

GOVERNMENT OF THE DISTRICT OF COLUMBIA  
CONTRACT APPEALS BOARD

PROTEST OF:

WEST GROUP	)	
	)	CAB No. P-612
Under RFP No. 9054-AA-NS-1-DW	)	

For the Protester: Christopher R. Yukins, Esq., Holland & Knight, LLP. For the District: Howard Schwartz, Esq. and H. Christopher Malone, Esq., Assistants Corporation Counsel.

Opinion by Administrative Judge Matthew S. Watson, with Chief Administrative Judge Lorilyn E. Simkins and Administrative Judge Jonathan D. Zischkau, concurring.

**OPINION**

West Group filed a protest against the terms of a solicitation for publication of the D.C. Code asserting that the failure of the District to commit itself to provide a list of current subscribers to the Code effectively restricts competition and unlawfully establishes a sole source procurement. The District asserts that the protest concerns contract administration not properly considered in a protest. Alternatively, the District asserts that the protest was untimely filed. The Board previously determined that the essence of the protest does not involve issues of contract administration. (Order, April 11, 2000) The Protester, however, has failed to show that the protest was timely filed. Accordingly, we dismiss the protest.

**BACKGROUND**

On April 21, 1999, the Office of Contracting and Procurement issued RFP 9054-AA-NS-1-DW ("RFP") on behalf of the Office of General Counsel of the Council of the District of Columbia. The RFP solicited proposals for a firm-fixed-price contract to update the annotated District of Columbia Code on an annual basis beginning with the year 2000; to prepare, print and bind pocket part supplements, replacement indexes and replacement volumes; and to market the "official" D.C. Code in printed and electronic form. (Agency Report ("AR") Exh. 1, Part 1, §B). Amendment 2 to the RFP extended the closing date for initial proposals to June 22, 1999. (AR Exh. 3). Under the solicitation, the contractor is to deliver to the District 510 copies of the printed edition of the revised code, index and supplements, (AR Exh. 1, §F.5.1.), and to license the District to use the annotated code in electronic form (*Id.* at Attachment J.1). The contractor is further required to make the revised annotated code available for sale to the public in printed (*Id.* at §C.18.2) and electronic forms (*Id.* at §C.9), and to provide an unannotated code to the public free of charge on an internet site. (AR Exh 3, §C.9.5). Under the subject solicitation, as well as previous contracts for publication of the

Code, the District retains ownership and copyright of all material produced in performance of the contract. (*Id.* at §I.14.2). Pursuant to the contract, the District grants an exclusive license to the contractor for the term of the contract to sell its printed and electronic editions of the code as the "official" annotated code (*Id.* at §C.18.1.2), and requires the contractor to maintain an inventory of the revised code volumes and supplements for sale to the public in printed form at approved prices. (*Id.* at §C.18.3).

Historically, the contract has been at no cost to the District. (AR Exhs. 7 and 9). In addition, the contractor pays the District a royalty on gross revenues received for electronic publication of the Code. (AR Exh. 1, §C.9.1). The contractor may, however, recover its total costs, including product delivered and the royalties paid to the District, from public sale of the official annotated code in printed and electronic form. The original solicitation provided only for evaluation of the cost to the District, but did not provide for any evaluation of the price to the public or the level of royalties. (*Id.* at §M.10).

Two publishers submitted proposals in response to the RFP, Lexis Law Publishing and West Group. (Reply to Opposition to Motion to Dismiss, Exh. 3, at 1) On October 14, 1999, a contract was awarded to West Group, the protester herein, pursuant to the subject solicitation. (AR Exh. 5). On November 5, 1999, the other offeror, Lexis, protested the award to West. (CAB No. P-602). On November 30, 1999, the Chief Procurement Officer declared the November 5, 1999, award to West void due to the failure of the District to hold discussions and adequately evaluate proposals. (AR Exh. 9), and the Board dismissed the protest. On the same date, the Contracting Officer reopened negotiations under the original RFP. (AR Exhs. 10 and 11). On December 28, 1999, the Contracting Officer issued Amendment 3 to the solicitation which set January 6, 2000, as the date for submission of revised proposals. In addition to establishing the date for submission of revised proposals, the amendment revised the price evaluation provisions of the solicitation to include 10 points (out of possible maximum 100 points) for the highest estimated royalty payments to the District. (AR Exh. 12). On January 5, 2000, the Contracting Officer issued Amendment 4 which extended the submission date to January 7, 2000. (AR Exh. 13).

West and Lexis both submitted timely revised proposals. (Motion to Dismiss at 5). On February 14, 2000, the Contracting Officer notified Lexis and West that Best and Final Offers (BAFOs) were due on February 18, 2000. (AR Exh. 14). The date for submission of BAFOs was subsequently extended to March 8, 2000. (AR Exhs. 15, 18 and 19). No substantive changes relating to the availability of prior contract subscriber lists were made after Amendment 2, issued June 9, 1999. (AR Exhs. 12, 13 and 19).

Since the District began contracting for private publication of the Code, the contract has been held by one company and its corporate successors, currently Lexis Law Publishing. Lexis possesses the list of subscribers to the official code which it has developed through its performance of previous contracts. Protester asserts that the District has a contract right to the subscription list. (Protest at 2). The District has not obtained a copy of the subscription list or committed to obtaining a copy to provide to any successful offeror on the RFP. (Reply to Opposition to Motion to Dismiss, Exh. 3

at 5). Protester asserts that, without the list of existing subscribers to solicit for subscriptions to a new contractor's official code revisions, no new contractor can economically compete with the incumbent. (Opposition to Motion to Dismiss at 10). As a result, Protester asserts, any solicitation which does not make the subscription list available to all potential contractors will result in a sole-source purchase from the incumbent.

On March 7, 2000, West Group protested the "Terms of Solicitation." More specifically, West protested:

1. The District's failure to recover the subscriber list from Lexis threatens to render the contract, as currently structured, economically unviable.
2. Due to the apparent imminent release of Lexis' D.C. Code product, the awardee may need indemnification for other losses that will be incurred as a result of confusion in the marketplace.
3. The solicitation, as amended, does not require offerors to submit a prior subscriber list (if available) with their offers; as such, the solicitation leaves Lexis Publishing with a grossly unfair and inequitable competitive advantage.

(Protest at 3-4).

West asserts that its protest was timely because it was filed prior to the final date for submitting BAFOs.

### DISCUSSION

Although West couched its protest in terms of various alleged failures of the District to obtain a list of current subscribers to the official D.C. Code revisions under the prior contract, it is the essence of the protest that the District will not supply a new contractor such a subscription list regardless of how the District should obtain the list. Protester contends that it is harmed because its competitor, the incumbent contractor, has the existing subscriber list. The District has moved to dismiss the protest on the grounds that it is untimely. The Board agrees and finds that the protest is untimely.

The Protester concedes that this protest is one concerning the terms of the solicitation which is governed by D.C. Code § 1-1189.8(b)(1) and Board Rule 32.2(a). (Protest at 1). The statute provides:

(a) A protest based upon alleged improprieties in a solicitation which are apparent prior to bid opening or the time set for receipt of initial proposals shall be filed prior to bid opening or the time set for receipt of initial proposals. In procurements where proposals are requested, alleged improprieties which do not exist in the initial solicitation, but which are subsequently incorporated into this solicitation, must be

protested not later than the next closing time for receipt of proposals following the incorporation.

D.C. Code § 1-1189.8(b)(1) (emphasis added).

The District asserts that the protest should have been filed by June 22, 1999, the deadline date for the initial proposals, but in any event, no later than January 7, 2000, the date for submission of revised proposals after the negotiation was reopened. (AR at 10). If the alleged impropriety was “apparent prior to . . . the time set . . . for receipt of initial proposals,” the protest was untimely if not filed by June 22. The question of the availability of the subscription list had clearly been raised prior to the deadline for initial proposals. The issue was raised at a pre-proposal conference held May 10, 1999. In the letter to the Contract Specialist confirming Protester’s understandings of information given at the pre-proposal conference, West’s Director of Government Relations and Contracting stated:

With respect to the last sentence of C.18.1, counsel clarified that the applicable subscriber list needs to be submitted to the counsel within 2 weeks after the award. The intent in this regard is to effectuate a smooth transition by providing this subscriber list to the successful offeror if that successful offeror is someone other than the incumbent publisher.

(West Group’s April 7, 2000 Reply in Support of its Motion for Discovery and Supplemental Request, Exh. 1, Attachment C, item 6.)

Although Protester’s letter may have reflected the position of the Codification Counsel, the record does not support that West’s understanding reflected the position of the Contracting Officer. It is only the contracting officer who has authority to bind the District. (AR Exh. 1 at §G.3.1; *see also*, 27 DCMR §1003). On June 9, 1999, following West’s letter, the Contracting Officer issued Amendment 2 to the solicitation. (AR Exh 3). The amendment changed the language of §C.18.1, referred to by Protester, which originally read:

The successful offeror shall submit a subscriber list to the District government with its offer and at other times upon request.

to:

The successful offeror shall submit a subscriber list to the Contract Administrator or designee two (2) weeks after contract award.

On its face, the revised language not only does not meet the objections raised by the Protester, but highlights the impropriety raised by the Protester. It could be argued from the original language that, even though the "successful" offeror would not be known at the time of submission, no offer could be successful unless the offer had been accompanied by a subscriber's list. By this interpretation, if the incumbent contractor were to make a proposal, it would have to submit its subscriber list with its offer. By the amendment, however, the District made it clear that no subscription list would be required of the incumbent contractor unless the incumbent won the award. After the amendment there could be no possible reading of the solicitation to provide that an unsuccessful offeror would be required to submit its subscription list after award to a competitor.<sup>1</sup> The alleged defect in the solicitation about which protester complains was therefore apparent no later than June 9, 1999. Regardless of whether West had been previously led to believe that the previous subscription list would be available to any successful contractor, the formal written amendment removed any ambiguity. Thus any protest as to the terms of the solicitation not filed prior to the next date for submission of proposals, June 22, 1999, is untimely.

As noted above, West's proposal submitted without protest on June 22, 1999, was accepted, and the contract awarded to West on October 14, 1999. That contract was subsequently voided and negotiations reopened. Even if the reopened negotiation is considered the equivalent of a new procurement establishing a new time limit for filing protests of the terms of the solicitation, the subject protest is still untimely. The Determination and Finding to cancel the initial West award was made November 30, 1999. (AR Exh. 9). West had previously been directed to cease performance on November 17, 1999. (*Id.*) West must have been fully aware that, in the over 4 weeks from award to the notice to cease performance, no subscription list was provided to it contrary to it previously alleged understanding that the subscription list would be available two weeks from award.

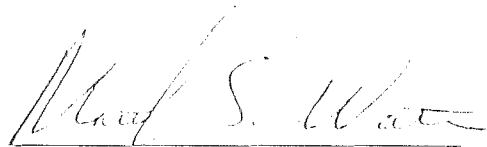
In Amendment 3 to the solicitation issued December 28, 1999, the Contracting Officer established a deadline of January 6, 2000, for submission of revised proposals. The amendment made certain changes in evaluation criteria but did not alter the previous terms as to the subscription list. On January 5, 2000, Amendment 4 extended the deadline for proposals and made a further change in evaluation procedures. (AR Exh. 13). Nothing in the amendments issued by the Contracting Officer in the reopened negotiations responded to the alleged deficiency in the solicitation claimed in the Protest. The alleged deficiency continued to be apparent. A timely protest could be filed no later than January 7, 2000, the date for submission of revised proposals. While Protester has alleged actions by Lexis Publishing after January 7, 2000, to publish an independent code (Opposition to Motion to Dismiss, 10), which West claims may make it uneconomic for it to perform the contract if it is awarded to it, Protester cites no facts which would make the alleged solicitation defects apparent which were not present prior to January 7, 2000.

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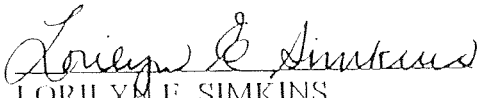
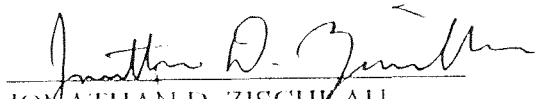
<sup>1</sup> Even if the amended language were as West stated its understanding in its letter confirming the pre-proposal conference, it is difficult to conceive of how the District could enforce any requirement on an unsuccessful offeror after a contract has been awarded.

**CONCLUSION**

The Protest based on an alleged impropriety in the solicitation was filed with the Board on March 7, 2000. The alleged impropriety should have been apparent to the Protester no later than June 9, 1999, when Amendment 2 to the Solicitation was issued. Responses to the RFP were due June 22, 1999. Even if the cancellation of the initial award nullified the earlier submission dates, revised proposals were solicited to be received no later than January 7, 2000. The deadline for filing a protest based on the alleged solicitation impropriety was no later than January 7, 2000. Accordingly, the protest is dismissed as untimely.

**SO ORDERED**DATED: June 8, 2000MATTHEW S. WATSON  
Administrative Judge

CONCURRING:

LORILYN E. SIMKINS  
Chief Administrative JudgeJONATHAN D. ZISCHKAU  
Administrative Judge