

GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

PROTEST OF:

SAGA Adventures, Inc.)	
)	CAB No. P-0704
Under Solicitation RFP No. CFSA-03-R-0005)	

For the Protester: Sherri L. Wyatt, Esq. For the Government: Howard Schwartz, Esq.,
and Talia S. Cohen, Esq., Assistant Attorneys General.

Opinion by Administrative Judge Matthew S. Watson, with Chief Administrative Judge
Jonathan D. Zischkau and Administrative Judge Warren J. Nash, concurring.

ORDER

LexisNexis Filing ID 6042267

SAGA Adventures, Inc. filed a protest on March 24, 2005, against awards made as of July 1, 2004, under a solicitation issued by the Child and Family Service Agency (“CFSA”) for Independent Living Main Facilities Programs (Solicitation Line Item Number 0001CA) on the basis that SAGA was given insufficient time to obtain the required Independent Living Program License prior to award and that it was thus at a competitive disadvantage to other offerors who were given longer notice of the license requirement. The District moved to dismiss the protest as untimely. We agree with the District and dismiss the protest.

DISCUSSION

The solicitation was initially issued July 28, 2003, requesting submission of proposals no later than September 10, 2003. (§ L.3.1). The solicitation scheduled a bidders’ conference on August 12, 2003. Amendment 1 to the solicitation was issued August 29, 2003. The amendment responded to questions asked at the bidders’ conference, including notice of licensing requirements, and extended the date for submission of proposals to September 17, 2003. (§ T). SAGA submitted its proposal on September 17, 2003.¹ A current Independent Living Program (“ILP”) license was not required to submit a proposal; however, such a license was required before award. (Agency Report “AR” Ex. 10).

¹ Protester asserts that it did not receive Amendment 1. The Board notes that this is unlikely since SAGA’s proposal was filed on the extended due date. Whether or not SAGA received the amendment, however, is not material. “Normally, a prospective contractor bears the risk of not receiving a solicitation amendment, unless it is shown that the contracting agency made a deliberate effort to prevent the firm from competing, or even if not deliberate there is evidence (other than non-receipt by the protester) that the agency failed to provide the amendment after the firm availed itself of every opportunity to obtain it.” (*Southern Maryland Restoration, Inc.*, CAB No. P-0459, Sept. 20, 1996, 44 D.C. Reg. 6503)

SAGA's proposal was in the competitive range, with deficiencies² noted in a letter dated November 24, 2003. SAGA corrected the deficiencies. On February 18, 2004, CFSA requested a Best and Final Offer from SAGA. On March 18, 2004, CFSA sent SAGA and all other offerors lacking an ILP license a letter indicating that within sixty (60) days of the date of the letter offerors needed to obtain a license for the Independent Living Program – Main Facilities Congregate Care. (AR Exs. 4 and 6). On May 27, 2004, SAGA sent CFSA a letter requesting an extension of time to comply with the licensing requirement. (AR Ex. 7). CFSA never responded to the request. However, since the license was not granted to SAGA until August 5, 2004, well after the requested extension would have run and after award of the contracts was determined, the issue of the requested extension is moot.

SAGA learned sometime before July 8, 2004 that it would not be awarded a contract. On July 8, 2004, SAGA sent the Contracting Officer a letter requesting that CFSA reconsider its decision not to award a contract to SAGA, specifically referencing the limited time it was allowed to obtain the ILP license. (AR Ex. 8). On August 11, 2004, SAGA sent Robert Bobb, City Administrator, a letter in which SAGA alleges mistreatment by CFSA. (AR Ex. 9). On August 18, 2004, CFSA sent SAGA a letter specifically advising SAGA that its ineligibility for award was based on its failure to timely obtain the required license³. (AR Ex. 10).

On December 23, 2004, SAGA made a FOIA request on the contract awards and on March 14, 2005, CFSA provided the requested FOIA documents. (AR Ex. 13). On March 24, 2005, SAGA filed the instant protest with the Board.

The essence of SAGA's protest is "the disparity in treatment of Protester [with regard to the requirement for an ILP license] in comparison with the other Offerors similarly situated." (Protest ¶ 29). Although the FOIA response to SAGA included some specific details as to alleged disparate treatment, namely that other proposers may have been reminded of the license requirement earlier⁴ than SAGA, which permitted other proposers to timely obtain the required license, while SAGA was unable to obtain the license before contract award, the basis of the protest was clearly known to SAGA on July 8, 2004, when it complained to the contracting officer as to the unfairness of the time it was allowed to obtain the requisite license. SAGA repeated these complaints to the City Administrator in a letter dated August 11, 2004. SAGA

² Although the District was aware that SAGA had not applied for the proper license (Protest Ex 11), the deficiency letter did not mention this failure. While technically correct that the lack of the license was not a "proposal" deficiency, since the license was not required until award, the agency could have improved competition by advising proposers of the licensing requirement.

³ It is not clear why CFSA did not send formal notification of the rejection of SAGA's proposal until January 14, 2005. (AR Ex. 12).

⁴ The evidence included in the FOIA response was a copy of a memo apparently written in November 2003 purporting to indicate that a group of proposers, including SAGA, had been sent notice that the ILP license was required. (Protest Att. H). SAGA alleges that it did not receive this notice. The contracting officer has, contrary to the memo, denied that such notice was ever sent, asserting that the only notice to any contractor was sent March 18, 2004. (Affidavit ¶ 4, AR Ex. 3).

was specifically advised by letter dated August 18, 2004 that it was ineligible for award due to its failure to have the license by July 1, 2004. (AR Ex. 10). At that point it was clear that SAGA would not receive an award of a contract.

To invoke the jurisdiction of the Board, “protests shall be filed not later than 10 business days after the basis of protest is known or should have been known, whichever is earlier.” (§2-309.08(b)(2)). To begin the statutory jurisdictional time period, such knowledge need only be sufficient information upon which to base a protest. “[A] protester may not wait until it obtains additional information under FOIA pertaining to the protest before filing if it is already reasonably aware of the protest basis. *Sperry Corp.*, B-225492; B-225492.2, Mar. 25, 1987, 87-1 CPD ¶ 341.” *Oak Ridge Associated Universities*, Recon. B-238411.2, May 31, 1990, 90-1 CPD ¶ 513.

SAGA knew that it would not be awarded the contract and knew the basis of its protest no later than its receipt of the contracting officer’s letter of August 18, 2004. Its protest filed over 7 months later was clearly untimely. The protest is dismissed.

SO ORDERED.

June 17, 2005

/s/ Matthew S. Watson
Administrative Judge

/s/ Jonathan D. Zischkau
Chief Administrative Judge

/s/ Warren J. Nash
Administrative Judge