

GOVERNMENT OF THE DISTRICT OF COLUMBIA  
CONTRACT APPEALS BOARD

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COMMUNICATIONS SECTION

PROTEST OF:

RODGERS BROTHERS CUSTODIAL SERVICES, INC.  
2225 Lawrence Avenue, N.E.  
Washington, D.C. 20018

CAB No. P-565

Under IFB No. 98-0213-AA-OMS-TS

AFFIDAVIT OF THE DISTRICT OF COLUMBIA IN RESPONSE  
TO THE AFFIDAVIT OF GEORGE RODGERS, JR.

I. Kevin A. Green do hereby declare and affirm under the penalties of perjury that:

1. I am the Agency Chief Contracting Officer for the Department of Public Works of the District of Columbia.

2. I received a memorandum dated October 8, 1998, from Leslie A. Hotaling the Administrator of the Solid Waste Management Administration of the Department of Public Works. (Ex. 9, Agency Report). The Administrator stated in her memorandum that Rodgers Brothers Custodial Services, Inc. (Rodgers) was in violation of the Solid Waste Facility Permit Law (Solid Waste Law) and was being sued by the District.

3. On October 15, 1998, I determined that Rodgers was nonresponsible in that Rodgers did not possess the requisite integrity and business ethics as required by law because of its failure to comply with the Solid Waste Law. (Ex. 10, Agency Report).

4. On October 15, 1998, I determined that Waste Management, Inc. was responsible. (Ex. 12, Agency Report).

5. In a letter dated October 16, 1998, I notified Rodgers that it was found nonresponsible for failing to comply with the Solid Waste Law. (Ex. 13, Agency Report).

6. On October 16, 1998, I had a conversation with George Rodgers, Jr. Mr. Rodgers

stated that Waste Management was in violation of the Solid Waste Law. I informed Mr. Rodgers that I would check on this claim because I had no information that Waste Management had violated the Solid Waste Law.

7. I had a conversation with Leslie Hotaling, Administrator of the Solid Waste Management Administration on or about October 16, 1998. Ms. Hotaling informed me that Waste Management was in compliance with the Solid Waste Law. Ms. Hotaling contradicted the information furnished by Mr. Rodgers.

8. I had no reliable evidence that Waste Management had violated the Solid Waste Law. I did not believe the information supplied by Mr. Rodgers.

9. I have personal knowledge of the facts stated herein.

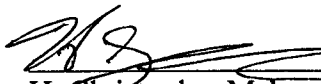


Kevin A. Green  
Agency Chief Contracting Officer

December 31, 1998  
Date

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing affidavit was sent on this 31 day of December, 1998, to the following:

  
H. Christopher Malone  
Assistant Corporation Counsel

MAILED, POSTAGE PREPAID

Philip R. Croessmann, Esq.  
Nick R. Hoogstraten, Esq.  
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ROG.AFF

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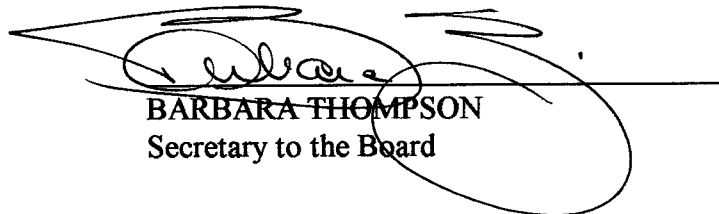
February 17, 1999

TO: Phillip R. Croessmann, Esquire  
Bastianelli, Brown & Kelley  
1133 21<sup>st</sup> Street, N.W., Suite #500  
Washington, DC 20008

H. Christopher Malone, Esquire  
Warren J. Nash, Esquire  
Howard S. Schwartz, Esquire  
Assistants Corporation Counsel  
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441 4<sup>th</sup> Street, N.W., 10<sup>th</sup> Floor  
Washington, DC 20001

SUBJECT: CAB Nos. **P-565**, (Protests Of: **Rogers Brothers Custodial Services, Inc.**)

Attached is a copy of the Board's Opinion dismissing protest in part and denying protest in part.

  
BARBARA THOMPSON  
Secretary to the Board

GOVERNMENT OF THE DISTRICT OF COLUMBIA  
CONTRACT APPEALS BOARD

PROTEST OF:

) )  
) )  
RODGERS BROTHERS CUSTODIAL SERVICES, INC. ) CAB No. P-565  
Under IFB No. 98-0213-AA-OMS-TS )

For the Protester: Philip R. Croessmann, Esq. and Nick R. Hoogstraten, Esq, Bastianelli, Brown & Kelley. For the Government: Howard Schwartz and H. Christopher Malone, Assistants Corporation Counsel, D.C.

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

**OPINION**

Rodgers Brothers Custodial Services, Inc. ("Rodgers" or "Protester") protests the Department of Public Works' Determination and Finding that it was a non-responsible contractor for performance of an emergency procurement for the collection and disposal of residential yard waste. Rodgers, the low bidder, contends that the Contracting Officer lacked a reasonable basis for the non-responsibility determination. The Protester also asserts that the Contracting Officer failed to consider similar allegations against the second low bidder and that this is evidence of bad faith. Rodgers' protest is denied in part and dismissed in part.

**BACKGROUND**

On September 22, 1998, the Department of Public Works ("DPW") issued IFB No. 98-0213-AA-OMS-TS, seeking bids for curbside biweekly collection and disposal of yard waste for Wards 1 through 8, designated as Items 1 through 8. (Agency Report ("AR"), Ex. 3, at. 3). DPW issued Addendum No.1 on September 30, 1998, establishing the dates of collection beginning October 26, 1998 through the week of January 15, 1999.<sup>1</sup> (*Id.*). DPW received bids on October 2, 1998 from Rodgers, the apparent lowest bidder at \$577,840 (\$124 per ton) for Items 1 through 8, from Waste Management Inc., the second low bidder at \$615,120 (\$132 per ton) for Items 1 through 8, and from C&H Trucking,

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<sup>1</sup>On November 4, 1998, the Chief Procurement Officer filed a Determination and Findings to Proceed with Contract Performance. The Protester challenged the Determination and Findings on November 12, 1998. The District filed its Response on November 16, 1998. On November 18, 1998, the Board denied Protester's Motion Challenging the Director's Determination to Proceed With Contract Performance. Accordingly, the contract performance dates were delayed by approximately three weeks.

who bid \$210,000 for Items 1, 2, and 8. (AR, Ex. 4).

On October 6, 1998, DPW's Contracting Officer requested Rodgers to supply the agency with general responsibility information. (Protest, Ex. 1 and AR, Ex. 7). On October 9, 1998, in response to the District's request, Rodgers submitted documentation pertaining to its financial resources and status; information about current and recently expired contracts relative to the collection of waste; information about its equipment, personnel and facilities; an analysis of how Rodgers intended to perform the collection services; and copies of its solid waste collector's licenses and copies of the licenses of its drivers. (AR, Ex. 8). By letter dated October 16, 1998, DPW's Contracting Officer informed Rodgers that DPW would not award the contract to it because: "[t]his office has determined your company non-responsible for failing to meet the requirements of D.C. Law 11-94, 'Solid Waste Facility Permit Act of 1995' (SWFPA)." (Protest, Ex. 2). On October 16, 1998, the Contracting Officer signed a Determination and Findings of Non-Responsibility ("D&F"), which provides:

Section 3 of D.C. Law 11-94, "Solid Waste Facility Permit Act of 1995," (SWAPA) prohibits the operation of open solid waste facilities. Section 6 of D.C. Law 11-94, requires owners and operators of solid waste facilities to submit periodic reports. Section 8 . . . requires the payment of a solid waste facility charge based upon the actual tonnage of solid waste deposited at the solid waste facility at the rate of \$4.00 per ton.

[Rodgers] has not filed any reports with the Department of Public Works, Solid Waste Management Administration, the agency responsible for administering the SWFPA of 1995 since the law became effective on February 27, 1996. For the aforementioned reasons, the Department of Consumer and Regulatory [Affairs] is currently in litigation with [Rodgers] to enforce the provisions of the SWFPA of 1995 pursuant to the provisions of D.C. Law 11-118, "Clean Hands Before Receiving a License or Permit Act of 1996."

(Protest, Ex. 3 and AR, Ex. 10).

The Contracting Officer determined that Rodgers lacked a satisfactory record of integrity and business ethics based on its failure to comply with the provisions of SWFPA. (See 27 DCMR § 2200.4(d)). The Contracting Officer based the Non-Responsibility D&F on a one-page memorandum, dated October 8, 1998, from the Administrator of the Solid Waste Management Administration ("SWMA") of DPW, who advised the Contracting Officer that Rodgers was operating a solid waste facility in the District in violation of the SWFPA. (AR, Ex. 9). The SWFPA requires each owner/operator of a waste handling facility to report to DPW the number of tons of material the facility receives on a monthly basis, and to pay a facility fee for each ton of District-generated waste received. (*Id.*). The SWMA Administrator informed DPW that Rodgers had not reported the amount of waste received or paid the solid waste fee since the initiation of the process in August of 1996. The memorandum also reported that the District had filed suit against Rodgers for violating the SWFPA.

In a Determination & Findings signed on October 15, 1998, the Contracting Officer determined that Waste Management was responsible. (AR, Ex. 12). On October 16, 1998, the Chief Procurement Officer approved the Contracting Officer's Determination and Findings to award the contract to Waste Management, the next lowest bidder. (AR, Ex. 11).

Rodgers filed its protest on October 21, 1998 asserting: (1) that the Contracting Officer lacked a reasonable basis for determining Rodgers non-responsible; and (2) that Waste Management had similar violations of the SWFPA and should have also been found to be non-responsible. Rodgers concludes that the Contracting Officer's affirmative finding of responsibility for Waste Management underscores the lack of a reasonable basis in the Contracting Officer's finding of non-responsibility for Rodgers. In its Comments on the Agency Report filed on November 25, 1998, Rodgers asserted for the first time that this alleged dissimilar treatment demonstrated bad faith on the part of DPW.

## DISCUSSION

We exercise protest jurisdiction pursuant to D.C. Code § 1-1189.3 (Supp. 1998).

### I. Timeliness of Bad Faith Allegation

While not addressed by the District, the Board finds as a preliminary matter that the protester's allegation of bad faith was untimely raised. Rodgers original protest asserts as evidence that the Contracting Officer's determination lacked a reasonable basis the alleged dissimilar treatment of Rodgers and Waste Management. (Protest, at 4). In its Response to the Agency Report, Rodgers asserts for the first time that the alleged dissimilar treatment is evidence of bad faith. Protests based upon matters other than improprieties in a solicitation must be filed with the Board not later than ten business days after the basis of the protest is known or should have been known. (Board Rule 302.2, 45 D.C. Reg. 1415 (March 13, 1998)). The Board is without jurisdiction to decide matters that are filed beyond the 10-day time period. See, e.g. *Good Food Services, Inc.* CAB No. P-457, Aug. 27, 1996, 44 D.C. Reg. 7147. Generally, the timeliness of an additional bases of protest raised after the filing of a timely initial protest depends upon the relationship that the later-raised bases bear to the initial protest. See *Vinnell Corp.*, B-270793.2, Apr. 24, 1996, 96-1 CPD ¶ 271. Where the later bases present new and independent grounds for protest, they must independently satisfy our timeliness requirements. Conversely, where the later contentions merely provide additional support for an earlier timely raised objection, we consider these additional arguments. See *GE Government Services*, B-235101, Aug. 11, 1989, 89-2 CPD ¶ 128. The allegation of bad faith by the protester is a new and independent ground of protest, rather than additional support for the earlier protest contentions. The concept of bad faith is not embodied in the protester's challenge to the reasonableness of the Contracting Officer's determination. Since Protester's allegation of bad faith was not raised until November 25, 1998, more than one month after the filing of its original protest, it is untimely, and we are without jurisdiction to decide it. Accordingly, the issue of bad faith is dismissed with prejudice.

## II. Reasonableness of Responsibility Determination

While there is no presumption of agency correctness under our *de novo* standard of review, we accord contracting officers broad discretion in the exercise of their duty to determine whether a prospective contractor is responsible. See e.g. *Kidd International Home Care Services, Inc.*, CAB No. P-547, Sept. 15, 1998, 45 D. C. Reg. 8835; *Central Armature/Fort Myer*, CAB No. P-478, Jun. 6, 1997, 44 D. C. Reg. 6823; *Aceco, LLC*, CAB No. P-486, July 23, 1997, 44 D.C. Reg. 6852; *Dixon Pest Control Services, Inc.*, CAB No. P-410, Apr. 6, 1994, 42 D. C Reg. 4528; *C.P.F. Corp.*, CAB No. P-413, Nov. 18, 1994, 42 D.C. Reg. 4902. Since the contracting officer must bear the brunt of any difficulties in obtaining the required performance, we will not disturb an affirmative responsibility determination unless the protester demonstrates a failure by a prospective contractor to adhere to definitive responsibility criteria, fraud or bad faith on the part of the contracting officials, or that the responsibility determination lacks any reasonable basis. *H.R. General Maintenance Corp, Inc.*, CAB No. P-557, Feb 2, 1999, 10 P.D. 7658.

In arguing that the DPW Contracting Officer had no reasonable basis on which to find Rodgers non-responsible, the Protester states that the "D&F contains only one real 'finding' of a supposed legal violation by Rodgers Brothers—that Rodgers Brothers has not filed any periodic reports required by the SWFPA." (Protester's Comments on Agency Report, at 3). Rodgers argues that it has regularly filed reports pursuant to a 1993 Consent Order, and that the District has never informed Rodgers that the reports were unsatisfactory. (*Id.*) The Protester also asserts that the October 8, 1998, one-page memorandum from the Administrator of the SWMA, which the Contracting Officer relied upon, contained erroneous information itself and was further misinterpreted by the Contracting Officer. The Protester states:

Citing to both the SWFPA's requirement to file reports of tonnage and then to SWFPA's requirement to pay a fee on each ton reported, the Administrator stated that Rodgers Brothers has not complied with 'this provision.' It is not clear whether 'this provision' refers to the payment of the fee based on reported quantities or the reporting requirement itself. In either case, the one page memorandum contained inaccuracies.

(*Id.*).

Rodgers observes that the D&F incorrectly refers to D.C. Law 11-118, "Clean Hands Before Receiving a License or Permit Act of 1996," rather than the SWFPA, as the basis of the Superior Court suit. (*Id.*) Noting that the District's Motion for a Temporary Restraining Order in the Superior Court suit was denied, Rodgers argues that the lawsuit allegations are not facts upon which the Contracting Officer could reasonably base his D&F. (*Id.*) Based on these various purported defects and errors in the D&F and the one-page memorandum, Rodgers charges that the non-responsibility determination is not based on substantial evidence and lacks a reasonable basis.

Despite the errors cited by the Protester, we find that the record contains substantial evidence establishing that the Contracting Officer's determination of non-responsibility was reasonable. The one-

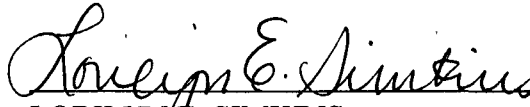


page memorandum from the Administrator of SWMA provided the Contracting Officer with adequate reason to determine that Rodgers had violated the SWFPA by failing to file reports concerning the amount of waste it had collected and failing to pay fees for the processed waste. Furthermore, the D&F was based on a document from the SWMA Administrator—the person responsible for all solid waste collection for the District. The Contracting Officer had ample justification to place great weight on the one-page memorandum, and was not required to further investigate the reports of non-compliance with the reporting and payment requirements of SWFPA. Although the D&F is not well written and in fact contains glaring errors, it adequately conveys a reasonable basis for finding Rodgers' non-responsible.

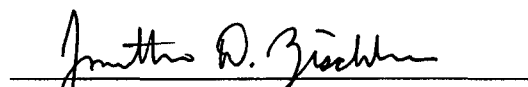
The record also fails to support Rodgers' claim of dissimilar treatment. Based on conversations with the Administrator of SWMA and Waste Management's response to DPW's responsibility inquiry, the Contracting Officer found Waste Management responsible and in compliance with the Solid Waste laws. (See "Affidavit of the District of Columbia in Response to the Affidavit of George Rodgers, Jr."). DPW's finding of responsibility for Waste Management is not a demonstration of dissimilar treatment and does not support Rodgers' claim that the Contracting Officer had no reasonable basis to find Rodgers non-responsible. This protest ground is denied.


Accordingly, the protest is dismissed in part and denied in part.

DATE: February 17, 1999

  
LORILYN E. SIMKINS  
Chief Administrative Judge

Concurring:

  
JONATHAN D. ZISCHKAU  
Administrative Judge

  
PHYLLIS W. JACKSON  
Administrative Judge