

Government of the District of Columbia

CONTRACT APPEALS BOARD
717 14TH STREET, N.W., SUITE 430
WASHINGTON, D.C. 20005



(202) 727-6597

DATE: September 26, 1994

TO: Jerry Petraglia, Vice President
American Medical Laboratories, Inc.
14225 Newbrook Drive, P.O. Box 10841
Chantilly, Virginia 22021-0841

Anne Cauman
Assistant Corporation Counsel
441 4th Street, N.W.
Washington, D.C. 20001

SUBJECT: CAB No. P-414, Protest of American Medical Laboratories, Inc.

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

Rose M. Gillison / mg
ROSE M. GILLISON
Clerk to the Board

Attachment

cc: Clifton N. West, Jr.
Secretary
3102 Georgia Ave., N.W.
Washington, D.C. 20010

GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

PROTEST OF:

AMERICAN MEDICAL LABORATORIES, INC.)	
)	CAB No. P-414
Under Solicitation No. JA/94671)	

For the Protestor: Jerry Petraglia, Vice President. For the Government: Anne Cauman and Howard Schwartz, Assistants Corporation Counsel.

Opinion by Administrative Judge Cynthia G. Hawkins-León, with Administrative Judges Lorilyn E. Simkins and Jonathan D. Zischkau, concurring.

**OPINION AND ORDER ON DISTRICT'S
MOTION TO DISMISS**

Procedural History

The instant protest was filed with the Board on July 22, 1994. American Medical Laboratories, Inc. ("Protestor" or "AML") alleged that emergency Solicitation No. JA/94671 for the performance of urine testing services for the Alcohol and Drug Abuse Services Administration of the Department of Human Services ("ADASA") had been awarded to B & W Stat Laboratories, Inc. ("B & W"). Further, Protestor alleged that the purported awardee was not a "NIDA approved laboratory as listed in the Federal Register"¹ as was required by Question #1 of the solicitation. Exhibit 1, Motion to Dismiss. AML stated that, at the time of the filing, it was the incumbent provider of these testing services.

Protestor requests "relief of this award and that due consideration be given to American Medical Laboratories for the continuation of the services that we have provided."

The Board sent its notice of filing of protest to the parties on July 26, 1994.

¹ Protestor attached a single page from the Notice section of the Federal Register that appears to be an incomplete copy of the "Current List of Laboratories Which Meet Minimum Standards To Engage In Urine Drug Testing For Federal Agencies And Laboratories That Have Withdrawn From The Program" (59 Fed. Reg. 34850 (July 7, 1994)).

On August 19, 1994, the Board received a response to the protest from the purported awardee or an interested party, B & W. Board Rule 304, 36 DCR 2712 (April 21, 1989). In its response, B & W stated that it had been orally notified by an employee of the contracting section of the Department of Human Services ("DHS") that B & W was the successful bidder for Solicitation No. JA/94671 and that a letter confirming B & W's contractual relationship with a NIDA-certified laboratory was needed to complete their contract file. B & W stated that this letter had been provided and deemed acceptable by DHS and that B & W was to sign the contract documents.

On August 29, 1994, in lieu of an agency report, the District filed a motion to dismiss on the ground that, in light of the fact that no responsibility determination has been made and no contract has been executed, AML is not an aggrieved party. Board Rule 306, 36 DCR 2713 (1989). The District bases its motion on D.C. Code § 1-1189.3 (Repl. 1992), Board Rules 300.1 and 300.2 (36 DCR 2710 (1989)), and an analysis of the Board's decision in Dixon Pest Control, Inc., CAB No. P-371, May 17, 1994, 41 DCR 3428.

To date, Protestor has not filed a response to the District's Motion to Dismiss. Protestor's failure to file a response within seven (7) days of the motion's filing may, at the Board's discretion, result in the dismissal of the protest or the Board's disregard of factual allegations that are not admitted by the District. See Board Rule 307, 36 DCR 2713 - 2714 (1989).

Statement of Facts²

On July 6, 1994, DHS issued emergency Solicitation No. JA/94671 for urine testing services for ADASA. DHS transmitted via facsimile the solicitation to seven vendors. The cover letter to the solicitation advised the vendors that responses were due by July 8, 1994. The solicitation was for an emergency procurement for a period of 120 days. By July 8, 1994, DHS had received four responses to the solicitation, including responses from B & W and AML.

Contrary to Protestor's allegation, DHS has not yet awarded an emergency contract for urine testing services for ADASA. At this time, the District has stated that it is unknown when such a contract will be awarded.

² As previously stated, in light of the Protestor's failure to reply to the District's Motion to Dismiss, the Board has accepted the District's uncontroverted statement of facts.

Decision

The Procurement Practices Act ("PPA") establishes the Board's jurisdiction over protests as follows:

The Board shall be the exclusive hearing tribunal for, and shall have jurisdiction to review and determine de novo:

(1) Any protest of a solicitation or award of a contract ... by any actual or prospective bidder or offeror ... who is aggrieved in connection with the solicitation or award of a contract

D.C. Code § 1-1189.3 (Repl. 1992).

The Board's Rules, which are intended to implement the PPA, are very specific concerning the Board's jurisdiction. Board Rule 300 sets the following parameters:

- 300.1 An aggrieved person may protest to the Board a solicitation issued by or for a District department or agency for the procurement of property or services, or a proposed award, or the award of such a contract.
- 300.2 For purposes of this chapter, an aggrieved person means an actual or prospective bidder or offeror who has suffered a loss or injury or has had a legal right violated as a result of adverse agency action.

36 DCR 2710 (1989).

Thus, the Board has held that a protest is only viable if the protestor has been wronged by agency action. In Group Insurance Administration, CAB No. P-354, February 2, 1993, 40 DCR 4933, the Board provided an in-depth discussion of the meaning of the term "aggrieved party." In its discussion of Micro Computer Company, Inc., CAB No. P-226, January 9, 1992, 39 DCR 4381, the Board observed the following:

[T]he Board clearly stated [in Micro] that it has jurisdiction over protests filed both prior to and after contract award. However, the protest must involve the solicitation process, i.e. actions taken which lead up to and include award of a contract.

40 DCR 4936, fnt. 4.

In Dixon Pest Control, the Board took this analysis further:

The Board has held consistently that in order for there to be a viable protest, a bidder must be aggrieved by agency action. Further, in order for a party to be aggrieved, there must be some showing of actual or threatened injury in fact.

Under the facts of the instant matter, it is clear that Dixon is not properly aggrieved for the purpose of our jurisdiction, in that no determination of responsibility has been made, and no award has been made. Thus, at best, protestor's challenge is speculative and premature. (citations omitted).

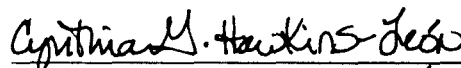
41 DCR at 3428 - 3429.

In the case at bar, as in Dixon, the District has not yet made a responsibility determination and has not yet awarded the emergency contract at issue.

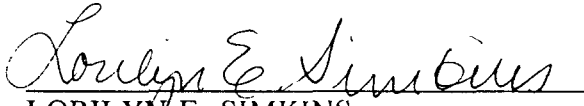
The interested party has asserted that it was scheduled to sign the contract documents, but had not yet done so as of August 18, 1994. Despite B & W's assertions, no proof has been submitted to the Board by the interested party (or the Protestor, for that matter) regarding DHS' actions or determinations. The Board is unable to make decisions based solely upon the assertions of counsel or company representatives. The Board requires evidence of proof. See Executive Security & Engineering Technologies, Inc., CAB No. P-399, June 22, 1994, 7 P.D. 5879. In sum, the evidence of record does not establish "actual or threatened injury in fact." Dixon Pest Control, 41 DCR at 3428. In light of the foregoing, the Protestor is not an aggrieved party and the instant action is premature.

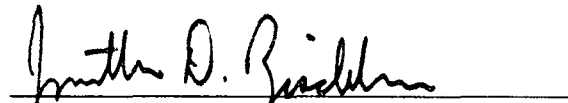
Therefore, based upon the facts, legal precedent and reasoning as set forth above, this protest is **DISMISSED**, without prejudice.

DATE: September 26, 1994


CYNTHIA G. HAWKINS-LEÓN
Administrative Judge

CONCUR:


LORILYN E. SIMKINS
Chief Administrative Judge


JONATHAN D. ZISCHKAU
Administrative Judge