

**DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD**

PROTEST OF:

Friends of Carter Barron Foundation of the)	
Performing Arts)	CAB No. P-0888
)	
Under Solicitation)	
No. DCCF-2011-R-3962-SDA 1)	

**OPINION AND ORDER ON DISTRICT'S MOTION TO DISMISS
OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT**

Filing ID 41840812

The protester, Friends of Carter Barron Foundation of the Performing Arts, has filed a protest concerning Request for Proposals No. DCCF-2011-R-3962-SDA 1 ("RFP") issued by the District's Department of Employment Services ("DOES"). The protester argues that the award made to another bidder is invalid on three separate grounds: (1) the District's mismanagement of an earlier solicitation led to unfair competition in the present RFP (Count I); (2) the District failed to notify protester of the award (Count II); and (3) the District's decision to issue only two in-school awards was not consistent with statements to prospective bidders that the budget for the solicitation was four million dollars (Count III). The District has moved the Board to dismiss Count I and Count III arguing that the protester has failed to clearly articulate a violation of procurement law, regulation, or RFP provision. In addition, the District argues that Count II is moot. We deny in part and dismiss in part the protest.

BACKGROUND

On April 1, 2011, the District's Office of Contracting and Procurement ("OCP") issued the RFP seeking contractors to design and implement an in-school year round youth program providing services that promote academic achievement, successful graduation, career preparation, and other skills development goals to 250-500 at risk youth. (District's Mot. to Dismiss, Ex. 2.)

There were six revisions to the RFP; each involved an extension of the due date while at least two changed the technical requirements of the RFP. (*Id.* at Ex. 4.) The revisions are as follows: (1) on April 14, 2011, the due date was changed from April 22, 2011, to May 4, 2011; (*id.*) (2) on April 26, 2011, (Amendment 0001), the due date was extended to May 13, 2011; (*id.*) (3) on May 9, 2011, (Amendment 0002), the due date was extended to May 27, 2011; (*id.*) (4) on May 18, 2011, (Amendment 0003), the RFP was replaced in its entirety and the due date was changed from May 27, 2011, to May 31, 2011; (*id.*) (5) on May 26, 2011, (Amendment 0004), technical amendments were made to the RFP and the due date was extended to June 6, 2011; (*id.*) (6) the due date was extended for the final time to June 8, 2011, (*id.*).

Section B.3.1 of the revised RFP stated:

For the purpose of this RFP and the ensuing contracts the District will be divided into two Service Delivery Areas (SDAs):

SDA District 1: Wards 1, 2, 3, and 4.

SDA District 2: Wards 5, 6, 7, and 8.

It is the intent of the District to award at least one contract for each of the SDAs. The District will award additional contracts based upon program needs and availability of funds.
(*Id.* at Ex. 2.)

By the final RFP deadline of June 8, 2011, the District received a total of 11 proposals, including the proposal from protester. (*Id.* at Ex. 4.) On August 15, 2011, the District awarded the contract to Dance Institute of Washington (“Dance Institute”). (*Id.* at Ex. 5.) The protester filed a protest with this Board on August 22, 2011, and an amended protest on August 23, 2011 (“Amended Protest”). Notice regarding the contract award to Dance Institute was not issued until September 12, 2011. (*Id.* at Ex. 6.)

In its Amended Protest, protester asserts three independent grounds for its protest of the award: (1) an earlier solicitation was mismanaged such that bidders in the present solicitation were able to gain access to the earlier proposal submitted by protester and better compete in the present competition (Count I); (2) OCP failed to notify protester about the SDA 1 in-school award either electronically or by mail (Count II); and (3) the District decided to issue only two in-school awards despite informing prospective bidders that they were competing for a solicitation budgeted at four million dollars (Count III).

The District filed a motion to dismiss arguing that in Count I and Count III, the protester failed to articulate an alleged violation of procurement law, regulation or solicitation provision as required pursuant to CAB Rule 301.1(c). Additionally, the District argues that Count II is moot. The protest is denied in part and dismissed in part.

DISCUSSION

We exercise jurisdiction over this protest pursuant to D.C. Code § 2-360.03(a)(1).

Count I: The District’s Mismanagement of an Earlier Solicitation

Protester asserts that the Board should sustain the protest “[b]ecause the last Solicitation process stood without appropriate procurement oversight and supervision to lead a non-competitive Performing Arts Bidder to receive a competitive awarded proposal.” (Am. Protest 3.) The District contends that the charge is unclear and fails to articulate any alleged violation of procurement law, regulation or solicitation provision. As such, the District argues that Count I should be dismissed for failure to comply with the requirements of Board Rule 301.1(c) which provides in pertinent part:

All protests shall be in writing, addressed to the Board, and shall include the following:

...

(c) 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 solicitation provisions claimed to be violated.

However, this Board’s precedent has been to read Rule 301.1(c) very narrowly. We have held that “[w]here the District believes that 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 and the absence of detailed facts concerning an alleged procurement deficiency in the initial protest filing does not necessarily dictate dismissal.” *CUP Temporaries, Inc.*, CAB No. P-0474, 44 D.C. Reg. 6841, 6844 (July 3, 1997). Thus, even where a protester’s allegations are mainly conclusory or barely supported by fact, where the applicable law and regulations at issue are made reasonably clear, this Board must address the allegations on the merits. *Unfoldment, Inc.*, CAB No. P-0435, 44 D.C. Reg. 6377, 6381 (Sept. 12, 1995); *see also CUP Temporaries, Inc.*, CAB No. P-0474, 44 D.C. Reg. at 6844 (denying the protest on the merits rather than dismiss the protest for failure to provide a clear and concise statement of its factual and legal grounds citing that (1) allegations were reasonably clear concerning the alleged improprieties of the award decision and the applicable law and regulations implicated and (2) the District had provided sufficient evidence to rule on the merits of the claim where the protestor claimed that the evaluation process was flawed due to its extreme brevity of only one day).

If understood correctly, the protester’s allegation amounts to a claim that during an earlier October 2010 solicitation¹, the protester submitted a bid and that bid was subsequently obtained and used by the awardee, Dance Institute, in this solicitation in order to win the present contract. Although lacking in clarity, protester’s argument is sufficient to show an allegation of a violation of D.C. Code § 2-354.17² which states:

The CPO shall review information which has been designated as confidential or proprietary by a person and which has been submitted in response to an Invitation for Bids or Request for Proposals. If the CPO determines that the designation is proper, the information shall be treated by the CPO, and any other District employee, in a confidential manner, shall be disclosed only to District employees for use in the procurement process, and shall not be disclosed to other persons or parties without prior written consent of the person

In addition, protester’s charge necessitates improper conduct by District government employees in the course of the RFP process. The conduct of District employees is governed by the District of Columbia municipal regulations as set forth in Title 6, Chapter 18. Specifically, “[i]t is the policy of the District government to avoid conflicts of interest concerning the award, implementation, monitoring, and performance of contracts for services.” D.C. Mun. Regs., tit. 6-B, § 1803.14 (2011). Since this claim entails an alleged violation of the statute and the regulation, we shall address it on the merits.

Based on a review of the record, it is clear that the protester has not met its burden of proof on this allegation. Protester has had at least four opportunities to set forth its record before the Board: the initial protest, the Amended Protest, the response to the District’s motion to dismiss, and the second response to the motion to dismiss. Protester has alleged but provided no evidence to support its claim that the October 2010 request for proposal process enabled noncompetitive contractors to obtain access to its proposal. Protester has stated that it was the “only” competitive bidder in the October 2010 solicitation and that Dance Institute was not competitive at that time. (Protester’s Second Resp. to District’s Mot. to Dismiss 2, Oct. 25, 2011.) Thus, protester assumes that Dance Institute obtained a copy of protester’s earlier proposal in order to become the winning bidder in the present solicitation. However, in support of its claim, protester has submitted its Past Performance Data only, and mere surmise is an inadequate basis

¹ Throughout its filings with this Board, the protester has interchangeably referred to the earlier solicitation as having occurred in October 2010 and October 2011. (*Compare* Protest 1 *with* protester’s Second Resp. to District’s Mot. To Dismiss 2.) This Board is proceeding under the assumption that the earlier solicitation referenced by protester occurred in October 2010.

² D.C. Code § 2-354.17 was enacted April 8, 2011.

upon which protester's case must be made. In the past, this Board has held that a protest must not be based merely on conjecture or speculation, or a mere expression of disagreement with the contracting agency's decision. *Metropolitan Pest Control, Inc.*, CAB No. P-0123, 38 D.C. Reg. 2958, 2959 (July 28, 1989). Furthermore, protester has even failed to show that its October 2010 proposal was designated as "confidential" or "proprietary" as that proposal was not submitted to the Board for review of its confidential or proprietary designation. Accordingly, there is no evidence to show any breach of confidentiality under the statute and no evidence to show any regulatory violation due to improper District employee conduct.

We find that the protester has failed to provide any facts or documents to support its allegation of improper procurement procedures during the earlier solicitation that resulted in its disadvantage in the present RFP process. Therefore, Count I is denied.

Count II. The District's Failure to Give Notice of Award

When this protest was filed on August 23, 2011, the District had not yet informed offerors that an award had been made to Dance Institute. Protester asserts that the District's failure to give notice of the award to offerors provides a basis upon which to sustain the protest. And, by its own admission, the District did not inform offerors of the August 15, 2011 award until September 12, 2011. However, the District argues that this ground is moot as the District has, since the initial filing of this protest, provided notice of the contract award.

The municipal regulations governing the procurement process in the District require that the contracting officer notify unsuccessful bidders promptly that their bids were not accepted. See, 27 DCMR §1544.4. Prompt notice is a procedural requirement which is expected to be observed. *John E. Kelly & Sons Elec. Constr., Inc.*, CAB No. P-0214, 38 D.C. Reg. 3065 (May 24, 1990). Our primary concern with giving notice of award to unsuccessful bidders is that "delays [in providing notice] create uncertainty as to whether a protester received knowledge of an award and consequently introduce unnecessary issues before the Board as to the timeliness of protests." *In re Horton & Barber Prof'l Servs., Inc.*, CAB No. P-0634, 49 D.C. Reg. 3333, 3338 (Feb. 21, 2001).

In the instant case, the policy concerns raised in *Horton* are not at issue. Despite not having received official notice from the District, the protester filed its protest with the Board within four business days of the award to Dance Institute. While we do not support what appears to be an inexplicable month long delay in providing notice, the protester was not injured by not receiving timely notice and has, at this time, received official notice. Accordingly, Count II is dismissed as moot.

Count III. The District's Decision to Issue Two In-School Awards

In Count III, protester alleges that the District's decision to issue only two in-school awards violated the terms of the solicitation. Protester asserts that during pre-proposal conferences, the District stated that the budget for the solicitation was four million dollars. However, the District contends that this protest basis is untimely in that the District's choice to award only one contract for each SDA was clearly stated in the RFP.

Section B.3.1 of the revised RFP stated:

For the purpose of this RFP and the ensuing contracts the District will be divided into two Service Delivery Areas (SDAs):

SDA District 1: Wards 1, 2, 3, and 4.

SDA District 2: Wards 5, 6, 7, and 8.

It is the intent of the District to award at least one contract for each of the SDAs. The District will award additional contracts based upon program needs and availability of funds.
(District's Mot. to Dismiss, Ex. 2.)

Based on the above RFP provision, the District intended to award at least one contract for each SDA but was under no obligation to award any additional contracts. To the extent that protester took issue with the language as set forth in the RFP, in light of statements made by OCP personnel during the conduct of the RFP, such alleged improprieties in the solicitation were readily apparent prior to bid opening or the time set for receipt of proposals. Under D.C. Code § 2-360.08(b)(1), a protest based on alleged improprieties which are apparent prior to bid opening must be filed with the Board prior to bid opening or the time set for receipt of initial proposals.

This Board has held that "in order to timely challenge the terms of a solicitation, the protest must be filed prior to the closing date for receipt of proposals or bid opening." *Unfoldment, Inc.*, CAB No. P-0358, 41 D.C. Reg. at 3659; *see also Int'l Builders, Inc.*, CAB No. P-0661, 50 D.C. Reg. 7461 (Oct. 11, 2002). As noted, the protests herein were filed on August 22 and August 23 (amended), 2011, respectively; whereas the proposal closing date was June 8, 2011. Consequently, this protest charge is untimely.

Moreover, this Board has the responsibility to determine whether the solicitation or award was in accord with the applicable law, regulations and terms and conditions of the solicitation. *Recycling Solutions, Inc.*, CAB No. P-0377, 42 D.C. Reg. 4550 (April 15, 1994). We find that there is no violation of procurement laws, regulations, or solicitation provision in the District's decision to award just one contract per service area. To the contrary, the District's decision to award one contract per service area was consistent with the terms of the RFP. Therefore, Count III of the protest is denied.

SO ORDERED.

DATED: January 12, 2012

/s/ Maxine E. McBean
MAXINE E. MCBEAN
Administrative Judge

CONCURRING:

/s/ Marc D. Loud, Sr.
MARC D. LOUD, SR.
Chief Administrative Judge

/s/ Monica S. Parchment
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