

DISTRICT OF COLUMBIA CONTRACT APPEALS BOARD

PROTEST OF:

DUANE A. BROWN)
) CAB No. P-0914
Under Solicitation No. 0014-2012)

For the Protester: Duane A. Brown; *pro se*. For the District of Columbia Housing Authority: Qwendolyn N. Brown and Mashanda Y. Mosley; District of Columbia Housing Authority, Office of the General Counsel.

Opinion by Administrative Judge Monica C. Parchment with Chief Administrative Judge Marc D. Loud, Sr., and Administrative Judge Maxine E. McBean concurring.

OPINION

Filing ID #48419099

The protester, Duane A. Brown, challenges the terms of Solicitation No. 0014-2012 issued by the District of Columbia Housing Authority (“DCHA”) which, as it relates to this protest, prohibits individuals who are landlords under the DCHA Housing Choice Voucher Program (“HCVP”) from simultaneously serving as an Administrative Hearing Officer (“AHO”) for HCVP matters. Because the protester is both a HCVP landlord and a prospective contractor seeking to perform the subject AHO contract, it contends that the Solicitation’s prohibition on maintaining this dual role is unreasonable and arbitrarily restrictive.

The Board, having reviewed the record in this matter, finds the protest to be without merit. The protest is, therefore, denied.

FACTUAL BACKGROUND

On May 7, 2012, DCHA issued Solicitation No. 0014-2012 (“Solicitation”), seeking individuals who are members of any attorney bar to serve as AHOs and primarily to preside over low-income public housing hearings, including HCVP informal hearings pursuant to D.C. MUN. REGS. tit. 14, ch. 89, in addition to other related responsibilities. (Agency Report (“AR”) Ex. 1 at 2-5.) DCHA is a large, public housing authority that manages over 8,000 public housing units for purposes of providing quality, affordable housing for individuals within the District of Columbia. (AR 3.) In this regard, the ultimate awardees under the Solicitation were required to conduct administrative hearings in the areas of federal housing and/or landlord tenant laws as administered by DCHA’s Office of Fair Hearings.¹ (AR Ex. 1 at 2.)

The Solicitation contemplated a one-year fixed-price contract for each awardee with two one-year option periods after completion of the base contract year. (AR Ex. 1 at 7.) The closing date for the Solicitation was on June 6, 2012, and the protester submitted a timely proposal in response to the Solicitation. (*Id.* at 9; AR 3.)

¹ DCHA’s Office of Fair Hearings provides a forum to hear grievances brought by residents of Low Income Public Housing (“LIPH”) and the participants of the HCVP. (AR Ex. 1 at 2.)

On June 4, 2012, before the closing date for receipt of proposals, the protester filed the present protest with the Board.² (Acknowledgement of Receipt of Notice of Protest Filing and Request for Agency Report 1.) The initial protest filed with the Board primarily challenged the language of the Solicitation which prohibits individuals who are HCVP landlords from providing AHO services adjudicating HCVP cases. (Protest 4.) The contested Solicitation provision states as follows:

To prohibit impermissible conflicts of interest, Contractor shall be strictly prohibited from participating in DCHA's [HCVP] as a participant, applicant, and/or landlord.... Failure of the Contractor to comply with the aforementioned requirements may be grounds for either a reduction in cases or termination of the Contract, in accord with the Termination Clause.³

(AR Ex. 1 at 4.)

The protester largely takes issue with the District's assertion in the Solicitation that it is an "impermissible conflict of interest" for AHOs to also act as HCVP landlords.⁴ (See Protester's Comments on AR 2-5.) The protester's challenge to this provision primarily stems from its contention that it has historically acted in this dual capacity for DCHA without any resulting inconvenience or impropriety to the agency, and also because of the protester's belief that acting in this dual capacity for DCHA – as HCVP AHO and landlord – does not, in fact, present a conflict of interest situation because the protester does not receive federal assistance through DCHA. (*Id.* at 3-5; Protest 3.) The protester also argues that eliminating its ability to act as an AHO under the disputed contract will substantially impact the protester's potential revenue. (Protest 4.)

In response to these allegations, the District contends that the Solicitation's conflict of interest provision that is at issue in this matter is consistent with the Solicitation's conflict of interest certification requirement. (AR 4.) This certification requirement mandates that offerors must represent, amongst other things, that they are not a DCHA contractor with a financial or ownership interest in real property whereby the owner receives a subsidy payment through DCHA.⁵ (AR Ex. 1, Attachment K.) More specifically, offerors were required to certify that they complied with the following statement:

² Subsequent to the filing of this protest, the District moved the Board for summary dismissal of this matter on jurisdictional grounds. The Board denied the motion on September 26, 2012, and ordered the District to immediately file its Agency Report in response to the original protest allegations.

³ This provision also includes ancillary language prohibiting the awardee from being a resident or applicant of the HCVP and LIPH. (AR Ex. 1 at 4.) The initial protest, however, only challenges the HCVP conflict of interest provisions, and not the LIPH related restrictions.

⁴ The protester also contends that it was given an ambiguous definition of an "impermissible conflict of interest" during the pre-bid question period. (Protest 2-3; Protester's Comments on AR 2-4.) However, the Board finds that, in more than one instance in the District's pre-bid question exchange with offerors, it made clear that the Solicitation would unquestionably prohibit AHOs from also being landlords in the HCVP. (AR Exhibit 1, Addendum No. 1.)

⁵ DCHA contends that the protester provided a material misrepresentation in this certification by failing to disclose his HCVP landlord status when certifying that no real or apparent conflict of interest existed. (AR 6.) The protester denies making such a misrepresentation as it does not believe that its landlord status constitutes a conflict of interest with regard to this procurement. (Protester's Comments on AR 6-7.)

No officer, employee, contractor or agent of DCHA, or its subsidiaries, may have a financial or ownership interest, direct or indirect, in any real property included, or proposed to be included, in any real estate development or redevelopment project of DCHA, or its subsidiaries, or in any real property whereby the owner receives a federal or local housing subsidy administered by DCHA.

(*Id.* (emphasis added).)

While DCHA effectively admits that in the past offerors were not required to certify compliance with these types of conflicts of interest in their proposals for similar AHO services, it, nonetheless, maintains that this new disclosure requirement is reasonable and consistent with the Solicitation's prohibition on "impermissible conflicts of interest" for all offerors. (AR 5-6.) Accordingly, DCHA argues that the Solicitation's prohibitions precluding the contract awardee from being a landlord and/or having a financial interest in property whereby the owner receives a subsidy rent payment from DCHA are directly applicable to protester. (AR 5.)

By way of background, DCHA notes that it receives housing subsidy funding from the U.S. Housing and Urban Development ("HUD"), which is administered by DCHA on behalf of HUD. (AR 3-4.) DCHA, in turn, contracts with hundreds of landlords, such as the protester, within the District of Columbia to provide affordable housing through a contractual arrangement which establishes the rent subsidy payment that the landlord will receive from DCHA for providing housing under the HCVP. (AR 4.) The HCVP landlord continues to receive these federal housing subsidy payments from DCHA on a monthly basis for the term of its contract with DCHA so long as its housing unit remains occupied by an HCVP tenant. (AR 4.) As a result, the District maintains that the protester's personal financial interest in the HCVP program as a landlord impairs its ability to act, or be viewed, as a fair and neutral arbiter of HCVP related cases for DCHA. (AR 7-8.)

As detailed below, the Board finds that the Solicitation terms, seeking a neutral arbiter of HCVP related claims, reasonably restricted the contract from being performed by individuals that have a personal financial interest in the HCVP activities.

DISCUSSION

The Board exercises jurisdiction over this protest and its underlying allegations pursuant to D.C. CODE § 2-360.03(a)(1).

As set forth herein, the present protest involves a challenge by the protester to the terms of the Solicitation which specifically preclude the ultimate awardee from simultaneously participating in DCHA's HCVP program as a landlord while performing contractual services for DCHA as an AHO. The protester argues that these conflict of interest provisions are, therefore, unreasonable and unduly restrictive in limiting its ability to compete for the subject contract. (Protester's Comments on AR 5.)

District of Columbia procurement statutes aim to provide bidders with adequate opportunities to bid by promoting full and open competition, to the extent possible, in government procurement. D.C. CODE § 2-351.01(b)(3); *see also* D.C. MUN. REGS. tit. 27, §§ 2500.1, 2500.2 (2002). Notwithstanding, solicitation provisions that restrict competition may still be deemed permissible if they are necessary to meet the District's minimum needs. *Gen. Oil Corp.*, CAB No. P-0181, 38 D.C. Reg. 3059, 3060 (Apr. 20, 1990) (citing *Am. Motohol Supply Corp.*, 38 D.C. Reg. 2998, 3001 (Nov. 21, 1989)).

In determining whether a solicitation provision unduly restricts competition, the Board looks to whether the challenged provisions are a reasonable element in obtaining the District's actual minimum needs. *Am. Motohol Supply Corp.*, 38 D.C. Reg. at 3001. The determination of an agency's minimum needs involves great discretion, *Am. Motohol Supply Corp.*, 38 D.C. Reg. at 3002, and, accordingly, the Board will give deference to the agency's technical judgment, *Koba Assocs., Inc.*, CAB No. P-0325, 40 D.C. Reg. 5023, 5032 (Mar. 12, 1993). *See also*, *Beretta U.S.A. Corp.*, CAB No. P-0144, P-0177, 38 D.C. Reg. 3098, 3120-21 (Aug. 23, 1990) (stating that government contracting officials are in the best position to know the government's actual needs when making decisions to limit competition). The Board will uphold the agency's determination of its actual minimum needs unless the decision is arbitrary or unreasonable. *Beretta U.S.A. Corp.*, CAB No. P-0144, P-0177, 38 D.C. Reg. at 3121 (citations omitted).

This foregoing standard applies to challenges to definitive responsibility criteria as well as to performance specifications. *See Am. Motohol Supply Corp.*, 38 D.C. Reg. at 3002. The protester bears the burden of showing, by a preponderance of the evidence, that the agency has impermissibly restricted competition. *Koba Assocs.*, CAB No. P-0325, 40 D.C. Reg. at 5032; *see also Am. Motohol Supply Corp.*, 38 D.C. Reg. at 3002 ("Any contractor attempting to prove the government's determination [of its minimum needs] objectionable bears a heavy burden.").

In the instant case, the Solicitation seeks licensed attorneys to act as impartial arbiters, or AHOs, to adjudicate administrative disputes related to federal housing and landlord/tenant law as administered by DCHA's Office of Fair Hearings, which necessarily includes DCHA's administration of the HCVP. (AR Ex. 1 at 2-4.) Given that the contract awardees are required to assume an impartial adjudicatory role, the Board finds it reasonable that the terms of the Solicitation bar from the competition offerors that have a conflict of interest, or the appearance of a conflict of interest, or who otherwise compromise the integrity of the HCVP decisions which they would render while performing the contract, as the District contends is the case with the protester.

The parties do not dispute that the protester is, in fact, a landlord having a contractual relationship with DCHA to provide low income housing to DCHA-approved tenants. (*See* Protest 1.) The protester, in this capacity, receives monthly payments originating from HUD, which are ultimately administered and paid to the protester directly by DCHA in the form of a rent subsidy payment, in addition to any additional amounts required to be paid to the protester directly from the tenant. (AR 4.) By all accounts, these facts undeniably lead to the conclusion that the protester has a personal financial interest in the housing activities of the HCVP. Furthermore, the protester would also be responsible for adjudicating complaints by HCVP tenants, applicants, and community members lodged against the very agency (DCHA) from

which the protester receives monthly payments.⁶ See D.C. MUN. REGS. tit. 14, § 8901.1. Given these circumstances, protester's status as an HCVP landlord was reasonably deemed by DCHA to be a conflict of interest given the nature of the impartial adjudicatory services required by the Solicitation for individuals providing AHO services involving HCVP and DCHA.

Indeed, as the Board has previously held, "[i]t is well settled that a contracting agency may impose a variety of restrictions, not explicitly provided for in [statutes] or other applicable regulations, when the needs of the agency or the nature of the procurement dictates the use of such restrictions." *American Motohol Supply Corp.*, 38 D.C. Reg. at 3002. Consequently, in light of this legal standard and the facts in this case, the Board finds that the challenged restriction in the Solicitation which precluded an awardee from having a simultaneous outside financial interest in the HCVP program, as property owner or landlord, was a reasonable restriction imposed by the agency in meeting its need to award the contract to individuals that would act, and be viewed, as neutral arbiters in rendering HCVP administrative decisions.⁷ In short, the protester has not met its burden of showing that the Solicitation's conflict of interest restrictions are not, in fact, reasonably related to the District's actual minimum needs. See, e.g., *Gen. Oil Corp.*, CAB No. P-0181, 38 D.C. Reg. at 3060 ("[a]ny Contractor attempting to prove the government's determination objectionable bears a heavy burden.").

CONCLUSION

For the reasons discussed above, the Board finds that the District's conflict of interest provision in the Solicitation, which is the subject of this protest, was reasonably included in the Solicitation by the agency to meet the necessary contract performance requirements for AHO services and did not constitute an improper restriction on competition.⁸ The protest is, therefore, denied.

SO ORDERED.

DATED: December 13, 2012

/s/ Monica C. Parchment
MONICA C. PARCHMENT
Administrative Judge

⁶ The District also asserts that, as an AHO, the protester would also have the authority to render decisions against tenants which could ultimately impact the overall financial interests of HCVP landlords including protester thereby potentially impacting his impartiality. (AR 7-8.)

⁷ The protester attempts to argue that HCVP landlords were not intended to be covered by DCHA's conflict of interest provisions in the Solicitation. (Protester's Comments on AR 2-5.) However, this contention is clearly refuted by the express terms of the Solicitation which clearly identify HCVP landlords and property owners receiving subsidy rent payments from HCVP as having a conflict of interest that must be disclosed to DCHA in their proposal submission. (AR Ex. 1 at 4.)

⁸ The Board makes no findings in response to the District's allegation that the protester materially represented its possible conflict of interest in connection with its HCVP landlord activities in its proposal as this is an administrative issue outside of the jurisdiction of the Board.

CONCURRING:

/s/ Marc D. Loud, Sr.
MARC D. LOUD, SR.
Chief Administrative Judge

/s/Maxine E. McBean
MAXINE E. MCBEAN
Administrative Judge

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