

GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

PROTEST OF:

RSC ELECTRICAL & MECHANICAL CONTRACTORS, INC.)	
)	CAB No. P-621
Under Solicitation 0017-00-HC)	
(District of Columbia Housing Authority)		

For the Protester: Henry L. Bolden, President, *pro se*. For the Government: Mitzie V. Smith, Esq., Acting General Counsel, and Patricia Gracyalny, Esq., Assistant General Counsel, District of Columbia Housing Authority.

Opinion by Administrative Judge Matthew S. Watson, with Administrative Judges Jonathan D. Zischkau and Phyllis W. Jackson, concurring.

OPINION

RSC Electrical & Mechanical Contractors, Inc. ("Protester" or "RSC") protests award to any offeror other than itself under Solicitation No. 0017-00-HC (the "Solicitation") issued by the District of Columbia Housing Authority ("DCHA"). The Solicitation requested proposals to perform maintenance and repair services for HVAC systems at buildings owned by DCHA. RSC challenges the award on the basis that DCHA was biased against RSC and improperly determined it to be non-responsible. DCHA moved to dismiss the protest for failure of the protester to exhaust administrative remedies, or, in the alternative, to deny the protest for lack of merit. We deny DCHA's Motion to Dismiss and deny the protest.

BACKGROUND

On March 6, 2000, the DCHA Development and Modernization Administration issued Bid No. 0017-00-HC seeking bids from contractors to provide maintenance and repair services as required on an annual basis for central HVAC systems and heat pumps at the DCHA headquarters building and 12 public housing developments comprised of 16 residential buildings owned by DCHA. (Agency Report ("AR") Ex. 3, §IX). Within the Arthur Capper Senior development, included in the solicitation, are 461 heat pump units. (*Id.*). On the date set for bid opening, March 20, 2000, RSC submitted a timely bid.

The financial statements attached to RSC's Statement of Bidder's Qualifications (AR Ex.4), showed total revenue for 1999 of \$200,551 and total assets at the end of the year of \$398,380. The

Estimated Project Work Force Breakdown showed that the RSC workforce assigned to this project would include only 2 permanent "journeymen," and 2 permanent "officer/supervisor" positions.*(Id.)*¹

By letter dated June 23, 2000², the Contracting Officer wrote to RSC stating, in part:

3. The firm's financial ability to properly administer the contract is questioned. The contract proposed by DCHA is over 50% of the firm's annual sales and 50% of the firm's HVAC services as outlined in the financial documents provided by the firm. The DCHA contract is almost as much as you're total annual HVAC sales. It would be difficult for RSC to handle this sudden increase in business, as your firm would have to purchase vehicles and hire additional employees that could create a financial burden and have significant impact on the performance of the contract.
4. The financial strength of the firm is a concern, as the firm's total assets equal less than 50% of the value of the contract. If DCHA has an emergency that requires a replacement of chiller with an estimated cost of \$70,000 in a senior building, the purchase of the equipment would be subject to your limited financial resources and would have an impact on performance.
5. The workforce breakdown submitted by RSC is woefully inadequate. Under DCHA's current contract there are, as a minimum, fifteen (15) Journeymen HVAC Mechanics to perform the work required, which is the same level of work as proposed under the current solicitation. RSC proposes to utilize only two (2) Journeymen HVAC Mechanics. The past history of this type of contract shows that a contractor could perform the services with no less than twelve (12) Journeymen HVAC Mechanics.

The letter concluded:

There is no acceptable evidence or explicit arrangement in existence at the time of contract award to rent, purchase, or otherwise acquire the needed equipment, other resources or personnel to perform sufficiently under the proposed contract. Based upon the above findings and the requirements of the regulations and the terms and conditions in the subject solicitation, DCHA has determined your firm non-responsible and unable to perform the requirements of the proposed contract.

¹ It is not clear whether the positions are mutually exclusive or duplicative.

² The letter was received by RSC on June 28, 2000.

Section VII.B of the DCHA Statement of Procurement Policy, (AR Ex. 2), provides:

BID PROTEST

Any actual or prospective contractor may protest the solicitation or award of a contract for serious violations of the principles of this Statement. Any protest against a solicitation must be received before the due date for receipt of bids or proposals, and any protest against the award of a contract must be received within ten calendar days after contract award, or the protest will not be considered. All bid protests shall be in writing, submitted to the Contracting Officer or designee, who shall issue a written decision on the matter. The Contracting Officer shall issue a written decision on the matter. The Contracting Officer may, at his or her discretion, suspend the procurement pending resolution of the protest, if warranted by the facts presented.

No protest was filed with DCHA. The protester timely protested the determination of non-responsibility to the Board.

DISCUSSION

We exercise protest jurisdiction pursuant to D.C. Code §1-1189.3 (1999).

Motion to Dismiss

DCHA moved the Board to dismiss the protest for the failure of the protester to exhaust remedies within the agency prior to filing the protest with the Board. DCHA asserts that an aggrieved party must avail itself of the agency's protest procedure as a prerequisite to filing a protest with the Board. Although the doctrine of exhaustion of administrative remedies is generally applied in common-law appeals of administrative actions to courts, the authority of the Board to consider protests is granted by the Procurement Practices Act ("PPA"):

(a) The Board shall be the exclusive hearing tribunal, 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

Id.

The DCHA's regulations contained in its Statement of Procurement Policy³ cannot deprive the Board of its statutory mandate. An exhaustion requirement would defeat the expedited procedures characteristic of government contract protests and intended by the PPA.⁴ The GAO similarly does not require exhaustion of procedures which may be provided by the contracting agency. Disappointed proposers often protest simultaneously to the agency and GAO. Keyes, *Government Contracts*, 379.

DCHA's Motion to Dismiss is denied.

Responsibility Determination

Bias

RSC alleges that the agency was biased in favor of the incumbent contractor. RSC asserts that "A' DCHA Contracting Officer indicated that DCHA didn't want RSC to have the contract before DCHA had completed a detailed review of RSC." (Protest, 1). RSC presents no further direct allegations of the alleged bias. However, RSC further asserts that, as a result of this bias, it was determined to be non-responsible.

RSC has not sufficiently alleged bias. Any analysis of a question of Governmental bad faith must begin with the presumption that public officials act "conscientiously in the discharge of their duties." *Librach v. United States*, 147 Ct.Cl. 605, 612 (1959). Courts have always been "loath to find to the contrary," and require "well-nigh irrefragable proof" to induce them to abandon the presumption of good faith dealing. *Knotts v. United States*, 121 F.Supp. 630, 631, 128 Ct.Cl. 489,

³ It is not clear whether DCHA published its regulations through rulemaking procedures necessary to make the regulations binding, but, for the purposes of this matter, the Board will assume that DCHA did so. The protest procedures set forth in the Solicitation instructions, however, also included provisions not included in the Statement of Procurement Policy. Further, the instructions could be construed as applying only to matters which will be the subject to a protest to the U.S. Department of Housing and Urban Development, not to a protest before the Board. The instructions provide:

Any party involved in a dispute with the District of Columbia Housing Authority ("the Authority") related to a procurement decision that has unfavorably affected the aggrieved party is entitled to a resolution of the dispute in a timely manner in accordance with applicable local or Federal law. The protestor, in all instances, must pursue a remedy through the established administrative procedures of the Authority prior to pursuing a protest with the Federal agency. Guidelines and procedures which must be followed are presented herein. (Emphasis supplied). (AR, Ex. 2).

⁴ Since the time limits for filing a protest with the Board are jurisdictional, the Board might lose jurisdiction entirely if the protester delayed filing a protest with the Board in order to complete agency procedures. See *Harold L. Sanders Associates*, CAB No. P-543, Jul. 7, 1998, 45 D.C.Reg. 8776.

492 (1954). The Board, absent compelling evidence, must also presume that government officials have acted in good faith. *Washington Family Services Associates*, P-368, June 17, 1993, 41 D.C. Reg. 3481. Proof of bad faith is not established by a showing of unpreparedness, indecision, inefficiency, or negligence. There must be proof approaching the irrefutable, that the government official acted with a malicious and specific intent to injure. *Dano Resource Recovery, Inc. v. District of Columbia*, 620 A.2d 1346, 1361 (D.C. 1993). The allegations in the protest fail to meet this test.

Determination of Non-responsibility

Regardless of whether the decision was the result of bias, the protester nevertheless asserts that the determination by the contracting officer that RSC was not responsible is unreasonable. Bidder responsibility is a prerequisite to award pursuant to a contract. D.C. Code §1-1183.3(e) (1999). A responsible bidder is an entity which "has the capability in all respects to perform fully the contract requirements. . . ." D.C. Code §1-1181.7(40) (1999). While there is no presumption of agency correctness under our *de novo* standard of review, the Board accords contracting officers broad discretion in this determination, consistent with well-settled procurement law principles that contracting officers shall have wide latitude to exercise business judgment. *Ideal Electrical Supply Corp.*, CAB No. P-372, Aug. 13, 1993, 41 D.C. Reg. 3603.

Maintenance of the heat and air-conditioning systems in housing units is a critical program affecting the health and safety of the housing residents. It was reasonable for the contracting officer to insure herself that a potential contractor is fully capable of performing the contract. The contracting officer determined that RSC had a permanent staff of only 2 journeymen to maintain central HVAC units for 15 multifamily buildings and over 450 individual heat-pump units for which there is a minimum need for 12 journeymen and the current contractor has assigned 15 journeymen. Although RSC indicated that it can hire additional journeymen on an as needed basis through Union Local 602, we cannot conclude that the contracting officer's business judgment that RSC is not sufficiently staffed with permanent employees is unreasonable.

CONCLUSION

Since we cannot find that the contracting officer's determination of non-responsibility was unreasonable, the protest must be denied.

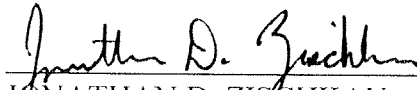
SO ORDERED

DATED: August 23, 2000



MATTHEW S. WATSON
Administrative Judge

CONCURRING:



JONATHAN D. ZISCHKAU
Administrative Judge



PHYLLIS W. JACKSON
Administrative Judge

NOTE⁵

The protester in this matter was not awarded a contract due to the determination of the contracting officer that the protester did not have the capacity to perform a contract of this size. In light of the risk to health and safety of a failure of heating or air-conditioning equipment in public housing, the non-responsibility determination was not unreasonable. We observe, however, that the risk to the housing tenants of a failure by the contractor to fully perform might have been reduced had DCHA not decided to procure maintenance service for such a large group of buildings from a

⁵ The Contract Appeals Board has a unique opportunity to review procurements arising from the entire range of District of Columbia government activity. Where we see examples of agencies utilizing alternative procurement practices which might be considered by other agencies, we will report on these practices as Notes appended to protest or appeal decisions. These Notes are for information only and are not in any way binding on agencies or to be considered precedent of any sort.

single contractor. Unless such an omnibus contract is awarded to a larger contractor, a catastrophic failure of one building's equipment requiring an unusual maintenance effort could degrade the service available to other properties, regardless of the effort and good faith of a smaller contractor. As a result, competition is limited to larger, well-established service providers. Such a restriction on competition may increase cost to the District and limit its ability to meet local and small business goals. Structuring the procurement to divide the requirements among a number of award groups and contractors might have worked well here, particularly where unrelated, although similar services are being procured at separate locations.

In meeting another critical need, cleaning of various District facilities, the Office of Contacts and Procurement divided the District's requirements into 10 separate award groups. "In order to minimize the risk of janitorial service interruption due to failure of a single contractor to provide service, the District reserve[d] the right to award no more than two (2) aggregate groups to any one (1) offeror." Solicitation No. 9046-AA-03-1-DD, Amendment 4; *see, Busy Bee Environmental Services, Inc., CAB No. P-617, July 24, 2000, 11 P.D. 7927*. In addition to reducing the risk of unsatisfactory performance by a single contractor, dividing requirements into smaller contracts might enhance competition and increase opportunities for small, local and disadvantaged businesses to secure District business.

We cannot predict whether dividing the requirements of the instant procurement into more than one award group would have permitted an affirmative determination of responsibility for the protestor. However, it clearly would have enhanced the possibility of an award to a smaller firm such as RSC, which is fully licenced by the District to perform the required services, has successfully performed smaller contracts, and is certified by the Local Business Opportunity Commission as both a Local and Small Business Enterprise.