1995, without prior Council approval, can be paid more than $ 1,000,000 for the products or services provided.

Modification No. 3, which extended the term of the letter contract through February 29, 2004, exceeded the not-to-exceed amount by nearly $62,000, and also exceeded the $1,000,000 contract threshold for Council review and approval. There is no evidence in the record that DCPS even sought Council approval. DCPS explains that it decided not to definitize the letter contract and intended merely to let the letter contract expire at the end of the anticipated definitized contract term of August 26, 2004. The problem with this approach, as just stated, is that the value of services during the past 9 months has far exceeded the letter contract's not-to-exceed amount and the statutory threshold of $1,000,000 for Council approval. Those thresholds were exceeded by late February 2004. Accordingly, Laidlaw has been performing without a valid contract since then. Because DCPS has never received Council approval, performance by and payments to Laidlaw after late February 2004 violate D.C. Code §§ 1-204.51 and 2-301.05a. *See Second Genesis, Inc.*, CAB No. D-1100, Feb. 4, 2000, 48 D.C. Reg. 1480, 1489.

DCPS states that Laidlaw is still providing the 90 buses to DCPS purportedly under the letter contract. Because there is no valid contract for Laidlaw's current performance, we direct DCPS to promptly compete its requirements for at least the remainder of the intended definitized contract term. We understand that there is an outstanding DCPS solicitation for a major acquisition of approximately 580 buses. It is for DCPS to decide how best it will meet its current and future requirements using valid, competitive procurement procedures.

Pursuant to D.C. Code § 2-309.08(f)(2), we award ATEL its reasonable proposal preparation costs and cost of pursing the consolidated protests. ATEL submitted a request for $196,795, consisting of $95,570 for labor hours incurred by ATEL's CEO, CFO, and staff, and another $101,225 billed by ATEL's consultant (George Lowe). We have reviewed ATEL's submission and DCPS's response to that submission. We find that ATEL has not properly documented its request for costs. To verify costs, the Board requires that a protester:

> (1) submit the names of its employees who worked on the bid or proposal, (2) identify and describe the tasks performed, (3) submit documentation supporting the hourly rates and number of hours worked, and (4) document overhead and fringe benefits. In so doing, we also require an affidavit or verified statement from one or more of the protestor's principals, which contains the explanations of costs incurred. … We do not mean to indicate that we require precise mathematical certainty in order to award bid or proposal preparation costs. However, we will not base awards on unsubstantiated

claims by the protestor which engage the Board in mere speculation.

Tito Contractors, Inc., CAB No. 363, Aug. 12, 1993, 41 D.C. Reg. 3597; *see also Recycling Solutions, Inc.*, CAB No. 377, June 30, 1995, 42 D.C. Reg. 4990. Further, the amount claimed must be reasonable. "[A] claim is reasonable if, in its nature and amount, the costs do not exceed those that would be incurred by a prudent person in pursuit of a protest." *Galen Medical Associates, Inc*., B-288661.6, July 22, 2002, 2002 CPD ¶ 114. ATEL's submission does not include required documentation of the names of the employees, an explanation of what each employee did, support for the employee labor costs, a breakdown of the staff who incurred labor hours, and either payroll documentation establishing the hours incurred or affidavits from each attesting to the labor hours incurred. All we have is a single affidavit from Brian Benton, the CFO, with an attached exhibit (Exhibit A) which lists brief activity descriptions and numbers of hours in three categories, "CEO", "CFO", and "Staff." Nor is there any explanation of the "freight" cost of $6,000 contained in the same exhibit. Finally, the only support for the $101,225 fee of George Lowe of Van Scoyoc Associates, Inc., is an undated letter from Lowe to Benton (Exhibit B) stating that "our fees incurred to date with respect to the bid protest which has been on-going since August 2004 through current date presently aggregate $101,225.00." Billing records are needed for Lowe describing activities and hours incurred by date, evidence of billing rate, and a specification of the amount, date, and reason for incurring each cost other than labor.

The parties shall negotiate the appropriate amount due ATEL and DCPS shall promptly pay the agreed upon amount. If the parties cannot agree, they shall present the matter to the Board for resolution.

SO ORDERED.

DATED: June 3, 2004

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

CONCURRING:

/s/ Matthew S. Watson
MATTHEW S. WATSON
Administrative Judge

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