

GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

PROTEST OF:

AMERICAN CONSULTANTS AND)	
MANAGEMENT ENTERPRISES, INC.)	
)	CAB No. P-0683
Under Solicitation Nos. PO-JA-2002-R-0037,)	
and PO-JA-2004-R-JD001)	

For the Protester: Mr. Ernest Middleton, *pro se*. For the District of Columbia Government: Howard Schwartz, Esq., and Talia S. Cohen, Esq., Assistants Corporation Counsel, D.C.

Opinion by Chief Administrative Judge Jonathan D. Zischkau, with Administrative Judge Matthew S. Watson, concurring.

OPINION

LexisNexis Filing ID 3590011

Protester, American Consultants and Management Enterprises, Inc. ("ACME"), has protested the cancellation of one request for proposals ("RFP") and the issuance of another RFP for what ACME says are essentially the same juvenile substance abuse treatment services. We conclude that there was a reasonable basis for the cancellation of the original solicitation and the issuance of the replacement solicitation based on substantial changes to the scope of work. Further, we find no evidence of bad faith by the contracting agency. Accordingly, we deny ACME's protest.

BACKGROUND

On March 12, 2002, the District's Office of Contracting and Procurement ("OCP") issued Request for Proposals No. PO-JA-2002-R-0037 ("RFP-1") on behalf of the Department of Human Services, Youth Services Administration ("YSA"), for a contractor to provide a therapeutic substance abuse community model and related services for 40 male youth and 10 female youth committed to the Oak Hill Youth Center. (Agency Report ("AR"), at 2; AR Ex. 1). OCP issued seven amendments to the solicitation prior to its closing on August 5, 2002. (AR, at 2; AR Ex. 2). One of the amendments removed the services to female youth. ACME, Systems Assessment and Research, Inc. ("Systems"), and Desert Counseling Clinic, Inc., submitted proposals in response to the amended solicitation. Desert Counseling did not respond to several requests by the District to extend its offer beyond the 150 days required by the solicitation.

OCP prepared a pre-negotiation business clearance memorandum requesting approval to enter into discussions with the two remaining offerors. (AR Ex. 4). The Procurement Review Committee approved the pre-negotiation business clearance memorandum on April 16, 2003, and discussions with the two remaining offerors were held on April 30, 2003. (AR Ex. 1). Following discussions, Gayle Turner, then Administrator of YSA, informed OCP that YSA only needed treatment services for 20 male youth, rather than the 40 called for in the solicitation. (AR Ex. 1). She requested that the solicitation be amended (prior to OCP's issuing of the request for Best and Final Offers ("BAFO")) to reduce the number of youth to be served from 40 to 20 and likewise to reduce the number of counselors

from four to two to maintain the counselor to youth ratio at 1:10. Ms. Turner also requested that the number of option years be reduced from four to two.

Responding to YSA's request, the contracting officer issued, on June 3, 2003, Amendment No. 8, making the following changes to the solicitation:

1. Reducing the number of youth to be served per month from 40 to 20;
2. Reducing the number of option years from four to two; and
3. Reducing the staffing levels from the previous requirement for a clinical supervisor, full-time clinician, and four substance abuse counselors, to a clinical supervisor, a half-time clinician, and two substance abuse counselors.

(AR Ex. 2).

The deadline for submission of BAFOs was August 5, 2003. ACME submitted a BAFO by the deadline. Systems indicated that the District should consider its initial proposal as its response to the BAFO. The District evaluated the BAFOs. The technical evaluation panel submitted the final evaluation report to the contracting officer on October 23, 2003. (AR, at 3; AR Ex. 1). In November and December 2003, ACME completed various preliminary compliance and survey activities with a view to receiving award, but no award was made.

Before the contracting officer completed his independent assessment of the offerors' proposals and before any source selection decision had been made, the newly appointed Director of the Department of Human Services and the Interim Administrator of YSA reviewed the statement of work of the amended solicitation. (AR, at 3; AR Ex. 1). Upon their review, they determined that the solicitation's requirements did not sufficiently meet the substance abuse treatment needs of the youth committed to the Oak Hill Youth Center.

On January 6, 2004, the YSA Interim Administrator prepared findings supporting a determination to cancel the solicitation. (AR Ex. 1). The YSA Administrator identified three main reasons for canceling the solicitation. First, the therapeutic community model, upon which the treatment requirements were designed, is not the best treatment method to address the problem of the youth committed to YSA's care. According to the YSA Administrator, the therapeutic community model is designed for youth who will be treated for one year or longer. However, the youth who are committed to Oak Hill generally stay for periods of 45 days to nine months. Thus, there is insufficient time for the youth to profit from a therapeutic community model treatment approach. In addition, the Administrator notes that the substance abuse patterns of the youth at Oak Hill ranges from experimentation to daily usage, and that it would be inappropriate to place youth who occasionally experiment with drugs in a long-term therapeutic community program. (AR Ex. 1). Second, YSA needs a contractor to provide substance abuse treatment services for 40 male youth, not 20 as provided in the amended solicitation, because approximately two thirds of usual population of 85 youth at Oak Hill has some sort of substance abuse problems. With a requirement for 40 youth, YSA will be able to serve about 50 percent of the committed youth each day. Third, a higher ratio of treatment staff to youth, such as 1:5, is needed rather than the 1:10 that had been specified. The YSA Administrator states that given the wide range of substance abuse patterns and the realization that these problems do not exist in isolation, the higher staff ratio will help YSA better serve the youth suffering from

substance abuse problems. In the findings, the YSA Administrator also states that because the District's needs have substantially changed, a new solicitation should be issued that incorporates the three requirements discussed above. (AR Ex. 1).

On January 8, 2004, the Director of the Department of Human Services approved the YSA Administrator's findings, and on February 5, 2004, the Chief Procurement Officer signed the determination and findings to cancel the solicitation. The Chief Procurement Officer transmitted a copy of the determination and findings for the cancellation to the Inspector General as required by law on February 9, 2004. On February 10, 2004, a contracting officer sent notices of the cancellation to the offerors, citing as authority certain regulations contained in 27 DCMR Chapters 15 (relating to IFBs) and 16 (relating to RFPs). On February 13, 2004, OCP issued a new solicitation, No. PO-JA-2004-R-JD001, incorporating the three changed requirements identified in the findings of the YSA Administrator. (AR, at 4; AR Ex. 3). On February 20, Middleton sent a letter to the contracting officer, stating that ACME had spent a great deal of time in responding to the request for proposals, and suggesting that the cancellation action did not show good faith on the part of the District. On February 27, the contracting officer replied to Middleton, stating that the changes to the solicitation were substantial and again citing to regulations supporting the cancellation, this time referring only to 27 DCMR Chapter 16.

On February 25, 2004, ACME filed its protest, challenging the cancellation of the original solicitation as well as the issuance of the new solicitation. ACME argues that its BAFO implemented a cognitive behavioral therapy method required by the new solicitation and thus issuing the new solicitation was unnecessary. Further, ACME argues that the changes from the first solicitation (as amended) to the new solicitation were so insignificant that the changes simply did not justify cancellation and reissuance. Finally, ACME states that the District did not act in good faith in canceling the original solicitation and issuing the new solicitation.

DISCUSSION

The Board's jurisdiction over this protest is founded on D.C. Code § 2-309.03(a)(1). D.C. Code § 2-303.07 provides that "An invitation for bids, a request for proposals, or other solicitations may be cancelled, or all bids or proposals may be rejected, only if it is determined in writing by the [Chief Procurement Officer] that the action is taken in the best interest of the District government." We have held also, consistent with well-settled procurement law, that a request for proposals may be cancelled if the CPO determines that there is a reasonable basis for cancellation. *Singleton Electric Co.*, CAB No. P-0411, Nov. 15, 1994, 42 D.C. Reg. 4888, 4893; *Shannon & Luchs*, CAB No. P-0415, Sept. 21, 1994, 42 D.C. Reg. 4851, 4859 & n.12; *McMillan Limited Partnership*, CAB No. P-0301, Oct. 22, 1992, 40 D.C. Reg. 4647, 4654 n.6. Chapter 16 of the District's procurement regulations contain the following provision concerning a change in requirements:

If a change is so substantial that it warrants complete revision of a solicitation, the contracting officer shall cancel the original solicitation and issue a new one, regardless of the state of the procurement. The new solicitation shall be issued to all firms originally solicited and to any firms added to the original list, and shall be advertised in accordance with the requirements of this title.

27 DCMR § 1615.3.

ACME argues that cancellation of the original RFP was not merited because the changes to the requirements were insignificant. We conclude that the findings prepared by the YSA Administrator adequately identify substantial changes to the statement of work justifying cancellation and reissuance. Removing the therapeutic community model treatment approach and increasing the ratio of staff providers to youth from 1:10 to 1:5, taken together, constitute more than an insignificant change to the scope of work. Clearly, under the facts here, the CPO had a reasonable basis for cancellation. ACME's argument that its proposal provided the correct treatment approach is simply irrelevant. The issue is not what one or another offeror agreed to provide but rather the issue is whether the competing offerors had a specification against which to properly formulate their offers and to compete on a fair basis. The District determined that its minimum needs would not be adequately met by the original solicitation as amended and that the new solicitation would properly address those needs. ACME has not rebutted the evidence of the changed requirements placed in the record by the District.

ACME also argues that the District has not shown good faith in conducting the original procurement. ACME's charge never gets beyond argument to evidence. We are not pointed to any specific actions of District officials. ACME does object to having spent considerable time and effort in responding to the original solicitation with an initial proposal and subsequent BAFOs. At the root of its complaint, we think, is that ACME believed it was going to receive an award when the contracting agency conducted preliminary survey and compliance tasks after the BAFO submissions. In any event, evidence of bad faith is entirely lacking in the record. ACME points to the poorly worded notice of cancellation from the contracting officer of February 10, 2004, which identifies IFB cancellation regulations, and the contracting officer's February 27, 2004 letter which contains two incorrect citations to the cancellation regulations in 27 DCMR Chapter 16. These matters, of course, do not begin to approach a showing of bad faith conduct.

In sum, ACME has not shown that the District has violated law or regulation in canceling the original solicitation and issuing a new solicitation to meet its changed requirements. Accordingly, we deny the protest.

SO ORDERED.

DATED: May 17, 2004

/s/ Jonathan D. Zischkau
JONATHAN D. ZISCHKAU
Chief Administrative Judge

CONCURRING:

/s/ Matthew S. Watson
MATTHEW S. WATSON
Administrative Judge