

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

PROTEST OF:

QUALIS HEALTH

Solicitation No. DCHT-2012-R-0002

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CAB No. P-0934

For the Protester, Qualis Health: Kristen E. Ittig, Steffen Jacobsen, and Caitlin K. Cloonan, Arnold & Porter LLP. For the District of Columbia: Talia S. Cohen, Office of the Attorney General. For the Intervenor, Delmarva Foundation for Medical Care, Inc.: Alexander J. Brittin, Brittin Law Group, PLLC; Jonathan D. Shaffer, Mary Pat Buckenmeyer, Smith Pachter McWhorter, PLC.

Opinion by Administrative Judge Monica C. Parchment with Chief Administrative Judge Marc D. Loud, Sr. concurring.

OPINION

Filing ID #53020812

This protest arises from a solicitation for quality improvement and utilization review services by the District of Columbia Office of Contracting and Procurement (“OCP”), on behalf of the District of Columbia Department of Health Care Finance (“DHCF”). The protester, Qualis Health (“Qualis”), contends that the District improperly canceled its solicitation four months after issuing a notice of intent to award a contract to Qualis. In a supplemental protest, Qualis also argues that the District failed to follow proper sole source contracting procedures when it extended the term of a previously-awarded sole source contract with one of Qualis’ competitors, the Delmarva Foundation for Medical Care, Inc. (“Delmarva”), shortly before canceling the solicitation. The District counters that it (1) acted reasonably in canceling the solicitation after it determined that its requirements had changed substantially; and (2) has taken all necessary corrective action to remedy any improprieties in its original sole source award to Delmarva.

For the reasons stated herein, the Board finds that the District properly canceled the solicitation. However, we find that the District acted improperly when it recently awarded a long-term sole source contract to Delmarva without the use of full and open competition given that this act was necessitated because of the District’s inadequate procurement planning for the required services. We sustain the protest, in part.

FACTUAL BACKGROUND

On October 14, 2011, the District of Columbia Office of Contracting and Procurement issued Request for Proposals No. DCHT-2012-R-0002 (the “RFP” or “Solicitation”) on behalf of the DHCF. (Agency Report (“AR”) Ex. 1.) The Solicitation sought a “Quality Improvement

AGREED REDACTION

Organization" to provide the services that the District had heretofore received under an April 2005 contract with the intervenor, Delmarva.¹ (*See id.* ¶ C.2.3.) Specifically, the District sought a certified quality improvement organization to perform utilization reviews and quality improvement activities for the approximately 73,000 participants in the District's Medicaid program. (*Id.* ¶¶ B.1, C.1.) The services provided by the contractor would aim to ensure the provision of appropriate medical care, validate the appropriateness of requested medical services, implement "improved safeguards against unnecessary or inappropriate use of Medicaid services," and identify fraud, waste and abuse in the Medicaid program. (*Id.* ¶¶ C.2.2.1, C.2.2.2.)

The District planned to award a requirements type contract with fixed unit prices for a one-year base period, and four one-year option periods. (AR Ex. 1 ¶¶ B.2.1, F.1, F.2.1.) The RFP contained 53 different contract line items ("CLINs"),² among 7 categories of services,³ which the contractor would be required to perform. (*Id.* ¶ B.3.1.) The RFP provided estimated quantities for 37 of the 53 CLINs, but only for the base year. (*See id.*) The RFP stated that the contract would be awarded on a best value basis to the offeror whose proposal was determined to be most advantageous to the District, considering price and other factors. (*Id.* ¶¶ L.1.1, M.1.) Proposals were to be scored based on several technical factors, past performance, price, and preference points for small, local, and/or disadvantaged businesses.⁴ (*Id.* at ¶¶ M.3.1-M.3.3, M.5.2.)

Proposals in response to the Solicitation were originally due on November 14, 2011. (AR Ex. 1 at ¶ A.9.) Amendments A0001 through A0004 to the Solicitation collectively extended the due date for submission of proposals until January 11, 2012. (*Id.* at 162-65.) Amendment A0004 further provided the District's responses to offeror questions regarding the Solicitation. (*See* Protest Ex. G.⁵) Amendment A0004 also made various amendments to the Solicitation in response to the offerors' questions. (*See id.*; AR Ex. 1 at 166-72.) Of the 16 CLINs that lacked estimates under the original RFP, Amendment A0004 added estimates for 8 CLINs and deleted the remaining 8 CLINs. (AR Ex. 1 at 166.) Amendment A0004 also provided the offerors with a copy of Delmarva's Fee-for-Service Provider Manual. (*Id.* at 175-201.)

The District issued Amendment A0005 on January 6, 2012. (*Id.* at 202.) Amendment A0005 provided responses to additional offeror questions and extended the proposal submission

¹ In response to an offeror's question regarding the Solicitation, the District indicated that the services required by the solicited contract would be substantially the same as those required by the District's April 2005 contract with Delmarva. (Protest Ex. G at 2 (question 10).)

² Sample CLINs included "0004AD Non-DRG Acute Care Hospitals" and "0006AA Level of Care Determinations." AR Ex. 1 ¶ B.3.1)

³ In order, the categories were: "0001 Prior Authorization (PA) Reviews," "0002 Pre-Admission Reviews," "0003 Emergency Admission Reviews," "0004 Continued Stay Reviews," "0005 Retrospective Reviews," "0006 Long Term Care Reviews," and "0007 Miscellaneous and Other Reviews." (AR Ex. 1 ¶ B.3.1)

⁴ The three technical factors under the Solicitation included the offeror's (1) Technical Approach, Methodology, and Narratives (25 pts.), (2) Technical Expertise, Capacity, and Organizational Narrative (35 pts.), and (3) Past Performance and Previous Experience (20 pts.). (AR Ex. 1 ¶ M.3.1.) Price constituted the fourth evaluation factor worth 20 points. (*Id.* ¶ M.3.2.)

⁵ The District's responses to offeror questions provided as Protest Exhibit G were not included with the District's Agency Report. The document, however, identifies itself as Attachment A to Amendment A0004. (Protest Ex. G at 1-2.) Further, the document refers to changes made to the Solicitation throughout, which were included with the Agency Report. (*See* AR Ex. 1 at 166-72.)

deadline until January 25, 2012. (*Id.* at 202-04.) Amendment A0005 replaced the price schedule, previously amended by Amendment A0004, in its entirety because the District had revised its estimates based on Delmarva's performance during the contract period ending April 30, 2011. (*Id.* at 203-09.) The revised price schedule contained 51 CLINS, though 7 CLINs had estimated quantities of 0. (*Id.* at 205-09.)

Evaluation & Award Decision

According to Contracting Officer ("CO") Patricia Tarpley's procurement chronology,⁶ prepared in response to the protester's original protest, only two offerors submitted timely proposals in response to the RFP; the protester, Qualis Health, and the incumbent, Delmarva. (AR Ex. 2 at 2.) Following evaluation by a Technical Evaluation Panel ("TEP"), CO O'Linda Fuller requested Best and Final Offers ("BAFO"s) from the offerors on May 3, 2012. (*Id.*; Protester Comments Ex. B at 1-2.) Also on May 3, 2012, CO Fuller issued Amendment A0006 to the Solicitation, which deleted 6 CLINs and required offerors to provide a transition plan. (AR Ex. 1 at 211-12.) BAFOs were due on May 9, 2012, and were to incorporate the changes made by Amendment A0006. (Protester Comments Ex. B at 1.) After reviewing initial BAFOs, the District requested a second round of BAFOs from the offerors, which were due on June 8, 2012.⁷ (AR Ex. 2 at 2; Protester Comments Ex. B at 5-7.)

On October 15, 2012, CO Fuller issued the District's notice of intent to award the solicited contract to Qualis. (AR Ex. 7.) The notice of intent to award stated that Qualis' second BAFO was found to be the most advantageous to the District. (*Id.* at 1.) The District asked Qualis to clarify some aspects of its cost proposal by October 18, 2012. (*Id.*) The District further stated that the contracting agency sought to submit the proposed award to the Council of the District of Columbia for approval by November 16, 2012. (*Id.* at 2.) On December 11, 2012, Lillian Beavers, a contract specialist working on this procurement, sent Qualis a draft contract. (Protest Ex. C.) Contract Specialist Beavers further sought confirmation that the District would not be liable for costs incurred during the transition period. (*Id.*) The protester asserts that through mid-February 2013, the District continued to contact Qualis in an effort to finalize this contract. (Protest 4, 6.)

⁶ Courtney Lattimore is identified as the contracting officer for this procurement in the original solicitation and the early amendments to the RFP. (See AR Ex. 1 ¶ G.7.1.1; *id.* at 162-65, 202.) At some point thereafter, O'Linda Fuller became contracting officer for this procurement. (See *id.* at 211; AR Ex. 2 at 2; AR Ex. 7 at 2; Protester Comments Ex. B.) Patricia Tarpley states that she became the contracting officer for this procurement on December 15, 2012. (AR Ex. 5 ¶ 3.) Tarpley is listed as such in the Determination and Findings to cancel the Solicitation, discussed *infra*. (AR Ex. 3 at 5.) However, in the letter Tarpley sent informing the protester of the decision to cancel the Solicitation, she identifies O'Linda Fuller as the contracting officer. (Protest Ex. D at 3.)

⁷ CO Tarpley's procurement chronology states that this second round of BAFOs were requested on May 30, 2012, and due on June 5, 2012. (AR Ex. 2 at 2.) The District's request to the protester, however, was issued on June 4, 2012, and stated that BAFOs were due on June 8, 2012. (Protester Comments Ex. B at 5-6.)

Cancellation of the RFP

At some point in December 2012, Contract Specialist Beavers submitted a business clearance package to the contracting officer for review and approval.⁸ CO Tarpley met with Contract Specialist Beavers on January 4, 2013, to discuss the procurement. (AR Ex. 2 at 3.) According to Tarpley, during this meeting and subsequent discussions with DHCF personnel, Tarpley learned that the procuring agency's requirements had changed. (See AR Ex. 2 at 3; AR Ex. 5 ¶ 4.) Tarpley states that she then requested DHCF provide a list of proposed changes to determine whether the changes were so substantial as to warrant canceling the Solicitation. (AR Ex. 5 ¶ 5.) On January 22, 2013, a DHCF official sent Tarpley an email describing the necessary changes to the RFP. (AR Ex. 3 at 59-61.) The email stated that the estimated number of Medicaid participants had decreased from 73,000 to 67,000. (*Id.* at 59) The email also described in broad terms the various CLINs that would be increased, decreased, or deleted. (*Id.* at 59-60.)

CO Tarpley states that a Determination & Findings ("D&F") to Reject Proposals and Cancel Solicitation was drafted on January 23, 2013. (AR Ex. 2 at 3.) The D&F was signed by Contract Specialist Beavers and Wayne Turnage, Director of DHCF, on February 5, 2013. (AR Ex. 3 at 5.) Tarpley signed the D&F on February 12, 2013, and the D&F was finally executed by the Chief Procurement Officer ("CPO") of OCP on February 15, 2013. (*Id.*) According to the D&F, the CO⁹ had determined on October 31, 2012, that the offerors' price proposals had previously expired on October 6, 2012. (*Id.* at 3.) The D&F further stated that the CO had determined that the District's needs had changed significantly. (*Id.*) In describing these changes, the D&F essentially restated the changes discussed in DHCF's January 22, 2013, email that was previously sent to Tarpley. (Compare *id.* at 4, with *id.* at 59-61.) Due to both reasons, the District stated that it would re-solicit the RFP at a later date. (*Id.* at 4.)

On February 15, 2013, CO Tarpley emailed Qualis a letter¹⁰ stating that the District was canceling the RFP and rejecting all offers. (Protest Ex. D.) The letter only cited the changes in the District's requirements as the reason for canceling the solicitation. (*Id.* at 2.) The letter further rescinded the District's earlier Notice of Intent to Award. (*Id.*)

In response to the District's decision to cancel the Solicitation, Qualis contacted the CPO by letter dated February 20, 2013. (Protest Ex. H.) Noting that D.C. MUN. REGS. tit. 27, § 1644¹¹ requires a determination to cancel an RFP to be in writing, Qualis requested a copy of the District's written determination. (*Id.*) On February 22, 2013, the CPO provided Qualis with a redacted version of the D&F to Reject Proposals and Cancel Solicitation with its supporting attachments. (See generally Protest Exs. I, J.) After receiving the D&F, Qualis timely protested the cancellation of the RFP on March 1, 2013.

⁸ The exact date on which this was sent is unclear from the record. CO Tarpley's procurement chronology states that this occurred on December 28, 2012. (AR Ex. 2 at 3.) However, the Determination and Findings to cancel the Solicitation states that this occurred on December 11, 2012. (AR Ex. 3 at 3.) The D&F then states, in another instance, that the Contract Specialist forwarded this package to the CO on October 31, 2012. (*Id.*)

⁹ Presumably, CO Fuller made this determination given the date the determination was made. See, *supra*, note 6.

¹⁰ While the email was sent on February 15, 2013, the letter itself was dated February 12, 2013. (Protest Ex. D at 2.)

¹¹ Section 1644 was first adopted as an emergency rule on November 15, 2012, as part of the District's rewrite of chapter 16 of the District's procurement regulations. 59 D.C. Reg. 14,039, 14,066-67 (Dec. 7, 2012). The District adopted the emergency rule as final, without amendment, on January 22, 2013. 60 D.C. Reg. 1136, 1163-64 (Feb. 1, 2013).

Sole-Source Extensions to Delmarva

During the course of this protest, Delmarva has continued to provide the required quality improvement services for the District. The final option period for Delmarva's 2005 contract for quality improvement services ended on April 26, 2011, after which the contract should have expired by its terms. (Supplemental AR Ex. 5 at 1.) Notwithstanding the lack of additional options under the contract, the District twice extended the 2005 contract through July 15, 2011. (*Id.*) Thereafter, the District authorized Delmarva to continue providing quality improvement services through a series of nine sole source contract actions, including new contract awards, extensions and after-the-fact ratifications. (*Id.* at 1-2.)

As relevant here, the District entered into Contract No. DCHT-2012-C-0023 on November 30, 2012. (Supplemental AR Ex. 1 at 1.) Under the contract, Delmarva was to provide the quality improvement services on a requirements basis through January 31, 2013. (*Id.* ¶¶ F.1, F.2.) The contract included one two-month option period, and was not to exceed a total duration of four months. (*Id.* ¶¶ F.2.1, F.2.4.) On January 31, 2013, the District issued Modification M0002 to the contract, which extended the contract for six months through July 31, 2013, at an estimated cost of \$2,273,567.88.¹² (Supplemental AR Ex. 3 at 1-2.) The CPO executed a D&F for Sole Source Contract Extension on February 1, 2013. (Supplemental AR Ex. 5 at 4.) The sole source D&F described the history of sole source awards to Delmarva and stated the sole source extension was necessary to "ensure continued compliance with Federal Medicaid rules without interruption," pending completion of a competitive award. (*Id.* at 1-3.)

Despite having already effected an extension of Delmarva's prior sole source contract on January 31, 2013, on February 15, 2013,¹³ the District posted a notice of its intent to extend this same sole source (Contract No. DCHT-2012-C-0023) on the OCP website. (Protest Ex. E.) This notice proposed to extend the sole source contract for a period of six months, through July 31, 2013. (*Id.* at 1.) The notice stated that such an extension was required for the District to continue to receive services pending the award of a contract under the Solicitation No. DCHT-2012-R-0002, even though the District had already canceled the Solicitation. (*Id.*) The notice further requested responses by February 25, 2013. (*Id.*) The notice also included a draft, unsigned, D&F for the sole source extension, despite the D&F having been executed on February 1, 2013. (Protest Ex. F.)

Qualis responded in opposition to the February 15, 2013, notice to extend Delmarva's sole source contract on February 25, 2013. (Protest Ex. K at 3-7.) First, Qualis argued that there was more than a single source available to provide the District's minimum needs, as demonstrated by the recently canceled procurement. (*Id.* at 3-4.) Qualis then argued that the award to Delmarva was not in the best interests of the District because, comparing Qualis previously offered prices to the District's estimated requirements, an award to Qualis would save the District approximately _____ per month. (*Id.* at 4-5.) Lastly, after noting the history of sole source awards to Delmarva, Qualis argued that the intended sole source extension was improper because it was driven by the District's lack of procurement planning. (*Id.* at 5-7.)

¹² It is unclear from the record whether the District obtained approval from the Council of the District of Columbia for this extension as required by D.C. CODE §§ 1-204.51(b), 2-352.02.

¹³ This is also the same date that the District canceled the RFP for the follow-on contract.

Qualis maintains that it received a copy of the executed D&F to make the sole source extension to Delmarva on March 18, 2013. (Supplemental Protest 3.) Accordingly, Qualis filed a supplemental protest challenging the sole source extension on March 20, 2013. Delmarva moved to intervene in this matter on March 28, 2013, which the Board granted on April 4, 2013. (See Order on Mot. to Intervene.)

On April 2, 2013, CO Fuller responded to the protester's February 25, 2013, letter. (Supplemental AR Ex. 7.) Fuller stated that the District intended to cancel the sole source award to Delmarva and issue a new notice of intent to make a sole source award. (*Id.*) According to Fuller's procurement chronology, the District posted this new notice and a revised D&F for Sole Source Award on April 3, 2013. (Supplemental AR Ex. 4 ¶ 10.) In the revised sole source D&F, the District justified the intended sole source award on the basis that Delmarva could provide the required services without needing a transition period prior to beginning work.¹⁴ (Supplemental AR Ex. 6 at 1-3.) The District terminated its sole source contract with Delmarva, Contract No. DCHT-2012-C-0023, for convenience on April 24, 2013, with an effective date of April 30, 2013. (Dist. April 25, 2013, Letter to Board Ex. 1.) On April 30, 2013, Fuller executed a letter contract with Delmarva to provide these services for a 60 day period beginning May 1, 2013. (Dist. May 2, 2013, Letter to Board Ex. 1 at 1-2.) The District stated that it intends to definitize the letter contract within this 60 day period, with the definitized contract expiring on January 31, 2014. (*Id.* at 1.)

Contentions of the Parties

The protester argues that the District's decision to cancel the RFP was improper. (See generally Protest 11-20.) The protester contends that the District's proposed changes are not significant and do not support cancellation. (*Id.* at 12-14; Protester's Comments 3-6.) Along these lines, the protester argues that the change does not alter the nature of the quality improvement services and that resolicitation would not result in increased competition or cost savings. (Protest 19; Protester's Comments 7.) The protester further argues that the expiration of its offer cannot sustain the District's cancellation decision because Qualis had not attempted to alter its pricing terms in its attempt to finalize a contract with the District. (Protest 14-16.) Lastly, the protester argues that cancellation was not in the best interests of the District because an award to Qualis would have saved the District an approximate per month¹⁵ compared to extending the contract with Delmarva, pending resolicitation. (*Id.* at 17, 19-20.)

Further, with regard to the original sole source extension to Delmarva, Qualis argues that the District violated D.C. Mun. Regs. tit. 27, § 1304.2 and D.C. CODE § 2-354.04 when it awarded the extension to Delmarva "without first posting a notice of intent to award on OCP's website." (Supplemental Protest 3.) In its supplemental protest, Qualis also incorporates its previous objections to the sole source award made in its February 25, 2013, letter to the District challenging the earlier notice of intent to award. (*Id.* at 2-3.) Additionally, Qualis also maintains that the sole source award to Delmarva was an improper emergency contract. (*Id.* at 3 n.1.) The

¹⁴ This revised D&F omitted the history of sole source procurements with Delmarva that had been set forth in the previous sole source D&F. (See generally Supplemental AR Ex. 6.)

¹⁵ It is not clear from Qualis' protest whether this figure takes into account the District's changed requirements.

protester also challenges the District's corrective action with regard to the original sole source contract as arbitrary, capricious and an abuse of discretion. (Protester's Comments 9-11.)

The District maintains that it acted reasonably in canceling the RFP. (*See generally* AR 4-6; Dist. Resp. 2-4.) The District asserts that the changes to the District's requirements, cumulatively, are substantial and provide a reasonable basis for cancellation.¹⁶ (AR 5-6; *see also* Dist. Resp. 3 (noting changes to 26 CLINs and the elimination of 5 CLINs).) Additionally, while the District concedes that the original sole source award was procedurally defective, it asserts that its corrective action (i.e., canceling Delmarva's sole source extension while "simultaneously award[ing] a new sole source extension contract") cures the procedural defect. (Supplemental AR at 5; Dist. Resp. 4-5.) The District further argues that a sole source award to Delmarva is justified because only Delmarva can meet the District's minimum needs by providing the required services without a transition period. (Supplemental AR 6-7.) This fact, according to the District, provides a reasonable basis for the sole source award. (*Id.* at 6.)

DISCUSSION

The Board exercises jurisdiction over Qualis Health's original and supplemental protests pursuant to D.C. CODE § 2-360.03(a)(1) (2011).

The District Properly Canceled RFP No. DCHT-2012-R-0002

The parties dispute whether the District's change in CLIN estimates justified the District's decision to cancel RFP No. DCHT-2012-R-0002.¹⁷ Our standard of review in this area is well settled. The District's procurement statutes provide that a request for proposals or other solicitation may be canceled if the CPO makes a written determination that such cancellation is in the best interests of the District government. D.C. CODE § 2-354.14 (2011). With regard to a negotiated procurement, such as the one at issue here, the CPO need only have a reasonable basis for canceling a solicitation. *Am. Consultants & Mgmt. Enters., Inc.*, CAB No. P-683, 52 D.C. Reg. 4176, 4178 (May 17, 2004); *Shannon & Luchs Commercial D.C., Inc.*, CAB No. P-415, 42 D.C. Reg. 4851, 4859; *see also Jenkins Sec. Consultants, Inc.*, CAB No. P-846, 2010 WL 3947583 at *2 (Aug. 3, 2010); *Corr. Med. Care, Inc.*, CAB No. P-722, 54 D.C. Reg. 2005, 2007 (Mar. 20, 2006). If there is a reasonable basis for cancellation, an agency may cancel a solicitation regardless of when the information providing this reasonable basis arises, even after proposals have been evaluated. *Blue Rock Structures, Inc.*, B-400811, 2009 CPD ¶ 26 at 3 (Jan. 23, 2009); *VSE Corp.*, B-290452.2, 2005 CPD ¶ 111 at 6 (Apr. 11, 2005).

A reasonable basis to cancel a solicitation exists where the solicitation fails to accurately reflect the agency's needs, *Trujillo/AHW, JV*, B-403958.4, 2011 CPD ¶ 218 at *2 (Oct. 13, 2011), particularly where resolicitation presents the opportunity for increased competition or cost

¹⁶ In doing so, the District refers to Exhibits 3 and 4 to the Agency Report. (AR 5-6.) Exhibit 3 is the D&F to cancel the RFP, which speaks generally as to the changes to be made, but does not provide any details regarding the specific changes. (AR Ex. 3 at 4.) Exhibit 4 is a chart prepared by CO Tarpley on March 21, 2013, in response to this protest, which details the precise changes to the CLIN estimates. (*See* AR Ex. 4.)

¹⁷ The D&F supporting the cancellation also cited the expiration of the offers as a basis for cancellation. (AR Ex. 3 at 3.) The protester challenged this basis in its protest. (Protest 14-16.) The District has not asserted this argument in defense of its cancellation decision in this matter. We therefore treat the point as conceded by the District.

savings, *Xactex Corp.*, B-247139, 92-1 CPD ¶ 423 at 3 (May 5, 1992). For example, we have found a reasonable basis for a District decision to cancel a solicitation for substance abuse treatment for male youth, and to issue a new solicitation, where the District had increased the number of youth from 20 to 40, increased the staff ratio from 1:10 to 1:5, and altered the treatment method. *Am. Consultants & Mgmt. Enters., Inc.*, CAB No. P-683, 52 D.C. Reg. at 4177-79.¹⁸

Further, even under requirements type contracts such as the protested procurement, where the government is generally not obligated to purchase any particular quantity of goods or services, an agency may be justified in canceling a solicitation and resoliciting its requirements to correct solicitation estimates that differ significantly from the agency's actual needs. See *Platinum Servs., Inc.*, B-402718.2, B-402923, 2010 CPD ¶ 201 at 4 (Aug. 27, 2010). Indeed, quantity estimates in a solicitation should reasonably provide an accurate representation of the agency's anticipated actual needs as a basis for an offeror's formulation of its proposed unit prices. See *id.*; *C-Cubed Corp.*, B-289867, 2002 CPD ¶ 72 at 3 (Apr. 26, 2002).

Having reviewed the record, the Board finds that, prior to the cancellation of the Solicitation, the District reasonably concluded that many of the original RFP's CLIN estimates changed significantly. For instance, according to the District's justification that is a part of this record, the District has increased its estimate for reviews for extended personal care aides under CLIN 001AF from 1,782 reviews to 9,791 reviews, and increased its out of state nursing home placement estimate under CLIN 0001AO from 0 reviews to 105 reviews. (AR Ex. 4 at 1.) Among other changes, the District also decreased its estimated reviews of intellectual and developmental disability waivers under CLIN 0001AK from 10,000 to 5,000, decreased the estimated pre-admission reviews for specialty hospitals under CLIN 0002AA from 1,316 to 502, decreased the estimate of emergency admission reviews for acute care hospitals under CLIN 0003AA from 11,829 to 9,805, and decreased its estimated out of state Prospective Payment System hospital reviews from 1,500 to 5. (See generally *id.*) Based upon these factors, we, therefore, find that the District's determination that the original Solicitation was not the most accurate reflection of its needs was reasonable and justified the cancellation of the Solicitation.

The District Was Not Justified in Extending Delmarva's Prior Sole Source Contract.

As stated earlier, the District essentially concedes that its February 1, 2013, sole source award was procedurally defective. However, the District maintains that it cured the only impropriety in the original sole source extension, a procedural defect, when it took corrective action by (1) issuing a new notice of intent to award sole source contract; (2) canceling the original sole source award; and then (3) issuing a new sole source award. (Dist Resp. 4-5.) While an agency has broad discretion in taking corrective action, the Board will review the proposed corrective action to determine "whether the agency's discretion is exercised reasonably in a manner that remedies the procurement impropriety." *Citelum DC, LLC*, CAB No. P-922, 2013 WL 1952320 at *8 (Mar. 1, 2013).

¹⁸ In this regard, we also note that the District's procurement regulations require the cancellation of a solicitation where a change in the District's needs is "so substantial that it warrants complete revision of the solicitation." D.C. MUN. REGS. tit. 27, § 1622.3 (2013). As noted above, the District recently revised Chapter 16 of its procurement regulations. See, *supra*, note 11. However, the cited provision is substantially similar to its predecessor. See D.C. MUN. REGS. tit. 27, § 1615.3 (1988).

The District's procurement statutes aim to promote full and open competition in government contracting. D.C. CODE § 2-351.01(b)(3) (2011); *Duane A. Brown*, CAB No. P-0914, 2012 WL 6929395 at *3 (Dec. 13, 2012). Given this mandate for competition, the Board will closely scrutinize protested sole source procurements in order to ensure that they were made in compliance with the District's procurement statutes and regulations. See *AA Pipeline Cleaners, Inc.*, CAB No. P-315, 40 D.C. Reg. 4687, 4694, 4696 (Nov. 5, 1992) ("In sum, a sole source award must be reasonably justified and made in compliance with statute and regulations."); *Beretta U.S.A. Corp.*, CAB No. P-177, 38 D.C. Reg. 3098, 3121 (Aug. 23, 1990). Thus, although the District seems to focus on primarily addressing whether its most recent and "corrected" April 30, 2013, sole source award properly addressed a procedural defect (i.e., lack of notice) in its earlier sole source decision, the Board must also review the propriety of the District's justification for the original sole source decision which was also challenged by the protester.

A noncompetitive, or sole source, contract award may be proper where there is only a single source available to provide the required good or service. D.C. CODE § 2-354.04(a); see also D.C. CODE § 2-351.04(59) ("Sole source" means that a single source in a competitive marketplace can fulfill the specifications of a contract."). Similarly, this Board has repeatedly held that a sole source award is not justified where there is more than one available source to meet the District's requirements. *Atl. Transp. Equip., Ltd.*, CAB Nos. P-678, P-680, 52 D.C. Reg. 4180, 4186-88 (June 3, 2004); *Answer Temps., Inc.*, CAB Nos. P-564, P-567, 46 D.C. Reg. 8549, 8553 (Jan. 28, 1999); *AA Pipeline Cleaners, Inc.*, CAB No. P-315, 40 D.C. Reg. at 4694-96; *Tri-Continental Indus., Inc.*, CAB No. P-297, 39 D.C. Reg. 4456, 4460-61 (Mar. 6, 1992). In *Answer Temporaries*, we rejected the District's argument that only a single contractor could satisfy the District's minimum needs where the District had recently canceled a solicitation for a substantially greater amount of services, to which four other bidders had responded, but had failed to contact any of the four other bidders regarding the lowered requirements. *Answer Temps., Inc.*, CAB Nos. P-564, P-567, 46 D.C. Reg. at 8553; cf. *Corr. Med. Care, Inc.*, CAB No. P-722, 54 D.C. Reg. 2005, 2007 (Mar. 20, 2006) (questioning the District's alleged inability to compete an interim contract where two offerors had responded to the canceled solicitation).¹⁹

By the same token, the use of a sole source procurement is not justified where the need for the sole source award arises from the agency's failure to adequately perform advanced procurement planning, or by issues such as administrative delays or lack of sufficient procurement personnel. D.C. MUN. REGS. tit. 27, § 1700.3(a) (2012); accord *Chapman Law Firm Co., LPA*, B-296847, 2005 CPD ¶ 175 at 3 (Sept. 28, 2005) ("[N]oncompetitive procedures are not justifiable where the agency created the need for the sole-source award through a lack of advance planning."); *Techno-Sciences, Inc.*, B-257686.2, 94-2 CPD ¶ 164 at 8 (Oct. 31, 1994) ("[U]nder no circumstances may noncompetitive procedures be used owing to a lack of advance planning.").

In the instant protest, there is clearly more than one available source for the quality improvement services sought by the District, other than Delmarva, as the present protest

¹⁹ In *Correctional Medical Care*, the Board nonetheless upheld the sole source award because the protester had failed to file comments in response to the District's Agency Report, and had thus "conceded the factual bases for the District's actions." CAB No. P-722, 54 D.C. Reg. at 2007.

primarily stems from a 16-month long competition between two qualified offerors, including the protester, that were capable of providing these same services. Indeed, the District initially sought to award the subject contract to the protester, and not Delmarva, prior to its subsequent decision to cancel the Solicitation. Nonetheless, the District argues that the subject sole source award was justified because only Delmarva could meet the District's immediate requirements without an interruption of services given that a 90-day transition period would be required with any other offeror. (Supplemental AR 6-7.)

While the Board in no respect seeks to minimize the importance of the health related services involved in this procurement or any of the District's transition considerations in making a follow-on contract award for these services, the Board must still consider whether the District has properly utilized a non-competitive sole source contract vehicle in this case given the underlying facts surrounding this procurement. The record in this matter reflects that Delmarva's incumbent base contract, with options, for the services at issue expired on April 26, 2011 – over two years ago. The District, however, failed to issue a solicitation for a follow-on contract until October 14, 2011, which was nearly six months after Delmarva's 2005 contract had expired on April 26, 2011. Since the expiration of the 2005 contract, the District has conducted a series of short-term sole source and emergency extensions to Delmarva, extending Delmarva's performance a few months at a time in a piecemeal fashion. (Supplemental AR Ex. 5 at 1-2.) The District's attempted January 31, 2013, six-month extension, which gave rise to the initial supplemental protest, would have extended Delmarva's sole source contract through July 31, 2013. (Supplemental AR Ex. 3 at 2.) Similarly, under the most recent "corrected" sole source award, Delmarva would, again, exclusively be designated to provide quality improvement services through January 31, 2014. (Dist. May 2, 2013, Letter to Board Ex. 1 at 1.)

In the foregoing regard, there appears to be no reasonable explanation as to why the District did not undertake the appropriate steps to plan to competitively award a follow on contract for the Delmarva's incumbent contract that would take effect when this incumbent contract initially expired on April 26, 2011, or even shortly thereafter. As stated earlier, the District did not even issue a competitive solicitation for a follow-on contract for these services until almost six months after the base contract award to Delmarva had expired. The District's procurement regulations require that an agency undertake procurement planning "as soon as an agency need is identified and preferably well in advance of the fiscal year in which the contract award is necessary." D.C. MUN. REGS. tit. 27, § 1009.4 (2011). Instead of meeting this planning requirement, the District has, for more than two years, inexplicably relied as its alternative on a series of short-term non-competitive emergency and sole source awards to Delmarva. Consequently, it appears that the District's current need to make a sole source award arises from its failure to adequately perform advanced procurement planning in lieu of a reasonable determination that there is only one source available to meet its current requirement for services.

Moreover, even assuming that the District needed an interim, short term contract vehicle put in place during the evaluation process under the newly issued solicitation for these services after its last sole source contract with Delmarva expired on January 31, 2013, an emergency, and not a long-term sole source, contract, should have been the procurement vehicle utilizing as

much competition as practicable under the circumstances.²⁰ D.C. CODE § 2-354.05(b). Under similar time constraints, we have found that the District could have performed some limited competition and awarded an emergency contract while still obtaining its required services. *See Answer Temps., Inc.*, CAB Nos. P-564, P-567, 46 D.C. Reg. at 8554 (finding that the District could have awarded an emergency contract with some limited competition between September 25 and October 1).

For the foregoing reasons, the Board finds that the District's recent decision to make a sole source award to Delmarva was improper.

CONCLUSION

As stated above, we find that the District acted reasonably in canceling the Solicitation, which the Board understands has been recently reissued under solicitation No. DCHT-2013-R-0030. Additionally, given the improper sole source award to Delmarva discussed herein, the Board hereby orders the District to terminate its sole source contract with Delmarva no later than July 31, 2013. The District shall make every effort to award a contract under the new solicitation No. DCHT-2013-R-0030 for these services by July 31, 2013. However, given both the District's continuing need to comply with federal law and regulations concerning Medicaid, and the need to continue services uninterrupted, the District may, in accordance with D.C. CODE § 2-354.05, award an emergency contract to cover any necessary short term transition period utilizing as much competition as practicable after the improper sole source is terminated and until the impending contract award under the new solicitation can be made.

SO ORDERED.

Date: June 26, 2013

/s/ Monica C. Parchment
MONICA C. PARCHMENT
Administrative Judge

CONCURRING:

/s/ Marc D. Loud, Sr.
MARC D. LOUD, SR.
Chief Administrative Judge

²⁰ The District objects to the protester's characterization of the sole source extensions as emergency contracts. (Supplemental AR 5 n.4.) Yet it argues that the sole source extensions were necessary to "assure the continuity of the critical medical health care services during the transition period." (*See id.* at 6.) This need to prevent the "serious disruption" of District services is one of the defining features of an emergency procurement. *See* D.C. CODE § 2-354.05(a); D.C. MUN. REGS. tit. 27, § 1702.1 (2012).

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