GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

PROTEST OF:

SMITH & WESSON)
)
Under IFB No. 6279-AA-10-0-6-EJ)

For the Protester: Dennis B. Lee, Director, Federal Marketing. For the Government: Philip T. VanZile, Assistant Corporation Counsel, D.C.

Opinion by Administrative Judge Sharpe[1] with Administrative Judges Booker and Davis concurring.

OPINION

There is pending before us the District's motion to dismiss this protest[2] as being time barred under the provisions of the D.C. Procurement Practices Act of 1985 (PPA), D.C. Code, sec. 1-1189.8(b)(1987) and our protest regulations (sec. 300.4). See "Motion of Appellee District of Columbia to Dismiss the Bid Protest or, in the Alternative, for Extension of Time in Which to File An Agency Report" (filed September 26, 1986). The motion was accompanied by a memorandum of points and authorities (District's Memorandum). The protester, Smith & Wesson (S&W), did not file a response to the motion.

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[1]Judge Sharpe's participation in this case is pursuant to the authority contained in the D.C. Procurement Practices Act of 1985, D.C. Code, sec. 1-1189.2(c)(2) (1987).

[2]This case originated during the period when the District of Columbia Contract Appeals Board was functioning pursuant to Commissioner's Order No. 9, D.C. Code, Supplement V (1978), as amended by Mayor's Order 86-65, 33 DCR 3006 (May 16, 1986). Pursuant to the D.C. Procurement Practices Act of 1985 (PPA), D.C. Code, sec. 1-1189.1 (1987), a new independent agency denominated as the Contract Appeals Board was created. This new Board became operational on August 1, 1988, and succeeded to the jurisdiction of all cases pending before the previously established Board.

We proceed to set out the facts relevant to the District's motion. On February 27, 1986, the Department of Administrative Services (DAS), on behalf of the D.C. Metropolitan Police Department, issued Invitation for Bids No. 6279-AA-10-0-6-EJ (IFB) for the procurement of 9mm semi-automatic pistols and magazines for the pistols. See District's Memorandum, exh. A. By its letter dated March 21, 1986, to DAS, S&W requested clarification of two requirements included in the IFB and claimed, in effect, that certain other specifications were unduly restrictive of competition and in one case also amounted to a sole-source procurement. The March 21 letter closed with the following solicitation:

> . . . in the interest of competitiveness in procurement and to ensure that the Government be guaranteed safe and reliable equipment at the best available price, it is strongly requested that a re-issuance of these specifications and an appropriate extension of the bid opening date be accommodated.

In a follow-up letter dated April, 4, 1986, S&W asked DAS for a response to its March 21 letter. On June 6, 1986, DAS responded seriatim to the March 21 letter in the form of a written amendment (Addendum No. 4) to the IFB. See District's Memorandum, exh. C. Addendum No. 4 contained, among other things, clarifications and the reasoning behind the specifications S&W questioned. In the final analysis, Addendum No. 4 did not change any of the questioned specifications other than by clarification.

Being of the view that Addendum No. 4 did not modify the IFB as requested in its March 21 letter, S&W, by letter dated June 26, 1986, submitted a protest to DAS. The protest was directed to Ms. Gwendolyn B. Lewis, Acting Administrator, Materiel Management

Administration.[3] DAS forwarded the protest to the Board, and we received it on July 10, 1986. Five days later (July 15, 1986), S&W filed a protest with the Board setting forth grounds identical to those that were included in the protest it submitted to DAS.[4]

Any analysis of a question concerning the timeliness of a protest must begin with a recognition that the PPA (sec. 1-1189.8(b)) requires a protest to be filed with the Board within ten working days after the protester knew or should have known of the grounds on which the protest is based. We have consistently construed this section to mean that this Board is without jurisdiction to hear and decide on the merits, a protest which does not meet the statutory ten-working days filing requirement. See Hood's Institutional Foods (D.C. CAB January 25, 1989), citing, MTI Construction Company, Inc., 1 P.D. 66, 70-71 (D.C. CAB June 1, 1987) and Southern International Corporation, 1 P.D. 30, 31 (D.C. CAB February 27, 1987). The District argues that S&W's March 21 letter evidences that it was aware of its protest grounds as of the date of the letter. See District's Memorandum at 3. Alternatively, the District argues that because Addendum No. 4 made a definite response to the March 21 letter, S&W knew or should have known of its grounds of protest on or about June 10, 1986 (the signature date shown on S&W's acknowledgment of Addendum No. 4).

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[3]It appears from the date stamped on the protest letter that the protest was received by Ms. Lewis' office on June 30, 1986.

[4]We note that the Board's letter of September 4, 1986, to S&W acknowledging receipt of the protest incorrectly stated that the Board received the protest on July 18, 1986. In this regard, see the Board's docket sheet for this case and the date stamp on the back of the protest letter.

Id.; see also S&W's signed copy of Addendum No. 4 attached to the protest. If we agree with either of the District's arguments, we must dismiss the protest because each of the occasions the District refers to occurred more than ten working days before the July 15, 1986 filing date of the protest. July 15, 1986, is the operative protest filing date because the protest which was directed to DAS and later transmitted by it to the Board is not properly before us. Section 1-1189.3(1) provides that protests must be "addressed to the Board" not to the procuring agency in order for the Board to have jurisdiction to review and decide them. It therefore follows that a protest which has not been addressed to the Board, though received by it, has not been filed with the Board. See MTI Construction Company, Inc., supra, at 68.

The critical fact underlying the District's two arguments is S&W's March 21 letter. In that letter, S&W asked DAS to clarify two of the IFB requirements. All of the other points in the letter spoke to S&W's view that the specifications it called attention to were unduly restrictive of competition. With respect to those protest grounds which allege unduly restrictive specifications, we think it pertinent to note our comment in Datacom Systems Corporation, CAB No. P-64 at 27 (D.C. CAB January 11, 1988):

> ". . . once a party knows or should have known of all the facts and circumstances necessary to form the basis of a protest, it simply cannot, without the consequence of dismissal, delay filing a protest with the Board for more than ten working days on the premise that it may pursue resolution of its objections to the procurement with agency officials."

Here, the specifications S&W complained of in its March 21 letter

as being unduly restrictive of competition constitute, in part, the basis of the protest now under consideration. Consequently, the record leaves no doubt that S&W knew of these grounds on March 21, 1986. By failing to file a protest with the Board within ten working days of the time it prepared the March 21 letter, S&W caused that portion of the protest alleging unduly restrictive specifications to be late.

S&W states in its protest that the protest "is made in accordance with Federal Acquisition Regulations [FAR]: Part 33, Subpart 33.1 - Protests." The FAR applies to Federal Executive agencies (see 48 C.F.R. sec. 1.101 (1987)) and does not in any way govern the filing of a protest involving a District government procurement. On the basis of S&W's statement, we presume that S&W simply misunderstood the procedure for filing a protest involving a procurement by a District government agency which is subordinate to the Mayor of the District of Columbia, as is the case here. In this regard, we reiterate what we stated in MTI Construction Company, Inc., supra at 71--i.e., secs. 1-1181.4(c), 1-1189.3(1) and 1-1189.8(b), when read in tandem with one another, make clear how all such protests are to be filed. Therefore, a protester "is not excused from complying with the [PPA's] filing requirements because it in earnest sought, in the first instance, to obtain resolution of its protest from the procuring agency." Id. (Citation omitted.) Insofar as filing a protest with the procuring agency is concerned, we indicated in Datacom Systems Corporation, supra at 19 that the PPA does not preclude a party from initially complaining to the procuring agency, and, as would be the case with any other

controversy subject to our jurisdiction, we encourage settlement of protests between the protester and the procuring agency. We further pointed out that there are several options open to a party to directly complain to the procuring officials without losing its right of protest to the Board:

> One approach would be for the party to initially submit its complaint to the procuring officials, and if a satisfactory resolution does not appear to be shortly forthcoming, file a protective protest with the Board before the ten-working day period expires. Another approach would be for the party to proceed to file a protest at the outset with the Board and either contemporaneously or thereafter pursue resolution of its complaint directly with the procuring officials while the protest is pending.

Id. at 19 and 20.

We noted earlier that S&W, in its March 21 letter, asked for clarification of two requirements which were included in the IFB. Since, at the time of the clarification request, it did not have sufficient information to determine whether it had a ground of protest, it would have been premature for S&W to file a protest with the Board at that time regarding the unclarified matters. We therefore disagree with that aspect of the District's argument which contends that the protest grounds relating to S&W's clarification requests should have been filed with the Board on March 21. The key date for determining the timeliness of S&W's protest regarding those requirements it sought clarification on is the date it first received a definitive response to its inquiries or the date when it became or should have became knowledgeable of a DAS action which was adverse to its concerns.

We mentioned previously that DAS responded to S&W's clarification requests by way of its Addendum No. 4 to the IFB,

and S&W acknowledged the addendum on June 10, 1986. We think it reasonable to infer from S&W's acknowledgment that it read the addendum before signing it. After reading the addendum, S&W knew or should have known whether and to what extent DAS had allayed it concerns. IF S&W had further concerns with the IFB requirements, it should have protested to the Board no later than June 24, 1986. Since the protest grounds concerning the IFB requirements which were the subject of the clarification requests were not raised with the Board until July 15, 1986, they are untimely.

For the reasons we have discussed, it is

ORDERED that the District's motion to dismiss this protest for untimeliness is GRANTED, and the protest is dismissed with prejudice.

DATE: February 27, 1989

SAMUEL S. SHARPE
Administrative Judge

CONCUR:

CLAUDIA D. BOOKER
Administrative Judge

WILLIAM L. DAVIS
Chief Administrative Judge