

GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

PROTEST OF:

B & B SECURITY CONSULTANTS, INC.

Under Federal Supply Schedule 539,

SIN 246-54, Guard Services,

Contract No. GS-07F-0364K

CAB No. P-630

For the Protester: Robert A. Klimek, Jr., Esq., Klimek, Kolodney & Casale. For the Government: Warren J. Nash, Esq., Chris Malone, Esquire and Howard S. Schwartz, Esq., Assistants Corporation Counsel. For the Intervenor: Jeffrey P. Hildebrandt, Esq., Holland & Knight.

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

OPINION

On November 6, 2000, B&B Security Consultants, Inc. ("B&B Security") filed a protest challenging the District's award of a contract to Heritage Services, Inc. ("Heritage") under the Federal Supply Schedule ("FSS")^{1/} to provide security services for the Commission for Mental Health Services ("CMHS") facilities. B&B Security was the incumbent contractor prior to award. On November 9, 2000, B&B Security voluntarily withdrew one of the two protest grounds of challenge.^{2/} Under the remaining protest ground, B&B Security alleged violation of 27 DCMR §2103.4(b), which governs when it is mandatory for the District to purchase from the FSS.

On November 27, 2000, the District filed a motion to dismiss. The Intervenor filed a motion to dismiss the protest on December 7, 2000.

On December 6, 2000, B&B Security filed an amended protest, alleging abuse of the procurement process and multiple violations of 27 DCMR §2103. B&B Security concluded that the contracting officer lacked authority to make award to Heritage under the FSS. On December 28, 2000, the District and Heritage filed motions to dismiss the amended protest.

Both the District and Heritage challenge B&B Security's standing to protest under the FSS. They both argue that the District had the authority and acted in compliance with the law in procuring under the FSS. In support of their motions to dismiss the amended protest, the District and Heritage also argue that the amended protest grounds are untimely filed and are otherwise without merit.

^{1/} 539 SIN 246-54, Guard Services, Contract No. GS-07F-0364K

^{2/} B&B Security filed a voluntary dismissal of its allegation that the District violated D.C. Code 27 DCMR § 6049 governing removal of the contract from the sheltered market. (Voluntary Dismissal of Second Basis of Protest).

The Protester responds that it is an aggrieved, sufficiently injured and interested party which has standing to protest; that its amended protest is timely; and that the District has violated District procurement law.

We conclude that B&B Security's challenge to the District's decision to use the FSS is untimely and that the Protester lacks standing to protest the procedures leading to award of the contract to Heritage under the FSS. Accordingly, the protest is dismissed.

BACKGROUND

On November 1, 1999, the District competitively awarded Contract No. RM-99-C-0044-AS to B&B Security to provide uniformed security services. This contract was for a base year period from November 11, 1999 to November 10, 2000, with four option years. On September 8, 2000, the Contracting Officer served B&B Security with preliminary notice of the District's intention to exercise the first year option. The September 8 letter also informed B&B Security that the preliminary notice did not obligate the District to exercise the option. (AR, Ex. 17). On September 11, 2000, the Interim Director of Administration/Chief of Facilities Management, CMHS, informed the Contracting Officer that CMHS did not wish to extend the contract with B&B Security. (*Id.*). The September 11, 2000, Memorandum also informed the Contracting Officer of CMHS's interest in obtaining security services from a FSS contractor, and mentioned that CMHS officials had held an introductory meeting with officials from Heritage Services, Inc. (*Id.*)

On September 26, 2000, the Contracting Officer notified B&B Security that the District had decided not to exercise the first year option of its contract and had instead decided to use a FSS contract to procure security services. (AR, Ex. 17). CMHS issued three determination and findings documents related to the use of the FSS other than the Determination to Proceed^{3/}: (1) a Determination and Findings For Using FSS ("Initial D&F") dated October 4, 2000, (AR, Ex. 18); (2) a Determination and Findings to Supplement For Using FSS, ("D&F Supplement") also dated October 4, 2000, (AR, Ex. 19); and (3) a Corrected Supplement to Determination and Findings To Use FSS ("Corrected D&F Supplement") dated November 29, 2000 which the District substituted in lieu of the D&F Supplement.^{4/}

In the initial D&F, the Contracting Officer concluded that security services should be procured under the FSS. (AR, Ex. 18). In the subsequent D&F Supplement and Corrected D&F Supplement, the Contracting Officer further identified its selection of FSS 539, Special Item Number (SIN) 246-54 Guard Services. (AR, Ex. 19). In the Initial D&F, the Contracting Officer

^{3/} Discussed *infra* at note 6.

^{4/} The District explained that on or about November 20, 2000, the Contracting Officer executed a D&F Supplement which was incorrectly dated October 4, 2000 and which contained clerical mistakes and errors. The District did not identify the mistakes and errors. (Corrected D&F Supplement §4(d)).

also listed a number of problems with B&B Security's performance. (AR, Ex. 18, ¶4(a)).

In the Corrected D&F Supplement the Contracting Officer found that CMHS required special features in security services to ensure effective program performance; and that such security services were not available from other government supply sources which met CMHS's minimum needs. The Corrected D&F Supplement also described the procedures that CMHS followed in utilizing the FSS.

On November 1, 2000, the District issued Purchase Order No. P1000097 to Heritage, under FSS 539 SIN 246-54, Guard Services, Contract No. GS-07F-0364K to provide security services for CMHS facilities for a 120-day period from November 11, 2000 through March 10, 2001. (AR, Ex. 21, Purchase Order; AR, Ex. 22, FSS). The purchase order hourly rate was \$13.51 for Guard Type I services and \$17.79 for Guard Type II services. The total amount awarded under the purchase order was \$923,324.40.

On November 6, 2000, B&B Security filed its initial protest challenging the District's award to Heritage. On November 9, 2000, the Contracting Officer /Acting Chief, OCP^{5/}, exercised a partial option with B&B Security and extended the term of the contract from November 11, 2000 through December 10, 2000. On November 17, 2000, Heritage filed as an Intervenor in the protest proceeding.

On December 8, 2000, pursuant to D.C. Code 1-1189.8(c)(2) (Supp.1998), the Interim Director (OCP) executed and the District filed its "Determination and Findings to Proceed With Performance Pursuant to an Order under a Contract under a FSS After Filing of a Protest by B&B Security Consultants, Inc." ("D&F to Proceed"). On December 22, 2000, the Board sustained the determination by the Interim Director which allowed the District to proceed with performance with Heritage. (Board's Order Denying Protester's Motion to Override Determination to Proceed, dated December 22, 2000).

The Initial and Amended Protests and the Motions to Dismiss

The Initial Protest

B& B Security argues that the Heritage contract violates the provisions of District law governing the requirements for purchasing through the FSS. B&B Security argues that the District's use of the FSS is governed by 27 DCMR §2103 and is mandatory where the FSS price is lower than the price obtainable with a new contract and where the District's minimum needs are met. However, B&B Security contends that the District failed to meet either of these requirements, since Heritage's prices are higher than B&B Security's and the \$200,000 maximum limitation for FSS purchases will not meet the District's needs, thereby requiring a series of \$200,000 purchase orders resulting in a

^{5/} Throughout the record, Johnny Allem is sometimes identified as the Contracting Officer or Acting Contracting Officer and at other times the Acting Chief, Office of Contracts and Procurement.

cumulative order in excess of the maximum limitation. Further, B&B Security argues that the District's D&F finding that the price requirement was met is false, arbitrary and an abuse of discretion. (Initial Protest).

The Amended Protest

Additionally B&B Security's amended protest alleges that: (1) The Contracting Officer lacked authority to issue a purchase order to Heritage in excess of the \$200,000 maximum order limitation; (2) CMHS abused the procurement process in making an illegal sole source award to Heritage and by applying the wrong standard in making its determination to justify use of the GSA Schedule; and (3) the District improperly cited FAR §8.404(b)(3) as authority for using the FSS, rather than Title 27 which limits awards under the FSS. B&B Security asserts standing based on direct economic interest in the procurement of security services by the District.

The Motions to Dismiss

The District and the Intervenor move to dismiss B&B Security's protests primarily arguing that B&B Security lacks standing to protest because B&B Security is not on the FSS, is not eligible to compete for orders under the FSS and is not an actual or prospective supplier whose direct economic interest would be effected. They assert that B&B Security would not be in line for award even if the amended protest were sustained. (Motion to Dismiss the Amended Protest). The District also contends that District procurement regulations and FAR authorize the District to use the FSS at its option, and that in this case FSS use was optional. The District argues that it is in compliance with the authority for optional use of a FSS per 27 DCMR §2100 (i), §2103.4 and §2104, FAR §8.404 (b), FSS 539 §552.216-72, and GSA Order ADM 4800.2(d) and therefore compliance with requirements governing mandatory use of the FSS is not applicable. (AR, Ex. 18; D&F, Ex. 1). With respect to the amended protest grounds, the District contends that they are untimely and should be dismissed.

DISCUSSION

The threshold issues in this matter are whether B&B Security could challenge the District's use of the FSS, whether that challenge was timely, and whether B & B Security has standing to protest the procedures that the District used in securing the services of Heritage.

Section 903 of the D.C. Procurement Practices Act ("PPA"), D.C. Code §1-1189.3, establishes the Board's protest jurisdiction and provides in pertinent part:

The Board shall be the exclusive hearing tribunal for, and shall have jurisdiction to review and determine de novo:

(1) Any protest of a solicitation or award of a contract addressed to the Board by an actual or prospective bidder or offeror, or a contractor who is aggrieved in connection with the solicitation or award of a contract

Section 908 (c) of the PPA, D.C. Code § 1-1189.8 (c), establishes the Board's standard of review:

(c) On any direct protest . . . the Board shall promptly decide whether the solicitation or award was in accordance with the applicable law, regulations and terms and conditions of the solicitation. The proceeding shall be de novo. Any prior determinations by administrative officials shall not be final or conclusive.

Consistent with the PPA, we have held that only "aggrieved" persons have standing in protests before the Board. In order to have standing, an actual or prospective bidder or offeror must show that it has suffered, or will suffer, a direct economic injury as a result of the alleged adverse agency action. *Recycling Solutions, Inc.*, CAB No. P-377, Apr. 15, 1994, 42 D.C. Reg. 4550, 4575 citing *District of Columbia v. Group Insurance Administration*, 633 A.2d 2, 18-19 (D.C. 1993); *Micro Computer Co.*, CAB No. P-226, May 12, 1992, 40 D.C. Reg. 4388, 4390-91. It is a well settled principle that a protester lacks standing where it would not be in line for award even if its protest were sustained. *St. John's Community Services*, CAB No. P-555, Mar. 23, 1999, 46 D.C. Reg. 7695, 7697; *CPF Corporation*, CAB No. P-521, Jan. 12, 1998, 45 D.C. Reg. 8697, 8699; *American Combustion Industries, Inc.*, CAB No. P-499, Aug. 14, 1997, 44 D.C. Reg. 6896.

The Board has also held that where a protester was not a contractor on the FSS that the protester lacked standing to challenge the award by the District to a vendor on the FSS. *MADIVAC Int'l Inc.*, CAB No. P-595, Nov. 18, 1999, 11 P.D. 7812, 7813; *Remco Business Systems, Inc.*, CAB No. P-131, Dec. 30, 1988, 36 D.C. Reg. 4016, 4017.

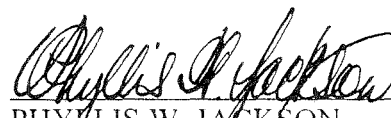
Were the Board to decide that the District's use of the FSS was illegal, the District would have to procure its service needs either by exercising its option with B&B Security or resoliciting the contract in the open market. In either case, B&B Security would have a possibility of receiving the award. B&B Security therefore had standing to challenge the legality of the use of the FSS. However, we find that B&B Security's challenge to the District's use of the FSS is untimely. The record reveals that CMHS informed B&B Security of its intention to use the FSS to secure security services in a letter dated September 26, 2000.(AR, Ex. 18). B&B did not file its protest with the Board until November 6, 2000. Even adding five days to account for mailing, the Board finds that B&B Security received notice of the District's intentions on October 2, 2000 (October 1, 2000 was a Sunday). To be timely B&B should have filed a protest concerning the District's use of the FSS by October 16, 2000, ten business days from the date B&B Security should have received the September 26 letter notifying it of CMHS's decision to use the FSS.

We also find that B&B Security is not a FSS contractor and could not receive a FSS contract under any circumstance. Therefore, B&B Security lacks the requisite standing to challenge the FSS procedures that the District used in awarding a contract to Heritage.

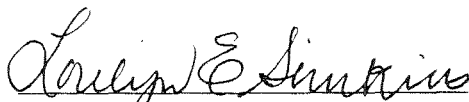

Accordingly, the protest is dismissed with prejudice.

SO ORDERED.

Date: March 7, 2001


PHYLLIS W. JACKSON
Administrative Judge

Concurring:


LORILYN E. SIMKINS
Chief Administrative Judge
MATTHEW S. WATSON
Administrative Judge