

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD**

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October 21, 1999

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SUBJECT: CAB No. P-592 (Protest Of: G&S Associates, Inc.)

Attached is a copy of the Board's Opinion dismissing Protest for lack of jurisdiction.


BARBARA THOMPSON
Secretary to the Board

GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

PROTEST OF:

G&S Associates, Inc.)	
)	
Under Contract No. 8083-AE-NS-4-WM)	CAB No. P-592
for Work and Training Related Services for)	
Welfare Reform)	

For the Protester: Frederick D. Cooke, Esq., Rubin, Winston, Diercks, Harris & Cooke, LLP. For the Government: Howard Schwartz and Warren J. Nash, Assistants Corporation Counsel.

Opinion by Chief Administrative Judge Lorilyn E. Simkins, with Administrative Judges Phyllis W. Jackson and Matthew S. Watson, concurring.

ORDER ON MOTION TO DISMISS

G&S protests the Department of Human Services' decision to terminate its contract for the convenience of the government. G&S alleges that the termination of its contract was based on perceived improprieties in the award process. The District moves to dismiss the protest arguing that the Board has no jurisdiction to determine the merits of G&S's protest with respect to the allegations regarding contract performance. Secondly, the District argues that the Board lacks protest jurisdiction since G&S does not set forth any evidence of the violation of any District statutes or regulations in the formation of the contract. Finally, the District argues that should the Board find that it has jurisdiction, the termination for convenience cannot be overturned because of the lack of the Contracting Officer's specific intent to injure G&S. We dismiss the protest.

BACKGROUND

On May 2, 1998, DHS issued RFP No. 8083-AE-NS-4-WM (the "Solicitation") to solicit proposals to provide work and training related services for persons receiving or applying for benefits under the temporary assistance for needy families ("TANF") program which is administered by the Income Maintenance Administration("IMA") of the Department of Human Services ("DHS"). On June 22, 1998, G&S provided a timely proposal in response to the solicitation. On October 29, 1998, DHS awarded a performance-based letter contract

to G & S and several other contractors to provide the services requested in the Solicitation.¹ DHS extended the letter contract on November 28, 1998 for thirty days and again extended the letter contract on December 24, 1998 for sixty days.

DHS executed a definitized contract for the same services on February 24, 1999 with an expiration date of November 28, 1999.(Motion to Dismiss ("MD") Exh. 1). The total possible amount of remuneration under the definitized contract was \$6,600,000. *Id.* Article 9 of the contract allowed the District to make an advance payment to G&S of up to two months of the contract price within less than a month of the contract execution date. DHS advanced G&S \$999,999. (MD Exh.6)

DHS issued two bilateral modifications to the contract. Modification No. 1, issued on April 12, 1999, permitted the District to recoup on a quarterly basis any unexpended portion of the advance payment by withholding and offsetting payments from any current invoices, and to recoup any portions of the advance payment for failure of the contractor to perform. (MD Exh. 1). On June 1, 1999, DHS issued bilateral Modification No. 2 replacing in its entirety Article 4--Payment /Invoices. *Id.* The District concluded that despite intensive work with TANF clients, none of the vendors was billing at the anticipated level, because billing was permitted primarily for placement outcomes. DHS revised the payment structure to permit payment for services required of the contractors, which had previously been uncompensated. (MD Exh. 3).

By memorandum dated June 22, 1999, the Contracting Officer informed the Administrator of the Income Maintenance Administration, that due to the low levels of performance by G&S and Community Life, a second vendor, that both should be terminated. He wrote:

In the interest of protecting the integrity of this procurement and given the sensitive political and public nature of these agreements, I find it necessary to issue a Termination for Convenience at the earliest possible convenience. I do not consider terminating for default a practical solution due to the time consuming nature of such a procedure and the inevitable appeal process that would follow. . . .

(MD Exh. 6). Attached to the June 22 Memorandum is a "Draft Summary" of DHS' Payment

¹DHS awarded contracts to the following other vendors: Davis Memorial Goodwill, Lockheed Martin, Crawford Edgewood, Pilgrim AME, Friendship House, Peoples Involvement Corporation, and Community Family Life. DHS anticipated that in total the contracts would be worth \$51 million. (MD Exh. 6).

Review for December 1998-February 1999, containing an "Initial Review" and an "Amended Review." The Amended Draft Summary reveals that D&S had referred 800 clients to G&S, and that it had earned only 1.16% of its Advanced Payment. By March 1999, the "Initial Review" demonstrated that G&S had earned only 1.60 % of its advance payment. Only Community Family Life had earned a lower percentage (0.54%) of its advanced payment.

The Contracting Officer prepared a Determination and Finding for Termination for Convenience, which he executed on July 16, 1999. (MD Exh. 7). As part of the facts justifying the termination, the Contracting Officer states:

. . . After award, it was determined that an inappropriate relationship existed between the Income Maintenance Administration (IMA) program administrator and one of the contractors, G&S Associates. The issue was turned over to the DC Office of the Inspector General for investigation, which is still ongoing. While no criminal activity has been evidenced, at the very least the OCP standard of the avoidance of the appearance of impropriety" was violated.

During the investigation, OCP and IMA have closely monitored the performance by all eight contractors, including G&S Associates. Early data suggested two issues needed to be addressed. First, all eight providers were performing poorly suggesting that the performance standards were too high and needed to be adjusted to more realistic levels. Second, as a result of such high standards, early data was at best, inconclusive and any decision evaluating the performance of the providers should be delayed pending more complete data.

Halfway th[r]ough the performance period of the contract, data, though still sketchy, clearly suggest trends in those providers who can and cannot perform the work. G&S Associates is one of those providers, Having received 1,500 referrals to date, G&S has been unable to work with only 200 TANF recipients. Of these, only 30 have received employment.

(Id.).

G&S was notified of the termination on July 19, 1999. (MD Exh. 8) G&S filed this protest on July 29, 1999.

DECISION

The threshold issue is whether the Board has jurisdiction to decide this matter as a protest. Generally, the Board will not review as a protest an agency's decision to terminate a contract for the convenience of the government, since that is a matter of contract


administration, which is not within our bid protest jurisdiction. However, under limited circumstances where the decision to terminate is the result of a finding that the initial contract award was improper, we have reviewed the award procedures that underlie the termination action. *AA Pipeline Cleaners, Inc.*, CAB No. P-315, 40 D.C. Reg.4687(Nov. 5,1992); *Washington Family Services Associates*, CAB No. P-368, 41 D.C. Reg.3481 (June 17, 1993).

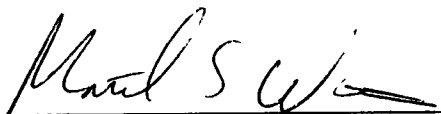
This exception does not apply here because the agency reports that the contract was terminated because of unsatisfactory performance, a matter of contract administration. While the D&F mentions an alleged inappropriate relationship between the principal of G&S and an IMA administrator, it is quite clear that any possible improprieties in the award of the contract were not the basis of the decision. The Contracting Officer states that there was no evidence of criminal activity at the time of award, but only a violation of the Office of Contracting and Procurement's internal policy against "the appearance of impropriety." In fact the Contracting Officer reports that the criminal investigation was ongoing at the date the D&F was executed. The Contracting Officer's decision to terminate was not made because of a finding that the initial contract award violated a statute or a procurement regulation. The substance of the D&F, and the reason for G&S' termination concerns the contractor's poor performance, a matter of contract administration, which we do not have protest jurisdiction to review. Because we do not have jurisdiction over this matter as a protest, we cannot examine the accuracy of the cited performance statistics, or the allegations of bad faith or disparate treatment.

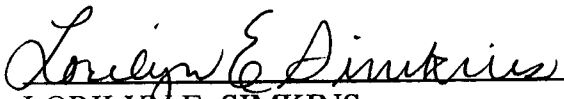
Accordingly, we grant the District's motion and dismiss the protest for lack of jurisdiction. However, we leave open the door for G&S, should it choose, to challenge the termination under our dispute jurisdiction, where we regularly review such matters.

SO ORDERED.

DATE: October 21, 1999


PHYLLIS JACKSON
Administrative Judge


MATTHEW S. WATSON
Administrative Judge


LORILYN E. SIMKINS
Chief Administrative Judge