

GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

PROTEST OF:

GOOD FOOD SERVICES, INC.

Under IFB No. 7286-AA-89-1-HT

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CAB No. P-494

For the Protester: Steven Gianacopolos, General Manager. For the Government: Anne Cauman, Esquire, and Howard S. Schwartz, Esquire, Assistants Corporation Counsel, D.C.

Opinion by Chief Judge Lorilyn E. Simkins with Administrative Judges Jonathan D. Zischkau and Phyllis W. Jackson, concurring.

ORDER ON MOTION TO DISMISS PROTEST

Good Food Services, Inc. ("Good Food" or "Protester"), the incumbent provider under Contract No. 5085-AA-73-1-LT ("Contract No. 5085"), complains that the District should have exercised Good Food's option under the Contract No. 5085 rather than issuing Invitation For Bid No. 7286-AA-89-1-HT ("IFB 7286") and awarding a contract ("Contract No. 7286") to a competitor. The Protester also complains that the amount of time it had to respond to IFB 7286 was unreasonably short. The District filed a motion to dismiss, contending that the protest was untimely filed. We agree, and dismiss the protest.

DISCUSSION

Protester was the incumbent provider of hot and cold meals for day care centers operated by the District of Columbia Department of Recreation and Parks ("DRP") under Contract No. 5085, a one year contract with two one-year option periods. (Protest and Protester's June 27, 1997 supplemental filing). The contract term ended on December 16, 1996. (*Id.*) By letter dated October 25, 1996, the Department of Administrative Services ("DAS"), which administered the contract for DRP, served preliminary notice of its intention to exercise the option to extend the term of the contract for a period of one (1) year or a fraction thereof. (Protest, Attachment 1). The Protester states that on or about December 1, 1996, it contacted the contracting officer to ascertain when DAS would forward the new contract. (Protest). DAS employees assured Good Food that the paperwork was being forwarded. (*Id.*). Apparently, Good Food did not receive the paperwork exercising the option. The Protester alleges that DAS issued a purchase order on February 14, 1997 for the period of February 18, 1997 to March 2, 1997. (Protest). Relying on DAS's October 25 letter of intent, and the informal indications from DAS employees that the option would be exercised, Good Food continued to supply food to DRP day care centers after the contract expired until March 1997. (*Id.*). On March 13, 1997, DAS issued IFB 7286 for hot and cold meals for DRP day care centers. (Motion, Exhibit 1). Good Food was one of the seven (7) prospective bidders to which DAS sent notice of the solicitation. (Motion, Exhibit 2). Good Food claims to have received the IFB on March

20, 1997 (Protest, p. 2). Two bidders, Good Food and THL Associated ("THL"), responded to the IFB. (Motion, p.2). Bids were opened on April 14, 1997. (Motion, Exhibit 3). On May 8, 1997, DAS awarded the contract to THL, the low bidder. (Motion, Exhibit 4) By letter dated May 14, 1997, DAS informed Good Food of the award to THL. (*Id.*).

The District filed a motion to dismiss the protest on June 13, 1997, contending that the protest was untimely filed. The Board initiated a telephone conference with the parties on June 25, 1997, and it (as well as Good Food) learned for the first time that the contracting officer had executed a Change Order/Unilateral Modification on December 28, 1996 to extend the contract term from December 17, 1996 until February 14, 1997.¹ Good Food states that it did not receive a copy of the change order. On June 26, 1997, Good Food filed a Reply to the District's motion to dismiss, which basically reiterated its protest claim, except that the Protester asserted in its Reply that it learned about the existence of IFB 7286 accidentally on March 28, 1997, rather than on March 20, 1997. On June 27, 1997, Good Food supplied the Board with a copy of Contract No. 5085, which suggests that the option expired with the contract on December 16, 1996.² If the change order exercising the option was invalid, then DAS officials wrongfully encouraged Good Food to supply food to DRP's day care centers without a valid contract in violation of D.C. Code § 1-1185(d)(1).

We can discern two issues raised by the Protester.³ First, the protester complains that despite the reasonableness of its prices, the District failed to exercise the option in IFB 5085 after it informed the protester of its intention to do so. Secondly, the protester complains that DAS gave it an insufficient amount of time to develop its bid for IFB 7286.

The right to exercise an option is a unilateral right of the District, and the contractor has no right to require the District to exercise the option even after the District issued a preliminary letter of intent to exercise the option. *See* 27 D

CMR ¶ 2099; *IPACHI*, CAB No. D-945, April 14, 1995, 42 D.C. Reg. 4972. Additionally, we will not generally consider protests of an agency's decision not to exercise a contract option, as this is a

¹The District faxed to the Board a copy of the change order on June 26, 1997.

²Section M.4.1 of Contract No. 5085 provides:

The government may extend the term of this contract in whole or part, for a period of one (1) year, or a fraction thereof, by written notice to the contractor **before the expiration of the contract**; provided that the government shall give the contractor a preliminary written notice of its intent to extend at least thirty days before the contract expires. The preliminary notice does not commit the government to an extension. (Emphasis supplied).

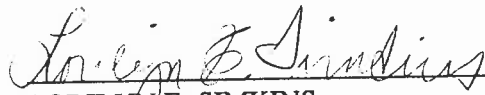
³The District maintains that the allegations in the protest are so unclear as to contravene the requirement of Board rule 302.1(c) for a clear and concise statement of protest ground. The protest grounds are not artfully stated, but the grounds of protest are sufficiently clear.

matter of contract administration within the discretion of the contracting agency. See *Arlington Public Schools*, B-228518, Jan. 11, 1988, 88-1 CPD ¶ 16.

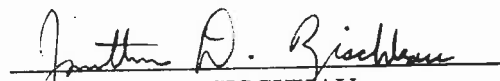
The District correctly argues in its June 13, 1997 motion that the protest is untimely filed. The contract and option period for Contract No. 5085 expired on December 16, 1996. DAS issued IFB 7286 on March 13, 1997. Protester claims to have learned of the new solicitation on either March 20 or March 28, 1997. The protest was not filed until May 21, 1997. D. C. Code § 1-1189.8 (b) requires that "the aggrieved person shall file a protest with the Board within 10 working days after the aggrieved person knew or should have known the facts and circumstances upon which the protest is based." The Board has repeatedly held that a protest filed later than 10 working days after an aggrieved person knew or should have known of the facts and circumstances upon which the protest is based is untimely. For challenges to the terms of a solicitation, the protest must be filed prior to bid opening. See, e.g., *Good Food Services, Inc.*, CAB No. P-457, August 27, 1996, 8 P.D. 7147; *Unfoldment, Inc.*, CAB No. P-435, September 18, 1995, 8 P.D. 7030. Thus, the protester's allegation that the amount of time it had to respond to the IFB was unreasonably short, should have been filed no later than April 14, 1997. Whether received on March 20 or March 28, 1997, Good Food's May 21, 1997 filing was well beyond the jurisdictional period. We therefore find that the protest was untimely filed.


Accordingly, we dismiss the protest with prejudice.

DATE: July 8, 1997


LORILYN E. SIMKINS
Chief Administrative Judge

CONCURRING:


JONATHAN D. ZISCHKAU
Administrative Judge


PHYLLIS W. JACKSON
Administrative Judge