

GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

PROTESTS OF:

TERRY MICHAEL BANKS, ESQ.,)	
TONY BUTLER-TRUESDALE, ESQ.,)	
CHARLES R. JONES, ESQ., COLES B.)	
RUFF, ESQ., DAVID R. SMITH, ESQ.,)	CAB Nos. P-0743, P-0744
FREDERICK E. WOODS, ESQ.)	
)	
Under Solicitation No. GAGA-2006-R-0270)	

For the Protesters: Terry Michael Banks, Esq., and Frederick E. Woods, Esq. For the District of Columbia Public Schools: Edward C. Dolan, Esq., and Michael D. McGill, Esq., Hogan & Hartson, L.L.P.

Opinion by Chief Administrative Judge Jonathan D. Zischkau, with Administrative Judge Warren J. Nash, concurring.

OPINION

LexisNexis Filing ID 13292608

Terry M. Banks, Esq., Tonya Butler-Truesdale, Esq., Charles R. Jones, Esq., Coles B. Ruff, Esq., David R. Smith, Esq., and Frederick E. Woods, Esq., the protesters, challenge the decision of the District of Columbia Public Schools (“DCPS”) to issue Solicitation No. GAGA-2006-R-0270, to procure the services of independent hearing officers. The protesters are the incumbent contracted hearing officers engaged by DCPS since 2005 whose contracts will expire on December 31, 2006. The challenged procurement for hearing officers is part of DCPS’s ongoing efforts to implement a consent decree entered on June 30, 2006 (“*Blackman* consent decree”), in the federal class action lawsuit *Blackman v. District of Columbia, et al.*, 97-CV-1629 (D.D.C.). Although the protesters recognize that they cannot compel DCPS to exercise an option to extend their existing contracts, they have leveled numerous attacks against the new solicitation with a recurring theme that awards under the new solicitation will not meet the needs of DCPS nor the special education program nearly as well as an extension of the existing contracts. Further, the protesters allege that awards under the new solicitation will be steered to other prospective contractors because DCPS is not satisfied with the decisions rendered by the protesters in special education cases under the current contracts. DCPS denies the allegations and urges that the Board lacks jurisdiction over these protests because the *Blackman* consent decree contains a waiver of District procurement law for procurements implementing its terms.

We conclude that we have jurisdiction over the protests because the solicitation expressly incorporates the Procurement Practices Act and provides resolution of protests by the Board. On the merits, we deny the protests. DCPS’s decision not to exercise options on the current contracts is a matter of contract administration and not subject to protest review. DCPS has violated no law in issuing the solicitation, and we see no basis for finding that DCPS acted in bad faith. Because we must accord deference to DCPS’s discretionary function of assessing its program needs, there is no basis for concluding that the specification and terms of the solicitation violates the law. Accordingly, we deny the protests.

BACKGROUND

On September 26, 2006, DCPS's Office of Contracts and Acquisitions issued Solicitation No. GAGA-2006-R-0270 to procure the services of independent special education hearing officers as part of DCPS's ongoing efforts to implement the *Blackman* consent decree entered on June 30, 2006. Under the terms of the consent decree, as well as the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 *et seq.*, as amended, and other applicable federal laws, DCPS is responsible for providing every disabled child with a "free appropriate public education" and procedural safeguards to ensure that DCPS is meeting this responsibility. A parent may initiate a complaint against DCPS if he or she believes that his or her child is not receiving "appropriate" special education services. Once a complaint is initiated, the parents are entitled to due process, including a hearing on the merits. These due process hearings are adjudicated by independent third-party hearing officers or examiners. DCPS is responsible for procuring the services of these independent hearing officers. The protestors are current independent hearing officers contracted by DCPS in 2005. On July 26, 2004, DCPS issued a solicitation to procure hearing officer services, Solicitation No. GAGA-2004-R-0271. DCPS did not receive as many responses to the 2004 solicitation as it expected. DCPS awarded individual contracts to each of the protestors on June 1, 2005, based on the 2004 solicitation. (Protest Ex. 2). The contracts were one year contracts which could be extended at the option of DCPS. All but one of the contracts were to expire by May 31, 2006. The remaining contract, that of Tonya Butler-Truesdale, is to expire on December 31, 2006.

In early 2006, counsel representing the plaintiff class in the *Blackman* litigation ("Class Counsel") approached DCPS and requested that DCPS examine the sufficiency of its efforts with respect to providing independent hearing officers. *Blackman* Class Counsel pointed out that they had not been involved with the 2004 procurement process, and they wanted to make sure that these hearing officers were selected in a manner that reflected the interests of the class. The DCPS contracting officer notified the individual protestors on May 1, 2006, of DCPS's decision to exercise its right to extend the contracts for seven months, through December 31, 2006. DCPS decided not to exercise the options on those contracts beyond December 31, 2006. DCPS chose instead to issue the new solicitation, under which protestors and other prospective contractors may compete for a new contract award.

The protestors filed these protests challenging the solicitation on October 10 and October 11, 2006, docketed as CAB Nos. P-0743 and P-0744 respectively. DCPS filed motions to dismiss the protests on October 31, 2006, and, by direction of the Board, DCPS filed Agency Reports on December 4, 2006, addressing the merits of the protests.

DISCUSSION

As a threshold matter, DCPS argues in its motions to dismiss that the Board has no jurisdiction over these protests because the solicitation clearly falls within the scope of an express procurement law waiver in the *Blackman* consent decree. The consent decree provides in relevant part:

The [District of Columbia Government is] not bound by the D.C. Procurement Practices Act, D.C. Code Section 2-301.01 *et seq.*, any other District or federal law relating to

procurement, and any regulation thereunder.

Blackman Consent Decree ¶ 139. The protesters raise a variety of arguments, including a challenge to the District Court’s authority to include such a procurement law waiver in the consent decree, but these challenges are either not subject to our review or are without merit. The protesters do raise a single meritorious argument for jurisdiction, namely, that the solicitation expressly incorporates District procurement law and our own protest jurisdiction. Section I.1 of the solicitation provides:

The Standard Contract Provisions for use with District of Columbia Government Supply and Services Contracts dated Nov 2004, (Attachment J.1) the District of Columbia Procurement Practices Act of 1985, as amended, and Title 27 of the District of Columbia Municipal Regulations, as amended, are incorporated as part of the contract resulting from this solicitation.

In addition, other provisions also reference the Procurement Practices Act and District procurement regulations. Section L.7 (“Proposal Protests”) provides:

Any actual or prospective bidder, Offeror, or contractor who is aggrieved in connection with the solicitation or award of a contract, must file with the D.C. Contract Appeals Board (Board) a protest no later than 10 business days after the basis of protest is known or should have been known, whichever is earlier. A protest based on alleged improprieties in a solicitation which are apparent prior to the time set for receipt of initial proposals shall be filed with the Board prior to bid opening or the time set for receipt of initial proposals. . . .

We conclude that we properly exercise jurisdiction pursuant to D.C. Code § 2-309.03(a)(1) only because DCPS voluntarily chose to make this solicitation subject to the PPA and our protest jurisdiction by the express terms of the solicitation. Although DCPS suggests that it could not waive the consent decree’s procurement law waiver in the solicitation, we do not agree. The consent decree merely provides DCPS an election to waive District procurement law, not a mandate to do so. Indeed, consistent with other consent decrees involving the District, federal court decrees typically respect a District agency’s election to adhere to District procurement law even if the decree incorporates an exemption for local procurement law that may be invoked where the interest of expeditious compliance with the consent decree requires such exemption. *Cf. Systems Assessment & Research, Inc.*, CAB No. P-0738, Sept. 21, 2006 (protest dismissed where there was no dispute that the agency invoked the procurement law waiver under *Blackman* consent decree).

Protest Count I – Predetermination

The protesters’ first ground alleges that DCPS “has already decided that it will not select one or more of the Protestors under the new Solicitation.” (Protest ¶ 21). They contend that DCPS has issued the new solicitation as a pretext for replacing them with other hearing officers because they have ruled too frequently against DCPS in the contested cases assigned to them. Responding to justifications advanced by DCPS for the new procurement, the protesters argue that no new solicitation is needed to correct perceived deficiencies in the existing contracts, that no current hearing officer has been notified

of poor performance, and that the DCPS budget and hearing room availability does not support expanding the number of hearing officers to hear cases. According to protesters, “the only plausible motivation for the agency’s decision to pursue a new solicitation is unlawful and contrary to public policy: to replace the current Hearing Officers whose decisions have dissatisfied agency officials.” (Protest ¶ 39). DCPS responds that this issue is premature because DCPS has not completed its evaluations or awarded contracts under the solicitation. DCPS denies that it has made any such predetermination and that all offerors will be fairly and equally considered based on the solicitation’s evaluation criteria.

We agree with DCPS that the arguments made by the protesters are either premature or unsupported. With regard to the terms of the solicitation itself, there is nothing evincing a bias against the protesters. Nor is there any basis for the protesters’ assertion that the solicitation “if not enjoined, interferes with the independence of the Hearing Officers and attempts to exact case outcomes contrary to the dictates of the law and evidence—the only basis on which Hearing Officers reach their decisions.” (Protest ¶ 37). Nothing in the solicitation places a restriction on the outcome of the decisions that will be reached by the eventual contracted hearing officers. Although the protesters repeatedly urge that the solicitation, as amended, improperly diminishes the importance of their prior experience as hearing officers in the special education field, or undermines the required performance, we are not persuaded that the solicitation as amended unfairly favors other prospective offerors over the incumbent contracted hearing officers. The protesters have not met the very substantial burden of showing that DCPS has issued the new solicitation in bad faith. The record contains legitimate bases for the new solicitation, namely, the existing contracts are expiring on December 31, 2006, and the agency needs to issue a solicitation to competitively procure the required hearing officer services at the best value. Even if DCPS were dissatisfied with the performance of the protesters, which is denied by DCPS, we do not see why the protesters believe that DCPS must notify them of such performance deficiencies or default terminate them to support DCPS’s decision to issue a new solicitation.

To the extent that the protesters argue that DCPS should have exercised the options to extend performance under the protesters’ existing contracts rather than issuing a new solicitation with a view to awarding new contracts, we reject such an argument. The protesters cannot validly challenge DCPS’s decision not to exercise the options under their existing contracts because the decision to exercise an option is committed to the discretion of the government and is a matter of contract administration. *See, e.g., Advanced Elevator Services, Inc.*, B-272340, Sept. 26, 1996, 96-2 CPD ¶ 125 (option exercisable at the sole discretion of the government, so the decision not to exercise the option is a matter of contract administration and not within the scope of GAO’s bid protest function); *Wayne D. Josephson*, B-256243, May 12, 1994, 94-1 CPD ¶ 307.

Protest Count II – Violation of Procurement Regulations

The protesters allege that DCPS violated District procurement regulations, 27 D.C. Reg. §§ 1602.3, 1602.4, by disclosing information about the subject procurement to “attorneys who are not currently employees of DCPS” before issuing the solicitation. (Protest ¶¶ 40, 41). DCPS states that it only shared a draft of the solicitation with the Class Counsel and the Court Monitor in the *Blackman* litigation, prior to formal issuance of the solicitation to obtain their concurrence. According to DCPS, the new procurement grew out of the concern expressed by Class Counsel that they had been excluded

from the earlier procurement for hearing officers. Class Counsel and the Court Monitor were under the authority of the District Court in the *Blackman* litigation to participate in developing the solicitation. According to DCPS, it notified Class Counsel of the specific prohibitions in the D.C. Procurement Practices Act prior to disclosing a draft of the eventual solicitation, indicated that Class Counsel would be precluded from responding to the solicitation, and asked each to confirm that they were not interested in bidding on the contract. In addition, Class Counsel were specifically instructed not to share the solicitation with any one, including other attorneys in their office. On these facts, we conclude that DCPS did not violate the procurement regulations by disclosing a draft of the solicitation to the *Blackman* litigation personnel under the authority of the District Court.

Protest Count III – Violation of Federal Consent Decree

The protesters allege that DCPS has violated the *Blackman* consent decree by not including special education experience as a requirement under the solicitation, and by failing to budget sufficient funds to extend the protesters' existing contracts. The consent decree directs DCPS to adopt Standard Operating Procedures ("SOP") applicable to the due process hearings. The SOP adopted by DCPS includes certain minimum requirements for hearing officers, including a "background" in special education and special education law. (Protest Ex. 3, SOP § 600.2). Section C.4.1 of the solicitation's "Mandatory Qualifications for Special Education Hearing Officers" states that the mandatory qualifications required by the DCPS for special education hearing officers include the following:

C.4.1.3 Shall have been engaged in the active practice of law for at least five (5) consecutive years prior to the date of responding to this RFP.

- a. Shall have a minimum of 2 years of practice in the areas of special education, disability law, administrative law, or civil rights.
- b. Shall be selected based on their academic achievement, background in special education and special education law, professional experience, writing ability and personal qualities.
- c. Shall have received special training in conducting administrative hearings.
- d. Shall have received training in special education laws, regulations, procedures and programs.

....

C.4.1.5 Shall possess good legal research skills and knowledge of the IDEA and its implementing regulations, Section 504 of the Rehabilitation Act of 1973, the Americans with Disabilities Act, and administrative law

(Protest Ex. 1; Nov. 8, 2006 Response to Motion to Dismiss, Ex. 5 (Amendment 2, Attachment A)). We cannot agree with the protesters' argument that the use of the disjunctive in C.4.1.3.a renders the solicitation's qualification requirements inconsistent with DCPS's SOP. The protesters' suggestion that DCPS eliminated the special education law background requirement in order to defeat the protesters' competitive advantage in the new procurement is equally unsupported by the terms of the solicitation.

Finally, we have little doubt that if the solicitation violated the *Blackman* consent decree, the *Blackman* Class Counsel and Court Monitor would have already raised the issue first with DCPS during the drafting stage, and if not resolved, then with the court.

Protest Count IV – Conflict of Interest

The protesters' final count charges that "[t]he involvement of the Board [of Education] members, the Office of the Superintendent, [and] the OGC [Office of General Counsel] in the decision to re-solicit bids for Hearing Officers is the result of a conflict of interests and undermines the statutorily protected independence and impartiality of the Hearing Officers." (Protest ¶ 60). In the response to the Agency Report, the protesters seem to change the thrust from a conflict in issuing the solicitation to a conflict in their involvement in the selection process. (Response to Agency Report, at 18-19). Regarding the solicitation process, we discern no legal impediment to having the named entities involved in the issuance of the solicitation. Regarding the selection process, the matter is premature because there has been no selection to date.

CONCLUSION

We have carefully considered each of the protesters' arguments, including their various requests for discovery and an evidentiary hearing, but we conclude that the challenges to the solicitation are not meritorious. DCPS has violated no law or regulation in issuing the solicitation. Accordingly, we deny the protests.

SO ORDERED.

DATED: December 27, 2006

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

CONCURRING:

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