

**GOVERNMENT OF DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD
717 14th Street, N.W., Suite 430
Washington, D.C. 20005**

(202) 727-6597

DATE: December 30, 1997

**TO: Ardelia Davis, Esquire
Law Office of Squire Padgett
1835 K Street, N.W., Suite 900
Washington, D.C. 20006**

**Awo Sarpong, Esquire
District of Columbia Housing Authority
1133 North Capitol, Street, N.E.
Washington, D.C. 20005**

SUBJECT: CAB No. P-513, Protest of First Impression Construction, Co.

Attached is a copy of the Board's opinion in the above-referenced matter.


**MIA J. HOUSE
Clerical Assistant**

Attachment

GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

PROTEST OF:

FIRST IMPRESSION CONSTRUCTION CO.)	
)	CAB No. P-513
Under Purchase Order No. 11476)	

For the Protester: Ardelia Davis, Esq. For the District of Columbia Housing Authority:
Awo Sarpong, Esq., Acting Deputy General Counsel.

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

OPINION

The protester, First Impression Construction Co., challenges the District of Columbia Housing Authority's (DCHA) award of a contract M.C. Services, Inc., and the failure of DCHA to act on another unsolicited proposal. DCHA moved to dismiss the protest on the ground that the Board lacks jurisdiction over protests of DCHA procurements. We conclude that through the Procurement Reform Amendment Act of 1996, the Council intended to and effected the uniform application of the Procurement Practices Act to all District agencies, departments, and instrumentalities except for certain agencies expressly exempted by the Procurement Reform Amendment Act. On the merits, the protest cannot be sustained. As the record demonstrates, there was neither an official solicitation nor an award with regard to First Impression's unsolicited proposal and therefore we dismiss that protest ground. We deny the protest with regard to the award of Purchase Order No. 11476 because the record shows that the protester's bid was not the lowest responsive bid.

BACKGROUND

On June 18, 1997, DCHA issued Invitation No. 11476 for the cleaning of exterior brick and the repair and replacement of gutters at the Syphax Gardens housing complex. (DCHA response, dated Nov. 21, 1997, Bid Tabulation Sheet). Through contacts with a DCHA project manager and unsolicited proposals during the period March through May 1997, First Impression had developed a scope of work that was reflected at least partially in Invitation No. 11476.¹ For example, in an unsolicited proposal dated May 15, 1997, First Impression set forth a statement of work needed for repairing and replacing downspouts and gutters at Syphax Gardens. The various copies of the May 15 proposal in the protest record do not include a price quote. (See Agency Report, Ex. 5, at 3; Protester's response, dated Nov. 21, 1997, Attachment A, at 1). The

¹ In its November 21, 1997 response, First Impression alleges that its March 12, 1997 unsolicited proposal ("Ref. No. 1091"), *see* Agency Report, Ex. 5, at 5-7, provided some of the specifications which were used in Invitation No. 11476. The point is legally irrelevant.

May 15 proposal as contained in the record does not indicate that First Impression included cleaning of exterior brick at Syphax Gardens. DCHA did not award a contract to First Impression in response to the May 15 proposal. Invitation No. 11476, as issued by DCHA on June 18 included not only the gutter and downspout work but also cleaning of exterior brick surfaces of the Syphax Garden buildings. Invitation No. 11476 set forth a bid opening date of June 24, 1997. DCHA's bid tabulation sheet indicates that three entities picked up a copy of the Invitation. The awardee, M.C. Services, Inc., submitted a bid in the amount of \$96,770 on June 19, Southern Renovation submitted a bid of \$107,020 on June 20, and EDWILL Management Inc. submitted a bid of \$109,270 on June 24. (Protester's response, dated Nov. 21, 1997, Attachment C, at 2-5). It appears from the record that First Impression did not learn of the issuance of Invitation No. 11476 until late July 1997, from the same DCHA project manager with whom First Impression had dealt regarding the May 15 unsolicited proposal. (*Id.*, Attachment A, at 4-6). On July 28, First Impressions submitted a bid of \$122,706. (*Id.*, Attachment A, at 2-3). On August 13, 1997, Ms. Lisa Blacknall, DCHA contracting officer, executed Purchase Order No. 11476, to M.C. Services for the work set forth in Invitation No. 11476.

First Impression also challenges the failure of DCHA to act upon its unsolicited proposal entitled "Contract for Enclosing Fifty-Eight Door Openings Approximately 36 x 80" under "Ref. No. 1092." The DCHA contracting officer states that DCHA never requested proposals for the work proposed by First Impression and DCHA never issued a contract for such work. (Declaration of Lisa Blacknall, filed Nov. 21, 1997).

DISCUSSION

In a submission dated October 31, 1997, and supplemented on November 12, 1997, DCHA has moved to dismiss the captioned protest on the grounds that DCHA is specifically exempted from the Procurement Practices Act by virtue of D.C. Code § 5-129(b), codifying section 11 of the District of Columbia Housing Authority Act of 1994, D.C. Law 10-243, which was enacted on March 21, 1995. Section 5-129(b) provides:

The Board [of Commissioners] shall develop standards for purchases of , and contract for, supplies and services consistent with applicable laws. Emergency purchases shall be allowed subject to the approval of persons delegated to do so by the Board, and a full written determination and finding of the circumstances of such emergency purchase, along with the purchase documents, shall be immediately open to public inspection. The Authority shall be exempt from Chapter 11A of Title 1.

By virtue of the consent order entered in *Pearson, et al. v. Kelly*, 92-CA-14030, the Board of Commissioners never came into existence. Instead, a receiver was appointed who assumed all powers of the former Department of Public and Assisted Housing (DPAH) and its statutory successor, DCHA. See *Padula Constr. Co.*, CAB No. D-997, Sept. 17, 1996, 44 D.C. Reg. 6497, 6500. DCHA correctly states that based on section 5-129(b) we had held that we lacked jurisdiction over protests of DCHA procurements. See, e.g., *MTI Construction Co.*, CAB No. P-445, Jan. 24, 1996, 44 D.C. Reg. 6411, *Wells Fargo Guard Services*, CAB No. P-442, Jan.

24, 1996, 44 D.C. Reg. 6408. Those decisions, however, were based on an analysis of section 5-129(b) and the Procurement Practices Act prior to enactment of the Procurement Reform Amendment Act of 1996, D.C. Law 11-259, effective Apr. 12, 1997. The Procurement Reform Amendment Act and the legislative history clearly show that the Council of the District of Columbia intended to make the Procurement Practices Act apply to nearly all departments, agencies, and instrumentalities of the District government.

Prior to the Procurement Reform Amendment Act, the 1992 amended version of D.C. Code § 1-1181.4 (derived from section 104 of the Procurement Practices Act of 1985, D.C. Law 6-85) provided in relevant part:

(a) Nothing in this chapter shall abrogate the authority of a separate branch of government or an independent agency, as defined in subchapter I of Chapter 15 of this title, to enter into contracts or to issue rules and regulations for the awarding of contracts pursuant to existing law.

(b) Any existing provisions of District law regarding the conformity to District procurement law of rules and regulations issued or promulgated by independent agencies shall remain in effect.

(c) This chapter shall apply to all agencies and employees of the District government which are subordinate to the Mayor.

. . . .

(e) Any branch or agency of government exempted from the provisions of this chapter by subsection (a) of this section may formally agree to be bound by any provisions of this chapter, or by the final rules and procedures adopted pursuant to this chapter.

Thus, the PPA (codified in Chapter 11A of the D.C. Code) prior to the Procurement Reform Amendment Act of 1996 covered only departments, agencies, and employees subordinate to the Mayor, and those independent agencies which elected by formal agreement to be bound by provisions of the PPA. The Procurement Reform Amendment Act substantially expanded the applicability of the PPA. As amended, D.C. Code § 1-1181.4(a) (Supp. 1997) now provides:

Except as provided in § 1-1183.20, this chapter shall apply to all departments, agencies, *instrumentalities*, and employees of the District government, including agencies which are subordinate to the Mayor, independent agencies, boards, and commissions, but excluding the Council of the District of Columbia, District of Columbia courts, and the District of Columbia Financial Responsibility and Management Assistance Authority.

D.C. Law 11-259, § 101(b), 44 D.C. Reg. 1423, 1425 (emphasis added). DCHA is statutorily defined as an instrumentality of the District government. D.C. Code § 5-122(a) (Supp. 1997).

Section 1-1183.20 expressly exempts certain agencies, departments, and instrumentalities from all or portions of the PPA. DCHA is not included in the list of exempt entities in section 1-1183.20.


The legislative history for the Procurement Reform Amendment Act demonstrates that section 1-1181.4(a)'s nearly universal coverage of District procurement was one of the principal features of the Procurement Reform Amendment Act. The Council's purpose was to achieve uniform procurement law throughout the District government. The Council intended to cover all departments, agencies, and instrumentalities except for those expressly exempted in the Procurement Reform Amendment Act. Because the Council intended the language of section 1-1181.4(a) to be quite broad, and the Council intended to make only narrow exceptions to the Act's coverage, we believe our statutory construction is proper here. Accordingly, we exercise jurisdiction over the protest pursuant to D.C. Code § 1-1189.3 (Supp. 1997).

On the merits, we see no basis for sustaining First Impression's protest with regard to the solicitation and award of Purchase Order No. 11476 to M.C. Services. It is not clear from the record why First Impression was not advised of Invitation No. 11476 until over one month after its issuance. Even accepting that First Impression assisted DCHA in developing its statement of work through its submission of unsolicited proposals and discussions with DCHA's project manager, it appears that DCHA did consider First Impression's July 28 bid. It did not receive the award because its bid was the highest of the four bids received. First Impression's contention that the low bid was not responsive because it was too low is not supported by the record. Moreover, First Impression has not shown that the second and third low bidders were nonresponsive or that their bids were not responsive to the solicitation.

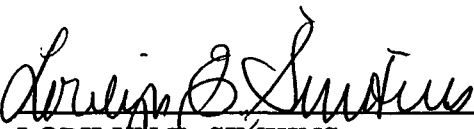
First Impression's challenge of DCHA's failure to act on its unsolicited proposal (Ref. No. 1092) is not a valid ground for protest and must be dismissed.

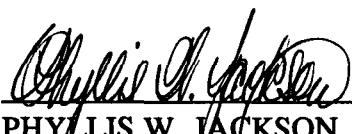
Accordingly, First Impression's protest is denied in part and dismissed in part.

DATE: December 30, 1997


JONATHAN D. ZISCHKAU
Administrative Judge

CONCURRING:


LORILYN E. SIMKINS
Chief Administrative Judge


PHYLLIS W. JACKSON
Administrative Judge