GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

PROTEST OF:

MICRO COMPUTER COMPANY, INC.	)	
	)	CAB No. P-226
Under IFB No. 9505-AA-99-1-CE	)	Reconsideration

OPINION

This is a motion for reconsideration of the Board's Opinion and Order dated January 9, 1992,[1/] which denied the government's motion to dismiss the protest, on the ground that a protest which challenges the solicitation or qualifications of a bidder responding to the solicitation is a valid protest for purposes of this Board's jurisdiction and cannot be considered premature or speculative simply because no award has been made. Additionally, in denying the government's motion to dismiss, the Board overruled A.A. Beiro Construction Co., Inc.[2/] and its progeny, and held that a pre-award challenge to the responsiveness of an offer and qualifications of an offeror or bidder constitutes a valid protest within the jurisdiction of the Board.

The government filed its motion for reconsideration on February 3, 1992, and the protestor did not respond. Pursuant to Rule 313, Rules of Practice of the D.C. Contract Appeals Board, 36 DCR 2716 (April 21, 1989), a party may, by motion, request reconsideration of a Board decision. Such a motion shall be conducted in accordance with Rule 117 of the Board's Rules, "except that the time periods contained in subsections 117.2 and 117.4 shall be shortened to fifteen (15) days." Rule 313.2. Thus, pursuant to Rule 117.2, 36 DCR 2696, the government's motion for reconsideration should have been filed within 15 days after the Board's decision was transmitted. The record shows that the decision was transmitted on January 9, 1992. Adding three (3) days for mailing,[3/] the government should have received the Board's Opinion on January 13, 1992. Calculating 15 days from the latter date, the government should have filed its motion by no later than

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[1/]The decision contains a typographical error respecting the date.

[2/]1 P.D. 60 (D.C. CAB 1987).

[3/]Rule 122.4, 36 DCR 2698.

January 28, 1992. Therefore, the motion for reconsideration is untimely and should be DENIED.

However, because the Board's decision herein will have significance in the conduct of future protest actions, the Board will consider the substance of the motion for reconsideration.

Pursuant to Rule 117.1, a party to a protest may request reconsideration of a decision or order for the following reasons: (1) clarification; (2) presentation of newly-discovered evidence which by due diligence could not have been presented prior to a decision; (3) patent errors on the face of the decision; and (4) the decision contains errors of fact or law. The motion for reconsideration itself must set forth the following: (1) the particular points of fact or law which the moving party believes the Board has overlooked or misunderstood; (2) any argument in support of the motion; and (3) the relief sought and reason therefor. Rule 117.3. Further, a party requesting reconsideration must show that the prior decision contains either errors of fact or law or has information not previously considered that warrants reversal or modification of the decision. Macton Construction, Inc.-Recon., CAB No. P-203, 4 P.D. 912.

In its motion, the government argues: (1) that the Board's Opinion contradicts the requirements and procedures established by the Procurement Practices Act of 1985, D.C. Code §§1-1181.1, et seq. (1987) (PPA) for bid protests; (2) the facts of the case do not rise to the level of a dispute concerning an aggrieved party; and (3) the opinion would impact on the ability of the contracting officer to determine the lowest responsible and responsive bidder and would lead to the filing of numerous anticipatory actions by actual or prospective bidders, thereby incurring a needless waste of time on essentially premature matters.

The Board's Opinion Supports the Requirements and Procedures Established for Bid Protests under the PPA and Its Implementing Regulations.

The Government claims that the Board misinterpreted the PPA and its protest jurisdiction by holding that a protestor who challenges the responsiveness of the bid of the apparent awardee, after bid opening but prior to the date of award, is an "aggrieved party" for purposes of the Board's jurisdiction and has made a valid challenge to the solicitation for award of a contract. In support of its position, the government declares that the Board's protest jurisdiction is derived from section 903 of the PPA, D.C. Code §1-1189.3(1), which states that the Board shall have jurisdiction to review and determine de novo:

> Any protest of a solicitation or award of a contract . . . by any actual or prospective bidder or offeror, or a contractor who is aggrieved in connection with the solicitation or award of a contract; . . .

The government then goes on to cite Rule 300.2, 36 DCR 3710, which provides the purported definition of "aggrieved person" as "one who has suffered a loss or injury or has had a legal right violated as a result of adverse agency action." In further support, the government cites the definition of "aggrieved party" found in the 1968 edition of Black's Law Dictionary. The government concludes by stating that because, in the instant matter, the government had not taken any action and because the bidder's pecuniary interest had not been affected by a "decree or judgment", the protestor could not qualify as an "aggrieved party". Furthermore, concludes the government, protestor could not be an "aggrieved party" because it had not suffered a loss or injury or had a legal right violated.

The government fails to recognize that the statute giving the Board its protest jurisdiction also involves the question of a protestor's standing, i.e. whether the litigant is entitled to have the Board determine the merits of its pre-award dispute. See Allen v. Wright, 468 U.S. 737 (1984).

In order to have standing, a protestor must establish that it has suffered or will suffer injury in fact from the contested action and that its interests are within the zone of interests protected by a statute. Control Data Corp. v. Baldridge, 655 F.2d 283 (D.C. Cir. 1981). Stated more succinctly:

> [A]t an irreducible minimum [standing] requires the party who invokes the court's authority to 'show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant,'. . .

Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 472 (1982), quoting Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 99 (1979).

The most common form of injury in government contract cases is the economic loss which would result from loss of the contract; and injury in fact clearly exists in the case of a person who submits a bid or proposal. As stated by the Circuit Court of Appeals for the Fifth Circuit:

> Unlike the type of delicate question which arises when a plaintiff alleges an injury of a non-economic nature to interests which are widely shared, . . .

> the economic injury suffered by a losing bidder in seeking a government procurement contract is manifest. . . .

Hayes International Corp. v. McLucas, 509 F.2d 247, 255 (5th Cir. 1975), cert. denied 423 U.S. 864 (1975).

Sufficient injury is also suffered by a potential competitor who is denied the opportunity to compete, Aero Corp. v. Department of the Navy, 540 F.Supp. 180 (D.D.C. 1982), or whose product or services is precluded from consideration by the government's specifications. Honeywell Information Systems, Inc. v. Devine, C.A. No. 84-2967 (D.D.C. 1984); Ray Baillie Trash Hauling, Inc. v. Kleppe, 477 F.2d 696 (5th Cir. 1973).[4]

Thus, the adverse agency action which gave rise to the protest in this instance was the determination of another company as the apparent low bidder, based upon, inter alia, its alleged responsiveness to the solicitation. Because protestor was the second low bidder, that governmental decision triggered its threatened economic injury, thereby rendering it an "aggrieved party" for purposes of the Board's jurisdiction.[5]

The government's argument concerning the meaning of the term "solicitation" in the context of the PPA's grant of protest jurisdiction is not persuasive. Contrary to the government's position, "solicitation" encompasses the entire competitive (and in some cases, non-competitive) procurement process used by government agencies to procure goods and services. The process runs the gamut, from development of competitive procedures, acquisition planning, development of specifications and provisions, soliciting competition (through invitations for bids, requests for proposals, etc.), to determining responsiveness and responsibility, evaluations of proposals, resolving mistakes,

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[4]See also O'Donnell Construction Company, CAB No. P-158, 4 P.D. 967 (protestor has standing to challenge whether invitations for bid were properly set aside but has no standing to challenge the solicitation once properly set-aside.) See also O'Donnell Construction Co. v. District of Columbia, C.A. No. 89-01867 (May 5, 1992), Slip Op. at 5.

[5]The government puts great emphasis on the definition of "aggrieved party" found in the 1968 edition of Black's Law Dictionary. That emphasis is clearly misplaced. The definition of "aggrieved party" at page 60 in the 1979 edition of Black's Law Dictionary refers the reader to the definition of "standing". There, at page 1260, it is stated, under "Standing to sue doctrine":

> Standing is the requirement that the plaintiffs have been injured or been threatened with injury by governmental action complained of, and focuses on the question of whether the litigant is the proper party to fight the lawsuit, not whether the issue itself is justiciable.

In essence, one cannot simply premise its argument on a single definition. One must look further to understand the full meaning of the term and the legal context in which it is used.

negotiations, awards and debriefings. See R. Nash, Jr. and J. Cibinic, Jr., Formation of Government Contracts, Chapters 4 through 6 (2d ed. 1986). Each of the actions mentioned above are contract actions, part of the solicitation process; and any one can clearly compromise the competition that leads to award. Where that happens, a contract award controversy, or bid protest, may arise. Id., Chapter 10, p. 1005. Thus, to attempt to restrict the term to formal contract documents is unsupportable.

The Protest Is A Valid Pre-Award Dispute for Purposes of This Board's Jurisdiction.

While acknowledging that a protest is a pre-award dispute, the government argues that the protest in question is not such a dispute because it is premature. In this regard, the government goes to great lengths in an attempt to distinguish the meaning of the term "dispute" in a protest context (as opposed to an appeal of a contracting officer's final decision) and concludes that because no award was made, the instant protest is not a pre-award dispute.

Here, it is clear that the government simply disagrees with the Board's prior decision. As stated earlier herein, "[a] party requesting reconsideration must show that the prior decision contains either errors of fact or law or that the [party] has information not previously considered that warrants reversal or modification of the decision. Repetition of arguments made during the original protest, or mere disagreement with the decision, does not meet this standard." Macton Construction, Inc., supra, at 913 (and cases cited therein).

In addition, the cases cited by the government lend little, if any, support to its position. Mustang Industrial Cleaners, B-172531 (March 5, 1976), 76-1 CPD ¶158 concerns a purported "protest" of matters which the Comptroller General found were aspects of contract administration and not for resolution under the Comptroller General's bid protest procedures.[6/]

[6/]The protestor alleged that the government failed to properly follow the disputes clause, improperly withheld funds and denied requests for constructive changes. Clearly, these were matters arising under the performance of a contract and had nothing to do with contract formation, i.e. the solicitation process.

Additionally, the government has misread the Court of Appeals' reason for citation to this case in footnote 3 of its decision in Jones & Artis Construction Company v. District of Columbia Contract Appeals Board, 549 A.2d 315, 319 (D.C. App. 1988). In that case, appellant argued, inter alia, that cancellation of an invitation for bids was subject to appeal, not merely a protest, and therefore was timely filed with the Board within the requisite 90-day period. Id. at 317. The Court was contrasting appeals ". . . as (continued...)

The Wilkenson Group-Recon., B-243291.2 (July 11, 1991), 91-2 CPD ¶47 concerned, inter alia, allegations of ineptness and bias in the evaluation of proposals submitted under a request for proposals (RFP). While finding that the protest was premature because the agency had not yet made a determination on the acceptability of proposals, the Comptroller General stated:

> If at the time offerors are notified of evaluation results and/or of award, and Wilkenson finds the results objectionable, then it may file its protest with our Office within 10 working days of notification.

Id. at 3. Thus, the Comptroller General clearly acknowledged that a protest may be filed before award, i.e. upon notification of evaluation results and that it would have jurisdiction thereof. See also Barrett and Blandford Associates, Inc., B-240723 (September 12, 1990), 90-2 CPD ¶204 (in an RFP situation, the protest was found to be premature because the agency had not yet determined the acceptability of proposals).

Foxbro Systems, Inc., B-245088; B-245089; B-245090 (September 13, 1991), 91-2 CPD ¶243 is equally inapposite. There, the protestor alleged that it believed that the government intended to purchase equipment for installation by means of extending an existing contract. In essence, the protest was not based upon a fact. Here, however, the protestor alleges specific facts to support its position, e.g. failure to provide proper certification for independent price determination, an element the protestor knew at the time of bid opening. The cases are easily distinguishable.

Consequently, the government's position regarding the non-existence of a dispute is without merit.

The Board's Decision Does Not Place Severe Restrictions on the Appropriate Evaluation of Bids and Ultimately on the Ability of the District to Carry Out the Policies and Purposes of the PPA.

As the Board understands the government's position, the argument is that the Board will be forcing the government to determine bid responsiveness well before it has

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6/(...continued)
customarily limited to issues of contract performance . . ." with bid protests, i.e. ". . . complaints about the solicitation and award of contracts...." Id. at 319. In essence, by citing Mustang, the Court of Appeals was trying to make clear that issues of contract performance, which only arise after contract award, do not belong in the bid protest arena. In the instant case, the issue of bid responsiveness arises prior to contract award--and is a valid subject for a bid protest.

had an opportunity to evaluate all bids, especially where a bidder challenges the responsiveness of a competitor's bid immediately after bid opening. Additionally, the government argues that the Board would be putting itself in the position of the contracting officer in determining bid responsiveness, an improper expansion of Board authority. This argument has no merit.

Section 1531.1 of Title 27, DCMR defines responsiveness in terms of materiality of nonconformity with a solicitation. That section states, "Any bid that fails to conform to the essential requirements of the IFB shall be rejected." (emphasis added) This requisite is almost reiterated in 27 DCMR §1541.1:

> Each contract shall be awarded to the responsible and responsive bidder whose bid meets the requirements set forth in the IFB. . . . (emphasis added)[7/]

Questions of responsiveness are decided only on the basis of information submitted with the bid and on the facts available at the time of bid opening. Thus, bid responsiveness is an area in which the contracting officer has limited discretion and concerns the issue of whether a prospective contractor has promised to do exactly what the government has asked. On the other hand, responsibility determinations surround the question of whether the bidder has the ability to perform as promised; and such decisions are made on the basis of all information submitted or available up to the time of award. See Formation of Government Contracts, supra, Chapter 5.

Thus, in a sealed bid scenario, responsiveness is determined at the time of bid opening and clearly concerns material compliance with the requirements contained in the solicitation documents. If a proposed awardee's bid is deemed by a competitor not to comply, that question is properly raised at that time or within 10 days thereafter with the Board. D.C. Code §1-1189.8(b).

Moreover, that the government will have to defend against a protest which challenges responsiveness within the bid acceptance period is of no moment. This is so because unlike our federal counterpart (GSBCA) and the Comptroller General, this Board does not have the authority to suspend or enjoin contract award or performance pending a protest. Group Insurance Administration, Inc., CAB No. P-309, 4 P.D. 992. Therefore, a contracting officer may proceed with the award process, i.e. determine responsibility and make award during the pendency of a protest. No "chilling effect" will result on the

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[7/]Compare FAR §14.301(a), which states:

> To be considered for award, a bid must comply in all material respects with the invitation for bids. Such compliance enables all bidders to stand on an equal footing and maintains the integrity of the sealed bid system. (emphasis added)

a protest. Group Insurance Administration, Inc., CAB No. P-309, 4 P.D. 992. Therefore, a contracting officer may proceed with the award process, i.e. determine responsibility and make award during the pendency of a protest. No "chilling effect" will result on the ability of the government to carry out its mandate under the PPA.[8/]

Furthermore, there should be no trepidation that the Board will have to consider numerous premature and anticipatory protests. If they arise, they will be dealt with accordingly.

Conclusion

The government's request for reconsideration contains no statement of facts or legal grounds which warrant modification or reversal. It only raises issues unsupportable in the law and reiterates arguments already made and considered by the Board. Consequently, the motion for reconsideration is DENIED.

DATE: May 12, 1992

TERRY HART LEE
Administrative Judge

CONCUR:

ZOE BUSH
Chief Administrative Judge

BENJAMIN B. TERNER
Administrative Judge

[8/]However, the government may have to fight the challenge in another arena. See Group Insurance Administration v. D.C. Office of Controller, C.A. No. 92-2093 (Memorandum Opinion and Order, April 1, 1992) (wherein the Superior Court for the District of Columbia enjoined contract performance pending a decision on the protest).

Furthermore, a protest lodged prior to award will give the government the opportunity to review its own work; and it may decide to withhold award pending that review. The federal sector provides ample regulatory precedent for that process. See FAR §33.103.