

## DISTRICT OF COLUMBIA CONTRACT APPEALS BOARD

PROTEST OF:

C&D TREE SERVICE, INC.

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CAB No. P-0780

Under Contract No. DCKA-2007-B-0159

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For the Protester, C&D Tree Service, Inc: Richard L. Moorhouse, Esq., Sean M. Connolly, Esq., David T. Hickey, Esq., Greenberg Traurig, LLC. For the District of Columbia Government: Howard Schwartz, Esq., Senior Assistant Attorney General, and Alton E. Woods, Esq., Assistant Attorney General.

Opinion by Chief Administrative Judge Jonathan D. Zischkau, with Administrative Judge Warren J. Nash, concurring.

### OPINION

*Filing ID 21771414*

C&D Tree Service protests the District's awards of indefinite delivery, indefinite quantity ("IDIQ") contracts on February 21 and March 3, 2008, to four other bidders on a solicitation issued for emergency tree and debris removal services. C&D claims that although those contracts called for only emergency tree and debris removal services, the District of Columbia Department of Transportation ("DDOT") Urban Forestry Administration improperly has been issuing work orders for routine tree removal services during the performance of the IDIQ contracts. C&D is the incumbent contractor under an existing requirements contract to perform all routine tree removal services. As a losing bidder in the recent solicitation for emergency tree and debris removal services, C&D asserts that it has been competitively prejudiced by alleged "material changes in the scope of work now being directed or allowed by the District in the performance of the IDIQ contracts." We dismiss the protest because the alleged constructive changes in the scope of work are contract performance issues rather than award challenges subject to protest.

### BACKGROUND

On October 19, 2007, the District's Department of Transportation ("DDOT") issued in the open market Invitation No. DCKA-2007-B-0159 ("IFB") to provide emergency tree and debris removal services. (Protest, Attachment A). Section C.2 states that:

The District has a recurring need to provide emergency tree removal service during a storm event or emergency situation, which will require the use of a crane or log truck to complete the work. It includes trees that fall into public space or from public space to private space and trees that have been identified as "standing hazardous trees" that need to be removed to prevent a public safety issue. . . .

The IFB contemplated award of four IDIQ fixed unit price contracts. (*Id.*, IFB Section B). Bids were opened on November 21, 2007. (Motion to Dismiss, at 2).

After evaluation, DDOT awarded contracts for emergency tree and debris removal services under the IFB to: Heavy Equipment Training Academy, LLC, on February 21, 2008, Excel Tree Expert Company on February 21, 2008, Community Bridge, Inc., on March 3, 2008, and Adirondack Tree Experts on March 3, 2008. (*Id.*). By letter dated March 4, 2008, the contracting officer informed C&D that it had awarded to other bidders the four contracts for emergency tree and debris removal services. (*Id.*).

C&D states that it is a long-standing contractor providing tree removal services to the District under POKA-2003-B00076-JBY, a requirements contract DDOT awarded to C&D on November 19, 2003. (Protest, Attachment B). According to C&D, under the terms of its requirements contract, the District agreed to purchase its requirements for the removal of all standing dead, dangerous, and diseased trees from C&D. (Protest, at 2). DDOT exercised several options to extend C&D's period of performance through November 18, 2008. (Protest, Attachment C). Despite the C&D requirements contract, C&D asserts that the District's arborists have provided information regarding numerous delivery orders issued by DDOT under the four 2008 IDIQ contracts where the work relates to routine, non-emergency tree removal services covered by C&D's 2003 requirements contract. (Protest, at 3-5, and Attachment D). We observe that C&D's work order data shows work orders presumably being assigned to C&D between August 2006 through 2008 under its requirements contract but later reassigned to one of the new IDIQ contractors in 2008. The record does not provide information regarding the dates of reassignment or the reasons for reassignment. There may well be some overlap between the requirements contract's specification for the removal of standing "dangerous" trees and the IDIQ contracts' specification for the removal of "standing hazardous trees" but C&D did not file a protest of the IDIQ solicitation so we need not address that here.

On July 10, 2008, C&D filed its protest, contending that C&D was competitively prejudiced since DDOT improperly issued delivery orders under the four IDIQ contracts for routine tree removal services and thus modifying or relaxing the contract specifications of the IDIQ contracts. C&D urges that DDOT should terminate the four IDIQ contracts for convenience and recompute the District's emergency tree removal needs under a "legally sufficient solicitation."

## DISCUSSION

We exercise jurisdiction pursuant to D.C. Code § 2-309.03(a)(1).

The District has moved to dismiss the protest on the ground that C&D is alleging essentially a contract dispute under its requirements contract, rather than a protest of the new awards. Both C&D and the District recognize the general rule that a protester's argument that an agency improperly relaxed specification requirements after award is based on contract performance and is thus not a proper ground for protest. *Shane Meats Co.*, CAB Nos. P-0339 *et al.*, Jan. 8, 1993, 40 D.C. Reg. 4885, 4899. The parties also recognize an exception to this rule where the agency modifies or relaxes the specifications in the awarded contract so that a bidder is competitively prejudiced because a competition for the contract as modified could have been materially different from the competition originally obtained. *M&M Welding and Fabricators, Inc.*, CAB No. P-0542, Mar. 15, 1999, 46 D.C. Reg. 8576, 8579-80. Under the circumstances of this case, we agree with the

District that the protest should be dismissed under the general rule that the matter involves contract performance issues properly addressed under our disputes jurisdiction.

*M&M Welding* and GAO precedent create a limited exception to the general rule where the modification or relaxation of a material term of the solicitation happens at the time of contract award or so close to award that it demonstrates the agency's intention to change or relax the contract term at the time of the award. In the present case, it is clear that the IDIQ contracts as awarded did not modify the solicitation's emergency tree removal services specification. There is no evidence that DDOT intended such a change at the time of award. Indeed, there has not been any change to the tree removal services through contract modification. Rather, C&D claims that DDOT has effectively modified the IDIQ contracts during performance by issuing delivery orders that cover routine tree removal work, not just emergency removal work. Even the record on this point is ambiguous. Work that may have been identified initially as routine when assigned to C&D under its requirements contract could later become emergency removal work after the passage of time or due to other causes. C&D says it did not learn of the alleged changes or relaxation until long after the awards and the beginning of performance. If some of the work assigned to C&D in 2007 was emergency tree removal services (the IDIQ emergency removal contracts were not awarded until February and March 2008), C&D could not complain that such work was reassigned to the four IDIQ contractors after the awards. Finally, as noted above, there may be some overlap between the requirements contract's specification for the removal of standing "dangerous" trees and the IDIQ contracts' specification for the removal of "standing hazardous trees." In any event, these issues are performance issues properly resolved under our dispute jurisdiction, not under our protest jurisdiction.

Because C&D raises issues that are properly contract administration issues rather than protest grounds, we dismiss the protest.

**SO ORDERED.**

DATED: September 30, 2008

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

CONCURRING:

/s/ Warren J. Nash  
WARREN J. NASH  
Administrative Judge