

GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

44 D.C. Reg. 6378

PROTEST OF:

UNFOLDMENT, INC.)	
)	CAB No. P-435
Under RFP No. 5090-AA-NS-3-CW)	

For the Protester: Kemi Morten, Esq., and Brian J.H. Lederer, Esq. For the Government: Edward Rich and Anne Cauman, Assistants Corporation Counsel.

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

ORDER ON MOTION TO DISMISS

Unfoldment, Inc., has filed a protest regarding Department of Administrative Services ("DAS") emergency solicitation No. 5090-AA-NS-3-CW. Unfoldment argues that the solicitation fails to meet competition requirements, constitutes an improper sole source procurement aimed at the incumbent contractor, A.L. Nellum and Associates, Inc. ("Nellum"), and fails to satisfy program requirements dictated by prior judicial orders. The protest also alleges bias in the selection and award process which resulted in an award to Nellum. The District has moved the Board to dismiss the protest on the grounds that the protest is untimely as to some issues and fails to set forth a clear statement of the law and facts as to other issues. We dismiss in part and deny in part the protest.

FACTS

On April 14, 1995, DAS issued emergency solicitation No. 5090-AA-NS-3-CW in the open market requesting proposals for drug abuse services for residential treatment and an aftercare program for the Department of Corrections. (District's Motion to Dismiss, Exhibit 1). The emergency solicitation, authorized by an April 3, 1995 determination and findings by the Director of DAS, was sent to three prospective offerors. (*Id.*, Exhibit 2).

On April 19, 1995, DAS issued Amendment No. 1 to the solicitation extending the submission date for proposals. On April 24, 1995, DAS issued Amendment No. 2 which added a clause and contained responses to 23 questions submitted by Unfoldment. On April 27, 1995, DAS received offers from Unfoldment and Nellum. (*Id.*, Exhibit 2). Nellum's proposal received a score of 355 while Unfoldment's received a score of 185. In addition, the contracting officer determined that Unfoldment's offer was technically unacceptable. (*Id.*) On May 30, 1995, DAS awarded Contract No. 5090-AA-NS-3-CW to Nellum based on its high score (and presumably because Unfoldment's proposal was determined to be technically unacceptable). Unfoldment received a notice from DAS on June 5, 1995 that Nellum had received the award.

Unfoldment filed a "Notice of Appeal" with the Board on June 14, 1995, which we deemed to be a protest. In its protest, Unfoldment challenges "the solicitation process, the selection process and the contract award" and alleges:

bias in the solicitation, selection and award of the contract; utilization of improper solicitation set-asides that favor minority for profit businesses and discriminate against minority nonprofit organization; use of inappropriate and unconstitutional evaluation procedures and possible violations of the D.C. Procurement Practices Act and procedures.

Perhaps confusing the rules governing disputes with the rules governing protests, Unfoldment indicated that it would later file a "complaint." The Board conducted a telephone conference with the parties on June 30 to clarify the Board's rules and the protest issues. During the conference, the Board learned that Unfoldment had not received a debriefing despite its request for one. In a June 20 order, the Board directed that Unfoldment receive a debriefing and supplement its protest. On July 17, the Board ordered the District to furnish relevant documents requested by Unfoldment. Thereafter, the District provided Unfoldment with responsive documents.

On July 28, 1995, Unfoldment filed a "Supplemental Protest" identifying six protest grounds: (1) DAS' decision to use a solicitation for competitive sealed proposals in lieu of competitive sealed bids is not supported by the written justification required by statute; (2) DAS' market survey violated the competition requirements of D.C. Code § 1-1183.12; (3) the procurement constituted an improper sole source procurement directed to Nellum; (4) the solicitation was improperly designed and prepared; (5) DAS' determination and findings supporting the need for an emergency solicitation violate D.C. Code § 1-1183.12 and 27 DCMR §§ 1710.2 and 1710.3; and (6) DAS violated 27 DCMR § 1710.6 by failing to initiate a separate non-emergency procurement action at the same time that the emergency procurement was made.

On August 18, 1995, the District moved to dismiss the protest, as supplemented, on the grounds that (1) in violation of Board Rule 302.1(c), Unfoldment has failed to set forth a clear and concise statement of the legal and factual bases for its protest, and (2) those portions of the protest challenging the solicitation itself are untimely. Unfoldment opposes the District's motion, repeating allegations set forth in its prior submissions and arguing that it has not received an adequate document production from the District.¹

¹ We grant Unfoldment's motion for leave to file out of time its opposition. Unfoldment's request for additional documents is denied. First, the Board held a telephone conference with the parties shortly after the District produced its documents on July 24 and neither then nor at any time up to Unfoldment's July 28 deadline for supplementing its protest did it move to compel. Unfoldment was obliged to obtain whatever documents it needed in sufficient time to meet the July 28 deadline. Therefore, its current request, and the "reservation" of a right to further supplement its protest upon receiving additional documentation (which was contained in its July 28 submission) are unavailing and disregard the Board's scheduling order. Second, the types of documents that Unfoldment claims it has not received are ones either that the District states do

DISCUSSION

The Board's protest jurisdiction is governed by D.C. Code §§ 1-1189.3(1) and 1-1189.8(a)-(c).

Generally, to satisfy the 10-working-day statutory limitation for a challenge to the terms of the solicitation, D.C. Code § 1-1189.8(b), the protest must be filed with the Board on or before the closing date for proposals. *See, e.g., Technical Resolution Corp.*, CAB No. P-393, Mar. 22, 1994, 41 D.C. Reg. 4138, 4141-42; *Associated Tool Co.*, 71 Comp. Gen. 359, 361, 92-1 CPD ¶ 376. Plainly, all of Unfoldment's challenges directed at the solicitation itself, raised well after the closing date for proposals, are untimely. Therefore, the following protest grounds are dismissed: bias in the solicitation; improper solicitation set-aside favoring minority for-profit businesses; inappropriate and unconstitutional evaluation procedures; improper use of competitive sealed proposals rather than competitive sealed bids without written justification; improper market survey; improper design and preparation of the solicitation; determination and findings fail to support an emergency solicitation; and failure to initiate a separate non-emergency procurement action at the same time that the emergency procurement was made. *See, e.g., Precision Signal, Inc.*, B-250852.2, Apr. 12, 1993, 93-1 CPD ¶ 309 (objection to solicitation's evaluation factors untimely when raised after closing time for proposals); *ASOMA Instruments, Inc.*, B-251674, Apr. 13, 1993, 93-1 CPD ¶ 317 (complaint that RFP should have been issued as a small business set-aside had to be raised prior to closing date for proposals); *Professional Performance Development Group, Inc.*, B-252322, June 9, 1993, 93-1 CPD ¶ 447 (allegations that RFP omitted certain provisions required by FAR, that certain provisions restricted competition, and that changes caused by a solicitation amendment indicate bias, had to be raised prior to closing date); *White Water Assocs., Inc.*, B-253825, Aug. 26, 1993, 93-2 CPD ¶ 126 (decision to replace set-aside solicitation with unrestricted solicitation had to be challenged prior to closing date).

The remaining protest grounds, *i.e.*, the agency was biased in the selection and contract award, the selection process was treated as a sole source procurement, and the agency engaged in illegal "evaluation procedures", refer to the actual conduct of the evaluation, selection, and award, rather than the content of the solicitation. Therefore, these allegations do not fall as untimely allegations of solicitation improprieties.

The District argues that we should not even reach the merits on these protest grounds because Unfoldment's protest fails to set forth a clear and concise statement of the legal and factual grounds as specified in Board Rule 302.1(c).² Although the District treats Board Rule

not exist or that in any event relate to protest grounds that were filed untimely.

² Board Rule 302.1, 36 D.C. Reg. 2711 (1989), provides in relevant part that all protests shall be in writing, addressed to the Board, and shall include: "A clear and concise statement of the legal and factual grounds of the protest, including copies of relevant documents, and citations to statutes, regulations or contract provisions claimed to be violated. . . ."

302.1(c) in a way that one might employ Rule 12(b)(6)³ of the Superior Court Rules of Civil Procedure in a motion for judgment on the pleadings, Board Rule 302.1(c) does not serve the same purpose that Rule 12(b)(6) does in an action before the Superior Court. Rule 302.1 is meant to advise protesters of the expected form and content of a protest, so that the protester identifies the legal and factual grounds of the protest for the Board and the agency and its counsel. It does not speak to raising a defense to a claim for relief in a pleading, although we have on some occasions cited Board Rule 302.1(c) when dismissing a case for failure to state a claim.

The issue of whether a protest fails to state a claim must be considered first with regard to our statutory mandate to "promptly decide whether the solicitation or award was in accordance with the applicable law, regulations, and terms and conditions of the solicitation." D.C. Code § 1-1189.8. That leads us to determine (1) which laws, regulations, and solicitation terms are applicable to the protest issues, and (2) whether there is a preponderance of record evidence to support a protester's claim that the agency has violated applicable law, regulations, or solicitation terms.

We must also consider the nature of a protest and our administrative protest procedures. Our protest procedures contemplate that the Board generally will base its decision on a record consisting of the protest submission, an agency report, a response to the agency report, documentation made a part of the record by the parties, and, where appropriate, testimony given at a hearing or through deposition. Our expectation of specificity in the initial protest submission must take into account that the protester may often have little more than the benefit of the solicitation documentation, its observations as a participant in the procurement, and a debriefing. Sometimes, as was the case here, the protester may not even have received a debriefing. Therefore, the absence of detailed facts concerning an alleged procurement deficiency in the initial protest filing does not necessarily or usually dictate a dismissal. Many protests are

³ Rule 12(b) (1995 ed.) states in relevant part:

Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or 3rd-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: . . . (6) failure to state a claim upon which relief can be granted If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the Court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

presented to the Board for decision based only on a written record. In such cases, the parties usually are able to obtain a decision on the merits in less time than it might take for a court to resolve a Rule 12(b)(6) motion or a summary judgment motion under Rule 56.

That is not to say that the District may not move to dismiss a protest in lieu of filing its agency report. Board Rule 306.1 authorizes an agency to file a dispositive motion in lieu of filing the agency report, but generally such a motion will be based on a jurisdictional defect rather than on a failure of the protester to state a claim for relief under the procurement law. The Board itself may summarily dismiss a protest when it is "invalid on its face, or untimely filed, or otherwise not for consideration." Board Rule 308.1. The Board infrequently invokes this procedure and only with an abundance of caution. *Cf. McBryde v. Amoco Oil Co.*, 404 A.2d 200, 203 (D.C. 1979) ("it is only where the facts material to a cause of action are shown to be undisputed, and those facts so established indicate an unequivocal right to judgment favoring a party that summary disposition will be permitted"). Where protest allegations are vague or unclear, the Board often will have a conference with the parties soon after the protest is filed in order to identify the protest issues. Where the District believes a protest ground fails to state a violation of procurement law or regulation or is unsupported by the facts, the matter should be addressed through the agency report on the merits in the first instance. Otherwise, the intended fast-track nature of the protest procedures is frustrated. Where the agency believes that some of the protest grounds are jurisdictionally defective while others are unclear or unsupported, it makes good sense to file an agency report which both requests dismissal for allegations which it believes are jurisdictionally defective and addresses the merits of the remaining protest allegations on appropriate legal or factual grounds.

In the present case, the remaining protest allegations are not so obviously invalid on their face to merit dismissal. Although the allegations are mainly conclusory and barely supported with facts, they make reasonably clear the applicable law and regulations at issue, and thus we must address the allegations on their merits. The District, in fact, properly treats the merits by pointing to specific factual or legal inadequacies of the remaining protest grounds. By including exhibits with its motion to dismiss, such as the solicitation and relevant procurement documentation, the District has supplied the Board with sufficient evidence to rule on the merits of the remaining allegations. Unfoldment has had three opportunities to make its record: in the initial protest, in the supplement, and in a response to the District's motion.

Based on a review of the record, it is clear that Unfoldment has not met its burden of proof on the remaining allegations. Although Unfoldment's factual presentation is rather unorganized, it sets forth the following support for its allegations: the agency failed to include Unfoldment in the market survey conducted prior to issuance of the solicitation even though it had provided services in the past and had indicated interest in providing such services again; its drug treatment program is superior to the Nellum's program; Nellum's program does not meet standards set by federal court remedial orders; and Unfoldment's proposed program cost is lower than Nellum's. Unfoldment's claim that its program is "better" than the awardee's ignores the evaluation criteria established in the solicitation to rate the offers. Unfoldment does not

challenge the actual evaluations and scoring of its proposal.⁴ Unfoldment also does not challenge that its proposal was technically unacceptable for failing to address several required areas of proficiency. *See Precision Signal, Inc.*, 93-1 CPD ¶ 309, at 3 & n.1. Unfoldment does not specifically identify how Nellum's proposed program fails to meet standards set by any federal court order or how such an alleged failure affected evaluation under this particular solicitation. Further, Unfoldment fails to show that either its or Nellum's cost proposal was improperly scored under the solicitation's evaluation criteria. Finally, the agency's failure to include Unfoldment in the initial market survey does not standing alone, or with the record as a whole, approach the kind of evidence needed to show bias on the part of agency officials.

The protest is dismissed in part and denied in part.

SO ORDERED.

DATE: September 12, 1995

/s/
JONATHAN D. ZISCHKAU
Administrative Judge

CONCURRING:

/s/
LORILYN E. SIMKINS
Chief Administrative Judge

/s/
PHYLLIS W. JACKSON
Administrative Judge

⁴ As discussed above, any challenge at this point to the solicitation's evaluation criteria and their relative weighting would be untimely.