

GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

PROTEST OF:

| | | |
|--------------------------------------|---|---------------|
| WALLACE C. WILSON |) | |
| |) | CAB No. P-484 |
| Under Solicitation No. 1264-10-OB-97 |) | |

For the Protester: Mr. Wallace C. Wilson, *pro se*. For the Government: Edward Rich, Esquire, and Warren J. Nash, Esquire, 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

Mr. Wallace C. Wilson has filed a protest with regard to emergency Solicitation No. 1264-10-OB-97 on the grounds that: the agency gave inadequate notice of the availability of the solicitation, one section of the solicitation omitted the due date for submitting proposals, and the solicitation improperly made proposals due within only four days. We conclude that: the extent of the agency's notice to prospective offerors to obtain the solicitation was legally adequate, the solicitation adequately informed Wilson of the due date for proposals, and Wilson has not demonstrated that a four-day response time was unreasonable. Accordingly, we deny the protest.

BACKGROUND

On February 24, 1997, the Department of Housing and Community Development ("DHCD") issued emergency Solicitation No. 1264-10-OB-97 to obtain proposals for license application review services on behalf of the District's Office of Banking and Financial Institutions ("OBFI"). OBFI prepared a list of 9 prospective offerors, Wilson being one, and transmitted the list to the contracting officer. One DHCD contract analyst contacted 5 of the 7 prospective offerors, including Mr. Wilson, by telephone on February 24, 1997, to advise them that there was an emergency solicitation for services of mortgage lender/broker examiners available for pickup at 51 N Street, N.E., Room 346, with a due date for proposals of February 28, 1997. (Affidavit of Christopher Aninye, ¶¶ 2-3). Another contract specialist contacted the other 2 prospective offerors. Mr. Wilson recalls being contacted but his memory is that the agency representative merely told him that there was a "package to pick up" in Room 346, without identifying that the package was for him personally, that it was a solicitation relating to OBFI, and that the solicitation had a four-day response time. (Protest, ¶ 3). He thought it was a non-essential pickup relating to some other work of his for DHCD. In any event, he sent a courier to pick up the package but when the courier arrived at DHCD, he did not know what package he was there to pick up. In

an affidavit, the contracting officer states that he was present when a courier came to Room 346 to pick up a package on either February 24 or 25. The contracting officer asked the courier if he wished to make a call to determine what package he was sent to pick up. The courier made a call but still did not know what package he was sent to pick up. The courier then left Room 346. (Affidavit of Cassandra Faye Lee, ¶ 2). Mr. Wilson had to re-send the courier the following day. Mr. Wilson states that he finally received the package on February 27. Thereafter, he called the contracting agency, apparently asking for more time (which was not granted) and for information concerning the work requirements (to which he received answers). The bottom line, according to Mr. Wilson, is that he did not have "enough time to get all the requirements completed." (Protest, ¶ 3). Mr. Wilson hand delivered his proposal the first business day after the due date for proposals. The contracting officer did not consider his proposal because it was late. The contracting officer received four timely proposals from prospective vendors.

Mr. Wilson filed his protest on March 6, 1997. On March 13, the Board held a telephone conference with the parties, including the contracting officer and the contract analyst. On March 27, the District filed its Agency Report. Mr. Wilson filed his response on April 3 and a motion to uphold the protest on July 22.

DISCUSSION

The District has moved to dismiss this solicitation protest on the ground that it was filed after the closing date for proposals. Although the District correctly notes that we have previously held that solicitation protests must be filed prior to the bid or proposal due date, we apply that rule as a bright-line test to avoid disputes over when the protester first knew or should have known of the grounds for protest after receipt of the solicitation. That rule does not apply in a protest under former section 908 of the Procurement Practices Act where the solicitation was received with so brief a proposal response time that a protest filed after the solicitation due date is nevertheless within the statutory 10-day requirement under former section 908(b) which applied to protests of both solicitations and awards. Therefore, we conclude that the protest is timely. For protests governed by the Procurement Practices Act as amended by the Procurement Reform Amendment Act of 1996, D.C. Law 11-259, Apr. 12, 1997, the former 10-day requirement will no longer apply to solicitation protests. Under section 101(ee) of the Procurement Reform Amendment Act, D.C. Code § 1-1189.8(b)(1) (Supp. 1997), a protest based upon alleged improprieties in a solicitation which are apparent prior to bid opening or the time set for receipt of initial proposals now must be filed prior to bid opening or the time set for receipt of initial proposals. Under the Procurement Reform Amendment Act, the 10-business-day filing deadline applies to all protests other than those covered in section 1-1189.8(b)(1). *See id.* § 1-1189.8(b)(2) (Supp. 1997).

Wilson's first contention on the merits, that the solicitation is flawed because section C.11 ("Proposal Submission Date and Time") does not specify a date, is not well taken. The solicitation identifies the due date for proposals and Mr. Wilson clearly knew proposals were due on February 28 notwithstanding the omission in section C.11.

We also cannot sustain the protest on the grounds that the agency gave inadequate notice of the emergency solicitation and that the 4-day response time was unreasonably short. In procurements by competitive sealed bids or proposals, potential bidders generally bear the risk of nonreceipt of the solicitation documents, unless there is evidence (beyond mere nonreceipt) establishing that: (1) the contracting agency deliberately or consciously intended to exclude the prospective bidder from the competition, (2) the potential bidder did not neglect reasonable opportunities to obtain the documents *and* the agency failed to comply with notice requirements for the solicitation documentation at issue, or (3) the agency did not obtain adequate competition or reasonable prices. *See, e.g., Nylen Business Support Products*, CAB No. P-395, Mar. 24, 1994, 41 D.C. Reg. 4143, 4144-45; *Technical Resolution Corp.*, CAB No. P-393, Mar. 22, 1994, 41 D.C. Reg. 4138, 4139.

There is no evidence that the agency attempted to exclude Mr. Wilson from the competition. Mr. Wilson was on the agency's list of 7 prospective offerors. He was given the same type of notice as the other offerors and had a reasonable opportunity to obtain the solicitation in a timely manner. The other prospective offerors picked up their solicitation packages in a timely manner and four offerors prepared and submitted their proposals by the February 28 closing date. Even accepting that there was poor communication between Mr. Wilson and the contract analyst, Mr. Wilson must bear the responsibility for not receiving the solicitation until February 27. If the nature of the package for pickup was unclear, he could have and should have sought immediate clarification on February 24 from the DHCD representative when told that a package was available to be picked up. The fact that Mr. Wilson submitted his proposal the next business day after the closing date -- despite receiving the solicitation on February 27 -- suggests that four days was not wholly out of line for responding to the solicitation.

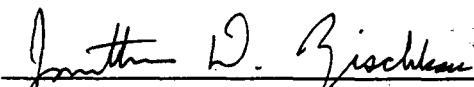
The contracting officer may accept late proposals under the conditions set forth in 27 DCMR § 1609.3. Those conditions are not met here because Mr. Wilson personally delivered his proposal late and his proposal was not the only proposal received.

Mr. Wilson also argues, correctly, that a contracting officer may extend the closing date for offers, even after the date has passed, in order to accommodate offers that would otherwise be late. *See Ivey Mechanical Co.*, B-272764, Aug. 23, 1996, 96-2 CPD ¶ 83 (proper for contracting officer to issue, after the original closing date, an amendment extending closing date to allow another untimely proposal to be accepted in the interest of obtaining competition); *Fort Biscuit Co.*, 71 Comp. Gen. 392 (1992), 92-1 CPD ¶ 440 (not improper to issue an extension of the closing date for the submission of best and final offerors after that date so as to permit one of four offerors more time to submit its best and final offer); *Varicon Int'l, Inc.*, B-255808, Apr. 6, 1994, 94-1 CPD ¶ 240 (not improper to extend the closing date after expiration of the original date so as to enhance competition by permitting two offerors submitting late proposals to compete against the two offerors that submitted timely proposals). However, in the present matter, the contracting officer has not issued an amendment to extend the closing date and the record does not support finding her failure to do so to be arbitrary and capricious.

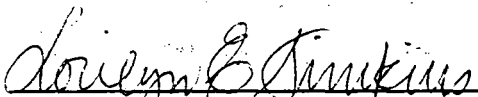
Accordingly, the protest is denied.


SO ORDERED.

DATE: August 4, 1997


JONATHAN D. ZISCHKAU
Administrative Judge

CONCURRING:


LORILYN E. SIMKINS
Chief Administrative Judge


PHYLLIS W. JACKSON
Administrative Judge

GOVERNMENT OF THE DISTRICT OF COLUMBIA

CONTRACT APPEALS BOARD

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

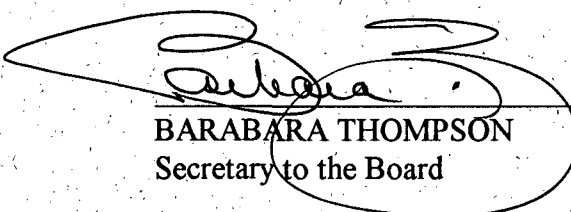
August 6, 1997

TO: Wallace C. Wilson
14730 Soft Wind Drive
North Potomac, MD 20878

Warren J. Nash, Esquire
Howard Schwartz, Esquire
Assistants Corporation Counsel
441 4th Street, N.W., 10th Fl.
Washington, DC 20001

SUBJECT: CAB No. P-484, WALLACE C. WILSON

Attached is a copy of the Board's Opinion denying the protest.



BARABARA THOMPSON
Secretary to the Board