

GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

PROTEST OF:

C&E SERVICES, INC. OF WASHINGTON)	
)	CAB No. P-465
Under Solicitation No. OMS-7002-AA-AC)	

For the Protester: Mr. Carl L. Biggs, General Manager, C&E Services, Inc., *pro se*.
For the Government: Anne Cauman and Howard S. Schwartz, Assistants Corporation Counsel.

Opinion by Administrative Judge Jonathan D. Zischkau, with Chief Administrative Judge Lorilyn E. Simkins and Administrative Judge Phyllis W. Jackson, concurring.

OPINION

C&E Services, Inc. of Washington ("C&E") has filed a protest of the revised Emergency Solicitation No. OMS-7002-AA-AC, challenging the decision of the Department of Public Works ("DPW") cancelling -- after bid opening -- the initial Emergency Solicitation, issued in the small business set-aside market and reissuing the Emergency Solicitation in the open market. C&E was low bidder on both the initial and revised solicitation, but lowered its bid price in responding to the revised solicitation. Relying on the Water and Sewer Authority Establishment and Department of Public Works Reorganization Act of 1996 (the "WASA Act"), D.C. Law 11-111, D.C. Code §§ 43-1661 to 43-1689 (Supp. 1996), which created the District of Columbia Water and Sewer Authority ("WASA"), and certain provisions of the WASA Act which make the Procurement Practices Act ("PPA") inapplicable to WASA procurements, WASA argues that the Board lacks jurisdiction over this protest. Alternatively, on the merits of the protest, WASA argues that DPW properly decided to cancel the initial solicitation and issue the revised solicitation because the United States Environmental Protection Agency ("EPA") advised DPW that use of a set-aside procurement would violate EPA requirements for open competition and therefore would preclude federal funding.

We conclude that this procurement was issued by DPW and conducted by DPW under the terms of the PPA, not the WASA Act. Therefore, the Board has protest jurisdiction. On the merits, we agree that DPW had a compelling reason for cancelling the initial solicitation and issuing the revised solicitation in the open market. Accordingly, we deny the protest.

FACTS

On October 21, 1996, DPW issued the initial Emergency Solicitation No. OMS-7002-AA-AC in the small business set-aside market, for the procurement of an estimated 900,000 gallons of methanol. (C&E Response, filed January 23, 1997, Tab A; WASA Response, filed January 13, 1997, Exhibit 1, at 3-13, Exhibit 2, at 1-4). The due date for bids was October 23, 1996. On October 22, 1996, DPW's contracting officer certified the "Findings" section of a

Determination and Findings ("D&F") justifying the need for the emergency procurement. The first finding cites D.C. Code § 1-1183.12(a)(1) ("Emergency Procurements") and 27 DCMR § 1710 ("Emergency Procurements") as authorization for the action. In his findings, DPW's contracting officer states that "DPW will solicit quotations to obtain the maximum practical competition." (*Id.*, Exhibit 2). The "Determination" section of the D&F states:

Based on the findings, it is hereby determined that the subject methanol should be procured on an emergency basis in accordance with D.C. Code section 1-1183.12(a)(1) and 27 DCMR section 1710, as certified [by DPW's contracting officer] above.

The "Determination" is dated October 24, 1996, and signed by the Director of the Department of Administrative Services ("DAS Director"). By memorandum dated October 24, the DAS Director returned the executed D&F to the Director of DPW. In the memorandum, the DAS Director notes that 27 DCMR § 1710.5 limits the period of emergency procurements to a maximum of 120 days, and the DAS Director directs that the DPW Director ensure that "the maximum period of this emergency procurement does not exceed 120 days and that you initiate a separate non-emergency procurement for this requirement" (*Id.*, Exhibit 2).

DPW received quotations from three vendors, and the low bid was C&E's at \$594,000. (*Id.*, Exhibit 5). No award was made. Instead, on October 28, 1996, DPW issued Addendum No. 1, revising the initial solicitation by eliminating the small business set-aside restriction and requesting new bids due that same day at 5:00 p.m. (*Id.*, Exhibit 1, at 1-2; C&E Response, filed January 23, 1997, Tab A). Apparently, there is no D&F supporting DPW's action of cancelling the initial solicitation and issuing the revised solicitation. DPW received timely quotations from five vendors, the three vendors who responded to the initial solicitation plus two other vendors. C&E was again the low bidder, with an actual bid price of \$585,000 and an evaluated bid price of \$514,800. (WASA Motion to Dismiss, filed December 2, 1996, Exhibit 2).

On October 28, 1996, C&E filed its protest. On November 5, 1996, C&E received contract award pursuant to the revised emergency solicitation. (WASA Motion to Dismiss, Exhibit 3). Apparently, there is no written determination of the basis for the selection of C&E. On December 2, 1996, WASA moved to dismiss the protest on the ground that the WASA Act and WASA's emergency contracting procedures govern the solicitation and award rather than the PPA. On December 10, 1996, C&E filed an opposition to the motion arguing that the solicitation was issued by DPW under the PPA and that WASA has not established its own procurement system but rather continues to use DPW's Office of Management Services for conducting its procurement activities. The Board directed WASA to respond to C&E's opposition and also address the merits of the protest by submitting any determination and findings supporting DPW's decision to amend the initial solicitation rather than make an award pursuant to it. (Order and Report on Telephone Conference, dated December 17, 1996). On January 13, 1997, WASA filed its response. C&E filed a reply on January 23, 1997.

DISCUSSION

I. Jurisdiction

To determine whether the PPA confers protest jurisdiction over a particular solicitation, we must consider the type of contract or agreement contemplated, the nature of the agency conducting the solicitation, the basis for the procurement or contracting authority, and the statutory and regulatory scheme which controls the procurement or disposal being solicited. D.C. Code §§ 1-1181.4, 1-1181.5; *Eastern Avenue Development Corp.*, CAB No. P-437, Sept. 26, 1995, 8 P.D. 7036, 7039; *Potomac Capital Investment Corp.*, CAB No. P-383, Jan. 4, 1994, 41 D.C. Reg. 3885, 3893; *Metropolitan Svc. & Maint. Corp.*, CAB No. P-388, Feb. 7, 1995, 42 D.C. Reg. 4918, 4925-27.

The PPA governs contracts and solicitations of all agencies of the District government which are subordinate to the Mayor. D.C. Code § 1-1181.4(c)-(d) (1992). DPW, an agency subordinate to the Mayor, is covered by the PPA. Created by the WASA Act, effective April 18, 1996, WASA is an independent authority having a separate legal existence within the District government. Thus, WASA is not an agency subordinate to the Mayor. WASA is the successor to the Water and Sewer Utility Administration ("WASUA") which was an administration within DPW. The WASA Act transferred all functions of WASUA to WASA. D.C. Code § 43-1689 (Supp. 1996). On an interim basis, all assets and liabilities of WASUA were transferred to WASA. *Id.* § 43-1677(e).

The WASA Act established a Board of Directors to manage WASA. *Id.* § 43-1674. Until the initial meeting of the WASA Board, the existing management of WASUA served as the operator of WASA. *Id.* § 43-1687(a). The record suggests that the initial WASA Board meeting occurred on September 26, 1996. (District's January 13, 1997 Response, Exhibit 3, at 1). After the WASA Board's initial meeting, WASUA was statutorily abolished. D.C. Code § 43-1687(a).

Central to WASA's jurisdictional argument, the WASA Act exempts WASA from the PPA and the District's Merit Personnel Act once WASA establishes personnel and procurement systems and promulgates rules and regulations pertaining to the WASA Board's duties. Entitled "Procurement system inapplicable," D.C. Code § 43-1684 provides:

Except as provided in section 217(b) [D.C. Code § 43-1687(b)], the District of Columbia Procurement Practices Act of 1985 . . . shall not apply to the Authority [WASA].

Section 217(b) of the WASA Act, D.C. Code § 43-1687(b), provides in relevant part:

Until the [WASA] Board establishes a personnel system and a procurement system, and until rules and regulations pertaining to the Board's duties have been promulgated, the District of Columbia Procurement Practices Act . . . and the District of Columbia Government Comprehensive Merit Personnel Act . . . and implementing rules and regulations shall continue to apply to the Authority.

At its second meeting, held on October 3, 1996, the WASA Board adopted interim personnel and procurement rules through documents styled as notices of emergency rulemaking. (Motion to Dismiss, Exhibit 1; District's January 13, 1997 Response, Exhibit 3). WASA's notice of emergency rulemaking governing its procurement procedures makes the PPA and the District-wide procurement regulations (Title 27 of the DCMR) generally inapplicable except for selected chapters and provisions from Title 27 of the DCMR. The notice makes applicable in whole the provisions of 27 DCMR Chapters 8, 9, 12, 16, 21-25, 27, 31, 33, 36-37, and 42. The notice makes applicable with modifications portions of 27 DCMR Chapters 13, 15, 17-20, 26, 28, and 32. All chapters made applicable in whole or in part are further modified by the notice which calls for substituting "WASA" for each reference to the "District" and for substituting the WASA Board or the WASA General Manager for references to the Director of the Department of Administrative Services, depending on the amount of the contract or dispute. (Motion to Dismiss, Exhibit 1, at 3, ¶ 5). Chapter 38 of Title 27 of the DCMR, dealing with protests, claims, and disputes subject to our jurisdiction under the PPA, is omitted. In its place, the notice provides:

The right to protest requests for proposals, invitations for bids, specifications and awards shall be as specified in the respective document. Generally, appeals will be within ten (10) working days and submitted to the [WASA] Board or General Manager, depending on the estimated amount of the contract.

The right to appeal a decision of the contracting officer will be as specified in the contract. Generally, appeals from decisions of the contracting officer will be within thirty (30) calendar days, and submitted to the [WASA] Board or the General Manager, depending on the amount of the Contract or the amount of the claim.

(*Id.*, Exhibit 1, at 3, ¶¶ 3-4). During the October 3, 1996 WASA Board meeting, a member asked for consideration of the dispute resolution provisions. When asked how the WASA Board would deal with disputes, the meeting minutes record the following interpretation by WASA's legal counsel:

[Legal counsel] noted that protests and appeals were handled through Chapter 38 and indicated that there had been several issues with the DCMR primarily the Federal Acquisition Regulations, Chapter 10, and the claims resolution aspect of it, Chapter 38. He explained that the interim regulations purport to address both sections. He explained that the contract bidding document will include the procedure and specify the contract amount, length of time and to whom to file protests. He said the same applies for appeals. [He] reminded the Board that for existing contracts, some of which are likely to play out over the next three years, D.C. has followed the procedure of putting the appeal process into the contract; therefore, the Authority still will have to take those existing contracts to the Contract Appeals Board.

(District's January 13, 1997 Response, Exhibit 3, at 6).

Our review of the solicitations at issue here, the manner in which the procurement was conducted, and the exercise of procurement authority, when measured against WASA's own interim contracting procedures, convinces us that the initial and revised solicitations were conducted pursuant to the PPA and the District-wide procurement regulations, not WASA's interim contracting procedures. Therefore, the WASA Act's exemption from the PPA does not apply here and we properly exercise protest jurisdiction.

It is clear that DPW, not WASA, issued both the initial and the revised solicitations and conducted the procurement. The transmittal pages bear DPW's letterhead. The solicitation number for the initial and revised solicitations begins with the "OMS" leader, referring to DPW's Office of Management Services. Addendum No. 1, embodying the revised solicitation, and printed on DPW letterhead, was issued by the Acting Chief of the Contract Support Division of DPW's Office of Management Services. The initial and revised solicitations contain references to the "contracting officer" and the "District." There is no mention or reference to WASA, the WASA Board, or the WASA General Manager. Although WASA argues that DPW conducted the procurement *on behalf of WASA*, that alone does not compel the conclusion that the WASA Act applies to this procurement. The issue is whether DPW was conducting the emergency procurement under the PPA or under WASA's interim contracting procedures. We conclude that DPW conducted the procurement under the PPA.

The solicitation language itself shows indicia of a PPA procurement, but no indicia of a WASA Act procurement or even any reference to either the WASA Act or the interim contracting procedures adopted by the WASA Board of Directors. The initial and revised solicitations incorporate the District's "Standard Contract Provisions for use with the District of Columbia Supply and Services Contracts" (Dec. 1984). Article 17 of those Standard Contract Provisions provides for resolution of disputed claims through appeal to our Board. Article 17 does not, standing alone, resolve the question of our protest jurisdiction because the Standard Contract Provisions do not address protests of agency solicitations or awards.¹ A protest clause can be found in Article 9 of the District's "Instructions to Bidders" (June 1991). The solicitations here, however, do not expressly incorporate the "Instructions to Bidders."² Solicitations should contain a clause clearly advising prospective contractors of their protest rights, because procurement policy strongly favors, and procurement law usually requires, prompt assertion and adjudication of protests.³ The initial and revised emergency solicitations here contain no protest clause and do not reference any procedures for handling protests.

¹ For WASA procurements and contracts exempt from the PPA by virtue of D.C. Code § 43-1684, WASA may request that we adjudicate its contract disputes or protests, if it enters into an agreement with the Board pursuant to D.C. Code § 1-1181.4(e).

² C&E notes that in other non-emergency solicitations conducted by DPW for WASA requirements, the solicitations contain a protest clause directing that protests be filed with us. (C&E Reply, dated January 23, 1997, Tabs E-F).

³ The minutes of the WASA Board's October 3, 1996 meeting indicates that WASA will, in its own solicitations and contracts, identify its applicable protest and dispute procedures.

Nevertheless, we can see aspects of the procurement that unmistakably were conducted according to the PPA, and contrary to WASA's interim contracting procedures. For example, the D&F supporting the need for an emergency procurement is certified by DPW's contracting officer and is approved by the DAS Director. In taking their certification and approval actions, the contracting officer and the DAS Director specifically relied on D.C. Code § 1-1183.12(a)(1), a provision expressly rescinded in WASA's interim contracting procedures. WASA's interim contracting procedures rescind the applicability of section 312 of the PPA, *i.e.*, D.C. Code § 1-1183.12, and approval of an emergency procurement for a contract of the dollar value involved here is vested in the WASA Board, not the DAS Director. (Motion to Dismiss, Exhibit 1, at 3, ¶ 5.b). The record shows no involvement of the WASA Board. In a October 24, 1996 memorandum, the DAS Director directed that the Director of DPW ensure that a "separate non-emergency procurement for this requirement" be initiated if the need for methanol would continue after the 120-day maximum period for an emergency procurement pursuant to 27 DCMR § 1710.5. Such a direction is inconsistent with WASA's interim contracting rules which rescind 27 DCMR § 1710.5 and which make no provision for any action by the DAS Director.

Based on our conclusion that the procurement was conducted pursuant to the PPA, we need not address other issues raised by C&E, such as whether WASA's interim contracting procedures constitute a "procurement system" pursuant to D.C. Code § 43-1687(b).

II. Merits

WASA argues that even if the Board has protest jurisdiction, the facts compel us to deny the protest because the District had a compelling reason for cancelling the initial solicitation and issuing the revised solicitation. Citing a letter from the United States Environmental Protection Agency, dated May 24, 1996, in which the EPA advised the District that use of a set-aside procurement would preclude the District from obtaining federal grant funds for paying for the methanol, the District states that it was proper for DPW to issue the revised solicitation which placed the procurement in the open market. C&E replies that the contracting officer failed to execute a D&F supporting its decision to reissue the solicitation in the open market.

The record does not contain any evidence that the DAS Director or his designee included in the contract file a written determination supporting the cancellation of the initial solicitation and the issuing of the revised emergency solicitation in the open market, as required by D.C. Code § 1-1183.7. The emergency solicitation requirements do not exempt the Director from complying with D.C. Code § 1-1183.7. For good reason, the PPA requires that:

Every determination required by this chapter shall be in writing and based upon written findings of the public official making the determination. These determinations and written findings shall be retained in the official contract file.

D.C. Code § 1-1181.6. The requirements of this section serve the important goals of documenting the rationale of government actions, enabling meaningful review and management, assessing accountability, and providing safeguards for the maintenance of a procurement system of quality and integrity. *See id.* § 1-1181.1(b).

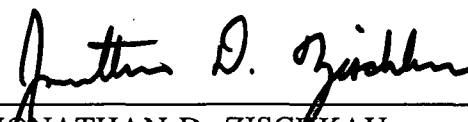
In addition, the District did not include in the record the written determination by the DAS Director or his designee of the basis for the selection of C&E, as required by D.C. Code § 1-1183.12(a)(3). When the Director or his designee validly determines that circumstances warrant an emergency procurement pursuant to D.C. Code § 1-1183.12(a), the emergency procurement requirements and other applicable requirements, including those for written determinations, as specified in the statute and implementing regulations, cannot be considered "optional" or less important simply on account of the emergency circumstances.

Although the lack of a D&F for the cancellation and resolicitation technically violates the statute, we do not believe that this defect requires us to sustain the protest. The ability to obtain federal funding, based on the guidance provided by EPA's opinion letter of May 24, 1996, constituted a compelling reason for the agency to cancel the initial emergency solicitation in the set-aside market and to revise and reissue the solicitation in the open market. C&E does not argue to the contrary. See 27 DCMR § 1530.4 (cancellation of IFB after bid opening); *Singleton Electric Co.*, CAB No. P-411, Nov. 15, 1994, 42 D.C. Reg. 4888, 4897-98.⁴


Accordingly, we deny the protest.


SO ORDERED.

DATE: February 10, 1997


 JONATHAN D. ZISCHKAU
 Administrative Judge

CONCURRING:


 LORILYN E. SIMKINS
 Chief Administrative Judge


 PHYLLIS W. JACKSON
 Administrative Judge

⁴ Because C&E has not challenged the procurement on the issue of whether the DAS Director or his designee issued a written determination of the basis for the selection of C&E pursuant to D.C. Code § 1-1183.12(a)(3), we will not rule on the issue. In addition, we do not consider whether these solicitations were valid emergency procurements. It suffices to say that the DAS Director and District contracting officials should consider carefully the standards set forth in D.C. Code § 1-1183.12(a)(1) and 27 DCMR §§ 1710.1, 1710.2, and 1710.3 governing the definition of an "emergency condition" and the circumstances justifying an emergency procurement. In particular, 27 DCMR § 1710.3(a) provides that in the absence of an emergency condition, an emergency procurement shall not be justified on the basis of "[t]he lack of adequate advance planning for the procurement of required supplies, services, or construction"

GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

717 14th STREET, N.W., Suite 430
Washington, D.C. 20005

February 11, 1997

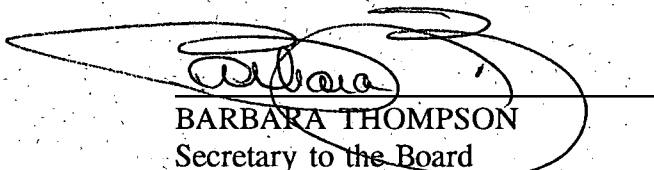
TO:

Mr. Carl L. Biggs Esquire
Mr. Sam Glasker
C&E Services, Inc., of Washington
2208 Martin Luther King Avenue, S.E.
Washington, DC 20020

Ann Cauman, Esquire
Howard S. Schwartz, Esquire
Assistants Corporation Counsel
441 4th Street, N.W., 10th Fl.
Washington, DC 20001

SUBJECT: CAB No. P-465, C&E SERVICES, INC., OF WASHINGTON

Attached is a copy of the Board's opinion DENYING protest.



BARBARA THOMPSON
Secretary to the Board