GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

PROTEST OF:

RGII Technologies, Inc.	)	
1997 Annapolis Exchange Parkway	)	
Suite 210	)	CAB Nos. P-0664, P-0669
Annapolis, MD 21401	)	and P-0670
	)	(consolidated)
Under Solicitation No. POTO-2002-R-0047	)	

For the Protester: Richard L. Moorhouse, Esq. and Leigh T. Hanson, Esq., Reed Smith LLP. For the Government Howard Schwartz, Esq. and Warren J. Nash, Esq., Assistants Corporation Counsel.

Opinion by Administrative Judge Matthew S. Watson with Chief Administrative Judge Jonathan D. Zischkau, concurring.

OPINION
(*Courtlink Filing ID: 1489749*)

On October 25, 2002, RGII Technologies, Inc. ("RGII" or "Protester") protested the consideration by the District of Columbia ("District") of a proposal from firms which Protester asserts have an organizational conflict of interest. This protest was docketed as CAB No. P-0664. During the pendancy of the protest, the District advised RGII that it was not within the competitive range and would not be permitted to enter the next round of negotiations. RGII filed an Amended Protest adding an allegation that RGII was improperly excluded from further competition on November 26, 2002, which protest was docketed as CAB No. P-0669. On December 24, 2002, the Board, at the request of the parties, suspended proceedings until January 24, 2003, to permit discovery of further information necessary to further amend the protest. A Second Amended protest was filed January 24, 2002, and docketed as CAB No. P-0670[1]. The District moved to dismiss the protest against acceptance of proposals from firms with alleged conflicts of interest as untimely, or in the alternative, to dismiss the protest for lack of standing, asserting that Protester, not being within the competitive range, is not in line for award.[2] The Board finds that the protest is premature as to the allegations of conflict of interest and timely as to the allegations that it

[1] The Board has consolidated the three protests. The time for determining the resolution of these protests shall be measured from the filing date of the last protest.

[2] In addition, the District contends that the protest should be suspended since the Board "may" be without jurisdiction on the basis that OCFO procurements under $500,000 are exempt from any "procurement review process." The District asserts that if award is made to a proposer under $500,000 the Board will be divested of jurisdiction, notwithstanding the fact that other proposals within the competitive range are over $500,000 and the District's own estimate may have exceeded $500,000. It is not necessary for the Board to reach this issue, however, it is unlikely that Congress intended that the Board's jurisdiction be so fluid as to cause the Board to gain or lose jurisdiction during a proceeding or that award to an offeror under $500,000 would divest the Board of jurisdiction to consider the handling of a offer over the $500,000 exemption.

was unfairly excluded from the competitive range for further negotiations. Having considered Protester's objections to its exclusion from the competitive range, the Board finds the District's action was not unreasonable and denies the protest.

CONFLICT OF INTEREST

On September 9, 2002, the Office of Contracting and Procurement (OCP) issued RFP No. POTO-2002-R-0047 for budget software. On September 18, 2002, OCP held a pre-proposal conference. In response to a question raised by RCII regarding the entities who assisted in preparing the RFP document, OCTO responded that, as well as District agencies, Keane Consulting Group ("Keane") participated in the development of the RFP. In addition, "The RFP included requirements which had been developed by Accenture prior to the creation of the RFP. Accenture had no direct involvement with the development of the RFP." Upon further questioning OCTO stated, "Because of its role . . . Keane is not allowed to bid on any additional integration work . . . . However, Accenture is free to bid." (Complaint, ¶ 3).

By letter dated October 2, 2002, RGII complained to the Contracting Officer that the RFP allowed certain offerors to compete that had actual or apparent organizational conflicts of interest, which could taint and compromise the integrity of the procurement. RGII received no response from the District.

RGII's protest contends that a named proposer should be excluded from competition due to organizational conflicts of interest. The Board agrees with the District's contention that RGII knew the grounds of the protest as to the alleged organizational conflict of interest on September 18, 2002, or, at the latest on October 2, 2002, when it complained to the contracting officer. The protest was filed more than 10 business days after the later date and would normally be considered untimely. The Board, however, adopts the policy of the General Accounting Office and finds that a protest on grounds of conflict is premature until an award is actually made to a conflicted offeror. In *REEP, Inc*., B-290688, Sep. 20, 2002, 2002 CPD ¶156 the Comptroller General held:

> The agency advises our Office that it has made no award decision in connection with the acquisition. This being the case, REEP's protest merely anticipates what it considers improper action by the agency, namely, award to Worldwide. We recognize that it could be argued that the failure to exclude a firm with an alleged conflict of interest from a competition is a defect in a solicitation that should be challenged prior to the submission of proposals or quotations. See 4 C.F.R. § 21.2(a)(1) (2002). Solicitation provisions, however, are not generally the vehicle for excluding firms with a conflict of interest from competing for award; rather, conflicts are generally handled on a case-by-case basis without public notice through the solicitation. Moreover, treating protests such as this one as premature may avoid unnecessary litigation, since the allegedly conflicted firm may not be the eventual awardee, either because it loses the competition or because the agency ultimately concludes that the firm has an impermissible conflict of interest. See *Saturn Indus*.--Recon., B-261954.4, July 19, 1996, 96-2 CPD ¶ 25 at 5. Unless the firm with the alleged conflict of interest is actually selected for award, the protester has not suffered any competitive prejudice; we will not sustain a protest absent a showing of such prejudice. *McDonald-Bradley*, B-270126, Feb. 8, 1996, 96-1 CPD ¶ 54 at 3; see *Statistica, Inc. v. Christopher*, 102 F.3d 1577, 1581 (Fed. Cir. 1996).

Since no award has yet been made, the Board cannot determine whether an award is precluded by a conflict of interest. Counts I and II of the protest with regard to conflict of interest are dismissed without prejudice as premature.

EXCLUSION FROM COMPETITIVE RANGE

RGII further protests its exclusion from the competitive range as not supported by the record and the product of bias. The Board will not interfere with an evaluation decision if, based on the entire record, the decision is documented in sufficient detail to show that it is not arbitrary and appears reasonable and in accord with the evaluation criteria listed in the solicitation. *Ideal Electronic Security Company and Accutech Systems, Inc.,* CAB Nos. P-0554, 0561, Dec. 29, 1998, 46 D.C. Reg. 8540. RGII disputes the validity of the weaknesses in the RGII proposal asserted by the District to support its evaluation of the RGII proposal and asserts that the poor evaluation was the result of retaliation for RGII filing this protest. Upon review of the record, the Board finds the weaknesses concluded by the districted to be adequately documented and not unreasonable.

For example, as to the weakness claimed by the District that "RGII's software does not have a flexible ad hoc reporting feature," RGII contends that because " 'ad hoc' flexibility" is not defined in the solicitation, the District has no basis to downgrade the RGII proposal. Reply, 3. The District documented that customized budget reports are often required on "as little as 15 minutes" notice and that "the fastest report-creation turnaround the [RGII] product could offer was 24 hours, because each time a custom report was needed, they would have to reconfigure the product." Nitz Affidavit, ¶ 28. The Board does not believe that the District interpretation that a 24-hour turnaround time does not meet the "ad hoc flexibility" requirement is unreasonable.

The District downgraded the RGII proposal because the software offered could not be maintained by District employees and "would require constant on-site vendor representatives to maintain the software correctly." Nitz Affidavit, ¶ 26. RGII countered that its recommendation of continued on-site presence is "best practice" and the District cannot downgrade its proposal because the RFP called for offerors to submit proposals based upon "best practices." Reply, 7. The District's analysis of RGII's proposal is documented and its conclusion that this "best practice" by the proposer does not measure up to other proposals is not unreasonable.

Paragraph 33 of the Second Amended Complaint states that "on information and belief, therefore, RGII was downgraded during Phase II, Oral Evaluation, in material part because it was pursuing the instant protest with the Board." RGII has not alleged any facts to support its assertion. RGII appears to assert that, having made the unsupported allegation there is a burden on the District to disprove any possibility of taint. RGII's reply in Section III concludes, "If the District wishes to bring closure to this issue of protest, it would be appropriate to obtain affidavits or declarations from other members of the SSEB confirming that all evaluations of RGII's proposal and oral presentation were fully completed before the S[ource] S[election E[valuation B[oard] member in question learned of the filing of the

protest." Contrary to the implication of this statement, mere knowledge of the protest does not support a presumption that the SSEB decision was tainted.

Based upon the record herein, the Board finds no evidence of bias in the decision to exclude RGII from the competitive range and concludes that the determination to exclude RGII from further negotiation was adequately documented and did not violate, law, regulation or the terms of the solicitation. Count III of the protest is DENIED.

March 6, 2003

/s/ *Matthew S. Watson*
MATTHEW S. WATSON
Administrative Judge

CONCURRING:

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