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CONTRACT APPEALS BOARD  
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January 28, 1999


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SUBJECT: CAB Nos. **P-564 & P-567**, (Protests Of: **The Answer Temps, Inc. (TAT)**)

Attached is a copy of the Board's Opinion sustaining protests.

  
BARBARA THOMPSON  
Secretary to the Board

GOVERNMENT OF THE DISTRICT OF COLUMBIA  
CONTRACT APPEALS BOARD

PROTESTS OF:

THE ANSWER TEMPS, INC.	)	
	)	CAB No. P-564, P-567
Under IFB No. DCPS-C-98219-4789-OT	)	(Consolidated)

For the Protester, The Answer Temps, Inc.: Laurence Schor, Esq., Brian T. Scher, Esq., McManus, Schor, Asmar & Darden, L.L.P. For the Intervenor, Horton & Barber Professional Services, Inc.: Ronald L. Thomas, Esq. For the Government: Howard S. Schwartz, Esq., and H. Christopher Malone, Esq., 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

In these consolidated protests, The Answer Temps, Inc. ("TAT") challenges the award of a letter contract by the District of Columbia Public Schools ("DCPS") to Horton and Barber Professional Services, Inc. ("H&B") under an emergency procurement relying on H&B's low bid price in an earlier solicitation, which was cancelled prior to an intended award to H&B. TAT contends that under the District's emergency procurement procedures, DCPS was required to obtain competition by soliciting TAT and the other contractors who submitted bids under the original (cancelled) solicitation. The District argues that DCPS did not have adequate time to seek bids under the emergency procurement and that only H&B was capable of timely providing the required services. We conclude that DCPS has failed to demonstrate that TAT or the other bidders were unable to provide the required services to meet the performance start date under the emergency letter contract. Because of the specification changes incorporated into the emergency procurement, it was not proper to rely on bids from the earlier solicitation. Accordingly, we sustain the protests.

### BACKGROUND

On July 24, 1998, DCPS issued IFB No. DCPS-C-98219-4789-OT for a contractor to provide 370 bus drivers and 370 attendants to transport special education students for the period October 1, 1998, through September 30, 1999. (Agency Report ("AR") Ex. 1). On July 30, 1998, TAT, the incumbent contractor whose existing contract was to expire September 30, 1998, advised DCPS that the solicitation omitted a wage determination for the attendants. (TAT Response to Agency Report, filed November 13, 1998, Ex. A). On August 6, 1998, DCPS notified all bidders that there "is no wage determination available for 'Bus Attendants.' Bidders may bid accordingly for this labor category." (*Id.*, Ex. B). Five bids were opened on August 10, 1998. After adjusting for bid preferences, H&B had the lowest evaluated bid of

\$43,163,193.60 for the base year and two option years. TAT's evaluated bid was second low at \$43,283,473.20. (AR Ex. 6, at 2 (bid abstract)). On August 11, 1998, TAT filed with the DCPS contracting officer a protest of any award to H&B,<sup>1</sup> which the contracting officer purported to deny on September 3, 1998. (TAT Response to Agency Report, Exs. C, D). Meanwhile, the contracting officer was preparing to award the contract to H&B. On September 1, 1998, the contracting officer determined that H&B was responsible and that its prices were reasonable. (AR Ex. 4).

On September 14, TAT filed a protest with us, docketed as CAB No. P-558, challenging any contract award on the ground that a proper wage determination for bus attendants was not included in the solicitation.

On September 25, 1998, the District's Chief Procurement Officer informed the DCPS contracting officer that a contract award to H&B would not be approved because the IFB specifications failed to include the existing wage determination for bus attendants and failed to accurately state the number of bus drivers actually needed by DCPS. (See AR Ex. 7). On the same date, September 25, 1998, the DCPS contracting officer executed a "Determination and Findings to Enter into a Letter Contract," which states in pertinent part:

Bus drivers and attendants are required for transportation of Special Education school children by [DCPS]. The current contract [with TAT] . . . expires on September 30, 1998. [DCPS] was moving toward award of a new contract with performance to begin on October 1, 1998. The solicitation . . . was cancelled on the advice of Corporat[ion] Counsel, leaving insufficient time for resolicitation. Reissuance of a competitive solicitation (Invitation for Bids) for Bus Drivers and Attendants will begin immediately.

DCPS cannot allow any disruption of these essential services. They must be provided under Court Order . . . . A Letter Contract is required to ensure continued provision of these judicially mandated services.

(AR Ex. 9).

On September 28, 1998, DCPS and H&B executed a firm fixed unit price letter contract. (AR Ex. 10). The term of the letter contract was 30 days and compensation was not to exceed \$844,032. DCPS indicates in the letter contract that it intends to issue a definitized contract within 30 days from the date of award. The letter contract also provides that DCPS may authorize performance for an additional period even if it does not definitize within the initial 30 day term. The letter contract and attachments required H&B to provide a minimum of 150 bus drivers and 150 attendants (aides) up to a maximum of 200 drivers and 200 attendants for the period October 1 to October 31, 1998, and to provide a minimum

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<sup>1</sup> TAT apparently was following incorrect protest procedures set forth in DCPS' solicitation. This Board, not DCPS, is the proper forum for protests of DCPS procurements. See *A.L. Eastmond & Sons*, CAB No. P-551, Sept. 9, 1998, 45 D.C. Reg. 8826, 8832 n.3.

of 150 bus drivers and 150 attendants up to a maximum of 370 drivers and 370 attendants for the period November 1, 1998 to January 28, 1999. (AR Ex. 10). On the same day that the letter contract was signed, September 28, 1998, the DCPS contracting officer executed findings supporting a "Determination and Findings to Conduct an Emergency Procurement," which state:

In order to ensure that there is no disruption of these judicially mandated services, the Office of Contracting and Procurement for DCPS will execute a 30-day Letter Contract (in the amount of \$832,024.00) with the low evaluated bidder, Horton and Barber Professional Services (Horton and Barber) in the original procurement. This contract will be definitized for a total period of 120 days. DCPS will initiate a resolicitation of these requirements with a February 1, 1999 date for the inception of contract performance.

The proposed awardee submitted the low evaluated bid (of five) in the subject competitive procurement and has been determined to be a responsible contractor, in that it has the credit and capacity to provide these required services. It has engaged drivers and attendants in sufficient numbers (155 and 187, respectively as of September 12, 1998, figures which are increasing daily) to meet DCPS' minimal requirements (150 and 150, respectively) for October 1, 1998 commencement date. Additionally, the prices bid by Horton and Barber are lower than both the prices and the current contract pricing of the incumbent contractor, *The Answer Temps, Inc.* These minimal requirements are substantially greater [than] the number of drivers and aides currently being provided by the incumbent contractor. It has only been able to meet approximately one-half of DCPS' previous driver and attendant staffing requirement, i.e., 230 and 230, respectively.

Further competition is not practicable in view of the need for commencement of services on October 1, 1998. The drivers and attendants were required to have been trained by DCPS prior to performing work. Since DCPS had anticipated award under the cancelled solicitation to the low evaluated bidder, Horton and Barber has engaged and had had trained the required numbers of drivers and attendants. There is presently no other firm that can provide the required number of drivers and attendants in time to ensure that no disruption of transportation services occurs. Horton and Barber stands ready, willing and able to begin performance with adequate personnel resources.

(AR Ex. 8 (paragraph numbers omitted)). On September 29, 1998, the Chief Procurement Officer executed the Determination and Findings.

The DCPS contracting officer executed a statement of findings supporting a Determination and Findings to cancel the original IFB on September 28, 1998. The Chief Procurement Officer executed the determination which cancelled the solicitation on September 29, 1998. (AR Ex. 7). Based on the cancellation, TAT's protest in CAB No. P-558 was voluntarily dismissed.

On October 16, 1998, TAT filed a new protest, docketed as CAB No. P-564, arguing that

DCPS' award of the letter contract to H&B was illegal because: (1) H&B did not have a valid corporate status because the District had revoked its corporate charter on September 8, 1998, based on H&B's failure to file its Two-Year Report and to pay associated fees; (2) DCPS could not have properly determined H&B to be a responsible bidder since it was no longer a viable corporation; (3) DCPS did not comply with applicable sole source and emergency procurement procedures because H&B was the only contractor that was solicited for the emergency contract, leaving out TAT, the incumbent contractor, and the other firms that bid under the original, now-cancelled IFB. After receiving a copy of the September 28, 1998 Determination and Findings to Conduct an Emergency Procurement, TAT filed a supplemental protest on October 27, 1998, challenging DCPS' findings, particularly the findings that "[t]here is presently no other firm that can provide the required numbers of drivers and attendants in time to ensure that no disruption of transportation occurs" and that "further competition is not practicable in view of the need for commencement of services on October 1, 1998." On October 29, 1998, TAT filed another protest, docketed as CAB No. P-567, challenging DCPS' right to extend performance of the emergency contract beyond October 31, 1998.

On November 5, 1998, the District filed its Agency Report, responding that: (1) the letter contract and extensions under the letter contract are valid because H&B's corporate charter was retroactively reinstated; (2) the contracting officer and the District's CPO obtained the maximum competition practicable in the emergency procurement pursuant to 27 DCMR § 1712 to provide transportation services required by court order; (3) the responsibility determinations and emergency procurement findings and determinations were proper and supported by substantial evidence; and (4) in extending performance, DCPS did not exercise any "option" but rather extended performance under the emergency contract consistent with 27 DCMR § 2425.9.

Although a draft definitized contract was prepared by DCPS, it was never signed by the parties. (*See, e.g.*, AR Ex. 13, 17-18). By modification of the letter contract executed on October 28, 1998, performance was extended through November 30, 1998, with a requirement "for up to 250 school bus drivers . . . and up to 250 attendants . . ." (AR Ex. 18). By modification of the letter contract executed on November 30, 1998, performance was extended through December 30, 1998, with a requirement "for up to 275 school bus drivers . . . and up to 275 attendants . . ." (District's December 7, 1998 filing). By modification of the letter contract executed on December 29, 1998, performance was extended through January 28, 1999, with a requirement "for up to 370 school bus drivers . . . and up to 370 attendants . . ." (District's January 11, 1999 filing). The modifications have collectively extended performance under the letter contract through January 28, 1999, at which time the emergency contract expires.

## DISCUSSION

We exercise protest jurisdiction pursuant to D.C. Code § 1-1189.3 (Supp. 1998).

The key issue presented by the protests is whether the District properly conducted an emergency procurement by negotiating an emergency letter contract with H&B, based on the bids submitted in connection with the original, but later cancelled, solicitation, without resoliciting either the incumbent

contractor, TAT, or any of the other three contractors who submitted a bid under the original solicitation.

The Procurement Practices Act requires that emergency procurements “shall be made with as much competition as is maximally practicable under the circumstances.” D.C. Code § 1-1183.12. The District’s regulations governing emergency procurement procedures states:

The contracting officer shall attempt to solicit offers or proposals from as many potential contractors as possible under the emergency condition. An emergency procurement shall not be made on a sole source basis unless the emergency D&F includes justification for the sole source procurement, in accordance with § 1705.

27 DCMR § 1712.3.

The District relies on the findings made by the DCPS contracting officer that no competition beyond the competitive bidding under the original (later cancelled) solicitation was practicable because: (a) H&B had engaged and trained the required number of bus drivers and attendants; (b) DCPS had trained the H&B bus drivers and attendants; (c) H&B had the lowest bid prices for the services under the cancelled solicitation; and (d) no other contractor could provide the required number of drivers and attendants and meet all of the necessary transportation requirements by the October 1, 1998 start date.

We find that the contracting officer’s finding – that no other contractor could provide the required number of drivers and attendants and meet all of the necessary transportation requirements – is unsupported by the record. The letter contract required the contractor to provide a minimum of 150 drivers and attendants up to a maximum of 200 drivers and attendants. First, DCPS never contacted either TAT or any of the other three contractors to determine whether they could supply the numbers required by the letter contract, amounts substantially lower than the number of drivers and attendants required by the original solicitation. Indeed, one of the problems with the original solicitation was that it overstated DCPS’ actual driver and attendant needs. Second, TAT was the incumbent contractor providing the same services and it was TAT’s contract that was expiring on September 30, 1998. As of September 11, 1998, TAT states that it was providing 176 drivers and by September 28, 1998, TAT was providing 195 drivers. (TAT Supplemental Protest, Ex. C, Corrected Decl. Of Allene Graves ¶¶ 4-5). During the same period, TAT was providing 154 attendants. (TAT Response to Agency Report, Ex. E, ¶¶ 8-9). In rebuttal, the District states that TAT had been providing between 144 and 167 drivers and between 112 and 140 attendants during September 1998. (District Response, filed November 25, 1998, Ex. 1). The problem with the District’s position is that TAT was providing the number of drivers and attendants as requested by DCPS. Significantly, the DCPS contracting officer made his September 1, 1998 determination of H&B’s responsibility contingent on “H&B’s providing lists of at least 150 qualified drivers and 150 attendants by September 12, 1998.” (TAT Supplemental Protest, Ex. C (Decl. Ex. A)). Indeed, many of H&B’s expected drivers and attendants were being recruited from the ranks of TAT employees. Thus, the record shows that H&B and TAT were recruiting from a similar pool and that TAT was at least as capable as H&B in obtaining the necessary drivers and attendants for an emergency contract to begin October 1, 1998.

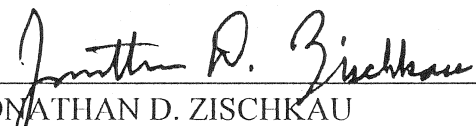
We also cannot sustain the contracting officer's finding that it was not practicable to obtain some limited competition under an emergency procurement and still meet an October 1, 1998 start date. By no later than September 25, 1998, the DCPS contracting officer knew the original solicitation would be cancelled. Having held a competition for the long-term requirements with bids opened just over a month earlier, DCPS could have issued an emergency solicitation, received bids, made the required determinations, and issued an award for performance starting October 1. Moreover, DCPS was itself responsible for the time constraints caused by its failure to remedy the solicitation defects which were made known to it even before bids were opened on the original solicitation.

The District cites *Trifax Corp.*, CAB Nos. P-194, P-197, July 9, 1991, 39 D.C. Reg. 4253, in support of the DCPS decision to limit the emergency procurement to negotiating with H&B without any additional competition beyond that provided by the original, and later cancelled solicitation. In *Trifax*, where the incumbent contractor defaulted, and same day service was needed, we found limiting competition to a database listing of current providers of the needed services met the requirement for maximum practicable competition under the emergency procedures required by 27 DCMR § 1712.3 where the contracting officer considered the necessity of the services, the known qualities of the contractor, the contractor's familiarity with the services to be provided, and the reasonableness of the price. In contrast to the situation in *Trifax*, here the only incumbent contractor, TAT, was not even solicited for a bid on the short-term emergency procurement. More importantly, DCPS did not conduct any limited competition under the emergency procurement with the five bidders but simply negotiated a letter contract with H&B.

### CONCLUSION

In sum, DCPS erred in negotiating an emergency contract with H&B without soliciting competition from the other bidders, including at a minimum, TAT, the incumbent contractor. There is no evidence in the record to support the DCPS finding that only H&B could supply the required drivers and attendants for an October 1, 1998 performance start date. When considering the important changes made to the requirements for the emergency procurement, DCPS erred in relying on the bids from the cancelled solicitation. The consolidated protests are sustained on these grounds.<sup>2</sup>

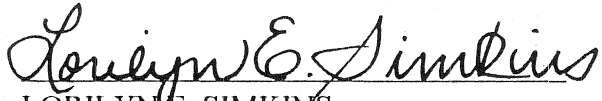
DATED: January 28, 1999

  
JONATHAN D. ZISCHKAU  
Administrative Judge

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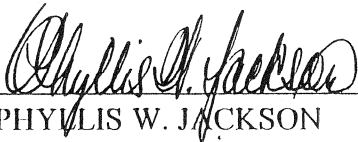
<sup>2</sup> We have considered the other protest issues raised by TAT, and the responses of the District and H&B, but conclude that the other protest grounds are either not well taken or do not alter our decision on the primary issue raised by the consolidated protests.

CONCURRING:

A handwritten signature in cursive script, reading "Lorilyn E. Simkins", written over a horizontal line.

LORILYN E. SIMKINS

Chief Administrative Judge

A handwritten signature in cursive script, reading "Phyllis W. Jackson", written over a horizontal line.

PHYLLIS W. JACKSON

Administrative Judge