GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

PROTEST OF:

PRISON HEALTH SERVICES, INC.	)	CAB No. P-610
	)	
Under Request for proposals 01-CDF99	)	

For the Protester: Lisa L. Hawkins, Esq. and Douglas C. Proxmire, Esq., Patton Boggs, L.L.P. For the Receiver: David W. Burgett, Esq., Hogan & Hartson, L.L.P.

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

OPINION

Prison Health Services, Inc. ("Protester") protests the award of a contract by the Receiver for Medical and Mental Health Services of the Central Detention Facility [D.C. Jail] ("Receiver") under RFP 01-CDF99. The solicitation sought the services of a contractor to provide comprehensive health services for inmates at the Jail. Protester asserts that the Receiver showed bias in favor of a company formed by the incumbent Medical Director by improperly considering the firm's late proposal, improperly permitting the firm's subcontractor to tour the facility after the tour provided for other offerors, and expressing a preference for contracting with a nonprofit entity. The Receiver asserts that unforseen delivery delays permitted acceptance of the firm's late initial proposal, and, in any event, as a result of a substantive amendment to the services required by the solicitation, the Receiver properly received the firm's amended proposal. The Receiver further contends that the Protester has not proven bias. We deny the protest.

In order to maintain the integrity of any procurement system, procurement actions must not only be fair, but they must appear fair. Although the Protester has not met the difficult burden of proving bias by the Receiver in favor of the incumbent Medical Director, certain of the Receiver's actions, as well as those of the Medical Director, could lead unsuccessful offerors to believe that the procurement was not conducted fairly.

Background

After protracted litigation as to the health care received by inmates at the D.C. Jail, the D.C. Jail Health Services receivership was established and the Receiver appointed pursuant to an order of the United States District Court for the District of Columbia dated July 11, 1995. *Campbell v. McGruder*, C.A. No. 1462-71 (consolidated with *Inmates of D.C. Jail v. Jackson*, C.A.75-1668). (Attached to Receiver's Motion to Dismiss, Ex. 1). The Receiver assumed the control and operation of medical services at the jail in September 1995. ([Administrative] Report of the Receiver ("AR"), at 1). In 1999, the Receiver, with the concurrence of the Department of Corrections and other interested parties, determined that the medical needs of inmates could be best served by contracting out the operation of the medical service. (*Id.* at 4).

The Solicitation

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In order to administer this solicitation, the Receiver retained a consultant in Atlanta, Georgia. On June 17, 1999, the Receiver issued RFP 01-CDF99 for Comprehensive Health Services at the Central Detention Facility (the "RFP"). (AR Exh. Vol. 1, Tab F). The RFP required offerors to submit comprehensive proposals based on detailed data regarding the historical medical needs of the jail population provided by the Receiver, which would be evaluated according to a stated evaluation scheme. (AR, at 5).

On June 30, 1999, all of the then-interested offerors toured the Jail and the Receiver responded to their questions. (*Id*. at 6). During the pre-proposal period, offerors also submitted written questions, and the Receiver provided responses to all prospective offerors. (AR Exh Vol. 1, Tabs A, C and G).

Submissions were due at 5 p.m. on July 30, 1999, at the offices of the Receiver's consultant in Georgia. Two proposals, one submitted by Prison Health Services ("PHS"), the protester, and one submitted by Correctional Medical Services were timely received. A third proposal, submitted by CCHPS, a new company formed by the incumbent Jail Medical Director, Dr. Stanley Harper, was received late. The Receiver asserts that the late proposal was timely sent, but was delayed by an unexpected weather-related airport closure and city-wide power failure in Atlanta. The Receiver determined, without any written documentation, that it would be in the best interest of the Jail, the Receivership, and the District to consider the late proposal. (AR, at 6).[1]

On December 3, 1999, the RFP was amended, deleting, among other items, the contractor's financial responsibility for hospitalization. At the same time, an extended closing date for receipt of proposals, December 17, 1999, was set. (AR , at 7). Based on a determination that the amendments made a significant change in the scope of the work, the Receiver reopened the competition, permitting the original offerors, as well as any new offerors, to submit proposals. The revised RFP was publicly advertised, and potential new offerors were advised that they could request additional time if they desired to bid.[2] No new offerors came forward, nor were there any requests for extension of time.

CCHPS, which had submitted the late proposal, timely submitted a revised proposal by the final closing date. In addition to responding to the amended RFP, CCHPS added a subcontractor, Addus HealthCare, Inc. ("Addus") of Palatine, Illinois.

[1/] In written answers to questions dated July 15, 1999, the Receiver answered an unqualified "No" to the question: "Will the Receiver consider granting an extension to the due date for proposals." (AR Exh Vol 1, Tabe C, Q. 57).

[2/] *See* Public Announcements of Amendment and Deadline Extension published in Washington Times and Washington Post. (AR Vol. 1, Tab L). It is noted that, although the published advertisement stated that requests for extension could be made, the actual solicitation amendment did not contain such a statement. (AR Exh. Vol 1, Tab F, 1) A recipient of the published announcement could have erroneously concluded from the statement of a deadline for a "request for extensions" that such requests would be automatically granted. Since no requests for extension were received, the question is moot.

On January 28, 2000, the contract was awarded to CCHPS which began performance on March 6, 2000. (AR Exh. Vol 1, Tab K, 2). A Determination and Finding authorizing the start of performance pending decision on this protest was subsequently approved by this Board. (Order, Mar. 16, 2000).

DISCUSSION

PHS protested against award of the contract on three grounds. First, PHS alleges that the amendment was improper, and in any event, even after the amendment, negotiations should have proceeded only with proposers who filed timely proposals; second, that CCHPS and its new subcontractor were permitted to tour the facility at a later date than other potential proposers; and, third, that the Receiver was biased in favor of CCHPS and its subcontractor Addus and had a preference for a nonprofit provider.

Acceptance of Late Proposal

The Receiver responded that the protest, insofar as it challenges the decision to amend the request for proposals and extend the time for initial proposals, was untimely. Even if timely, the Receiver contends that he properly extended the time for acceptance of proposals making CCHPS's revised proposal timely. (AR, at 12).

The Receiver asserts that the protest is untimely because protests against the terms of a solicitation, or a solicitation amendment, must be filed prior to the final deadline for submission of proposals. Rule 302.2(a)(1). The Protest was filed after the date for submission of proposals in accordance with the amended solicitation. The Receiver misconstrues the essence of the protest. The protest challenges, not the terms of the revised solicitation, but the consideration for award of a revised proposal from an entity which did not submit a timely proposal by the initial due date. The protester could not have known that CCHPS's revised proposal was being considered until notice of intent to award to CCHPS was given. In such circumstances, a protest is timely if filed within 10 business days "after the basis of the protest is known or should have been known." Rule 302.2(b). Protester was notified of the intent to award to CCHPS by letter dated January 13, 2000. The protest was filed on the tenth business day thereafter.[3] We find the protest timely.

There appears to be little question that, in accordance with generally accepted government procurement practice, the initial late proposal of CCHPS was improperly handled. The Receiver concedes that the proposal was received late. The proper procedure would have been to hold the proposal unopened. The District procurement regulations provide:

1609 LATE PROPOSALS, LATE MODIFICATIONS, AND LATE WITHDRAWALS

1609.1 Offerors shall submit offers, and any modifications, so that they will reach the District Office designated in the solicitation on time.

[3/] January 17, 2000, was the Martin Luther King Day holiday.

* * *

1609.3 Proposals and modifications to proposals that are received in the designated District office after the exact time specified in the RFP or under §1609.2 are "late" and shall be considered only if they are received before the award is made and one (1) or more of the following circumstances apply:

(a) The proposal or modification was sent by registered or certified mail not later than the fifth (5th) calendar day before the date specified for receipt of offers;

(b) The proposal or modification was sent by mail and it is determined by the contracting officer that the late receipt at the location specified in the RFP was caused by mishandling by the District after receipt; or

(c) The proposal is the only proposal received.

* * *

1609.6 A late proposal, late request for modification, or late request for withdrawal shall not be considered, except as provided in this section.

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1609.8 A late proposal, late modification of bid, or late withdrawal of offer that is not considered shall be held unopened, unless opened for identification, until after award and then retained with unsuccessful offers.

1609.9 The following information shall, if available, be included in the contract office files with respect to each late offer, late modification, or late withdrawal of offer:

(a) A statement of the date and hour of mailing, filing, or delivery;

(b) A statement of the date and hour of receipt;

(c) A written determination with supporting facts, why the late offer or modification was or was not considered for award;

(d) A statement of the disposition of the late action; and

(e) The envelope, or other covering, if the late offer or modification was considered for award.

It is an axiom of government contract law that the proposer takes the risk of a hand-delivered proposal arriving late. Poor weather conditions are not sufficient to overcome this presumption. In

considering a similar matter dealing with a late bid, which is governed by the same policy, the United States General Accounting Office stated:

> We understand how in circumstances such as those present here, a bidder may consider as harsh the provision which prohibits consideration of late hand-carried bids. Nevertheless, we believe there is a strong policy reason which favors such a rule. Since bids are opened publicly, allowing the consideration of a late bid, even one which is a few minutes late because of unusual circumstances over which the bidder had no control would lead to apprehension among timely bidders that the late bid was unfairly prepared after bid opening. The maintenance of the integrity and fairness of the procuring process is more important than the loss that a late bidder or the government suffers from the rejection of a late, low bid. Therefore, we have held that all late bids must be rejected except for those permitted in the exact circumstances provided for in the invitation. *Southern Oregon Aggregate, Inc*., B-190159, December 16, 1977, 77-2 CPD 477. We have applied this rule even when bids have arrived late under unusual circumstances over which the bidder had no control. For example, we have upheld an agency's refusal to consider a bid that was delivered late because of extreme weather conditions. *Hesse Machine & Mfg. Co., Inc.*, B-193984, February 23, 1979, 79-1 CPD 130. We have also upheld an agency's refusal to consider a bid that was delivered late when the bidder's representative was detained by the presence of a sniper in the area where bids were received. *Data Pathing Inc*., B-188234, May 5, 1977, 77-1 CPD 311.
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> The specific circumstances of the present case appear to be unique in that Unitron's bid was delivered late because a common carrier closed its offices during an emergency at a nearby nuclear electric generating plant. Contracting officers do have authority to delay bid openings when unanticipated events indicate that bids 'of an important segment of bidders have been delayed in the mails' or cause interruption of 'normal governmental processes so that the conduct of bid openings as scheduled is impracticable.' Defense Acquisition Regulation 2-402.3 (1976 ed.). The contracting officer reports, however, that mail deliveries were normal and, as stated above, the agency's normal workday was not affected. The contracting officer further advises that five bids were received and that it appears adequate competition was obtained. Under these circumstances, we do not believe that Unitron's bid should be treated any differently from a bid which is delivered late because of some other extraordinary and unforeseen circumstance such as a blizzard.

Unitron Engineering Co., Inc., 58 Comp. Gen. 748, 749-50 (1979).

Even applying the Receiver's personal policy as to the handling of late proposals, the Report of the Receiver fails to support its own conclusions. The Report states:

> . . . On July 30, 1999, that proposal was in transit, but was delayed by an unexpected weather-related airport closure and city-wide power failure in Atlanta. . . .

(*Id*. at 6). And further:

> In the present case, CCHPS did not obtain extra time to work on its proposal. Rather, its proposal was dispatched in time but delayed in transit.

(*Id*. at 15-16). The Receiver presents no evidence or contemporaneous record to support the alleged airport closure or power failure and its relevance to the delay. More importantly, the Receiver gives no basis for his statement that the "proposal was dispatched in time." The Report is even silent as to the means by which the proposal was delivered. However, the proposal must have been hand-carried by special messenger, since the Report states that it was delivered between "one and 2 a.m. on [Saturday], July 31, 1999." (*Id*. at 6). Common carriers are not generally making deliveries in the middle of the night and it is somewhat mystifying who may have received the delivery at that hour on behalf of the consultant.

The record is clear that the proposal was not dispatched at a reasonable time to insure timely delivery. The proposal was due at 5 pm in Atlanta, Georgia. In order to insure timely arrival, a prudent proposer would dispatch the proposal from Washington at least one day prior to the due date, and would use the Postal Service or a commercial delivery service.

The Protester alleged in its response to the Report of the Receiver that: "On July 30, 1999, or the afternoon all responses were due, members from CCHPS were making copies for submission on the copy machine at the [Jail] as late as two o'clock p.m. (Making it impossible for CCHPS to physically deliver their proposal in Georgia just three hours later)." (Declaration of Doyle H. Moore, 1). The Receiver replied that "there is no evidence – even hearsay evidence – to indicate that the copy being made was the copy that had been dispatched to Georgia for filing." (Receiver's Reply 7). While technically correct that there is no evidence as to what was being copied at 2 p.m., there is evidence in the Receiver's own records that the proposal which was dispatched to Atlanta was still in Washington as late as the morning of July 30, 1999. The bid bond attached to the proposal and delivered late to Atlanta, together with its cover letter transmitting it to the Receiver, was not signed by the representative of the insurance company until July 30, 1999[4], making it impossible for the proposal to have been dispatched from Washington earlier than the morning of July 30, 1999, the same date that it was due.[5] Barring some contrary evidence, it would not appear

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[4/] The date is apparently the actual date of signature, and not dated as of the due date of the proposal. As of 4:12 p.m. the day before, July 29, 1999, the insurance company conditioned its agreement to issue the bid bond on "receipt of collateral, in the form of a cashier's check, in the full amount of the bid security ($25,000.00). The check should be made payable to Amwest Surety Insurance Company." (AR. Vol. 1, Tab K, 92)

[5/] The transmittal letter from CCHPS accompanying the late proposal is not dated. However, it is noted that the letter is not addressed to the consultant in Atlanta, Georgia, as directed in the solicitation. Rather, it is addressed to a Washington address which, when used by Protester, the Receiver contended before this Board was "a fictitious office designation for the Receiver." (Receiver's Motion to Dismiss, 7). The transmittal is addressed:

prudent to delay dispatch of the proposal from Washington until less than 8 hours before the proposal was due somewhere in Atlanta.

Regardless of the correctness of the decision, the failure of the Receiver to make a written finding supported by any record as to his reasons for considering a late proposal gives the appearance of impropriety. But, notwithstanding that the Receiver's decision to consider the late proposal is questionable and the process has the potential for impropriety, the issue is rendered moot because, in addition to extending the date for submission of proposals, the Receiver amended the substance of the RFP by "eliminating optional vendor fiscal responsibility for off-site services." (AR Exh. Vol. 1, Tab L, 1). The Receiver has stated an economic justification for the amendment. (Reply to Protester's Response, 4). The Board does not find unreasonable the Receiver's determination that the amendment to the original solicitation made substantive changes in the solicitation. In light of the substantive amendment, the Receiver could properly receive proposals from entities which had originally filed late, or even from a proposer who had previously not submitted a response at all. 50 Comp. Gen. 547 (1971). Where the amendment provides a change so material as to constitute a new procurement, the exclusion of certain offerors based on their prior status is wholly inappropriate (*Tyco*, Incorporated, B-173665, Apr. 4, 1972). The Protester concedes that the Receiver could have canceled the solicitation and readvertised. (Protest, at 3).

The GAO has held:

> That when a change in procurement needs occurs which is of such substantive nature as to permit cancellation of the original solicitation and issuance of a new solicitation, firms other than those which submitted offers originally may be permitted to respond if the solicitation is appropriately amended in lieu of cancellation.

(*Norvel P. Tyler*, B-173665)

Tour of facility

The Protester further asserts that the Receiver permitted CCHPS and its subcontractor, Addus, to tour the jail facility on December 9, 1999, after official tours were complete. (Protest, at 5). The Receiver concedes that Addus was in the facility on December 9, however, asserts that the

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(AR Vol. 7, Tab A, 1). The Receiver contends that he "has never used an office designation or address that includes 'Department of Corrections'" and that [s]uch a designation is exceedingly misleading, since it falsely implies that the Office of the Receiver is an Office of the Department." (Receiver's Motion to Dismiss, 8). The transmittal letter is signed by Stanley Harper, President of CCHPS, who, at the time the letter was sent, was an employee of the Receiver.

Receiver did not grant access, but that "[a]pparently Dr. Harper and representatives of Addus, all of whom were part of the CCHPS team, had a meeting at Dr. Harper's office at the Jail." (AR, at 22).

Whether or not the Aldus representatives actually received a tour of the Jail, any possible harm is *de minimus*. Employees currently at the Jail were permitted to make proposals on the solicitation. It is thus obvious that certain proposers would have better access to the Jail than others. Dr. Harper, as director was at the Jail every day. Dr. Harper thus could not benefit from his late night meeting, nor could Aldus, working with Harper, gain anything additional from meeting in the Jail.

Bias of the Receiver

Lastly, the Protester asserts that the Receiver is biased in favor of CCHPS and its subcontractor, Addus, as well as biased against profit making corporations, such as the protester. (Protest, at 4).

> In reviewing allegations of bias, the Board presumes that Government officials, acting in their official capacity, do so in good faith. A protester must come forward with evidence to overcome the presumption. Because government officials are presumed to act in good faith, we do not attribute unfair or prejudicial motives to them on the basis of inference or supposition. *Ameriko Maintenance Co.*, B-253274, Aug. 25, 1993, 93-2 CPD ¶ 121. Thus, where a protester alleges bias on the part of government officials, the protester must provide credible evidence clearly demonstrating a bias against the protester or for the awardee and that the agency's bias translated into action that unfairly affected the protester's competitive position. *Advanced Sciences, Inc.*, B-259569.3, July 3, 1995, 95-2 CPD ¶ 52.

Emergency Associates of Physician's Assistants & Nurse Practioners, Inc., CAB No. P-500, Dec. 15, 1998, 46 D.C. Reg. 8527, 8532.

Essentially, Protester asserts that there is an indication of possible bias because of close relationships between the Receiver and the selected proposer. First, the principal owner and officer of the winning proposal was hired by the Receiver as medical director of the facility. And, second, the Receiver had previously worked with the subcontractor retained by the selected proposer. In addition, protester asserts that the Receiver expressed a preference for a nonprofit entity.

The allegations of the protester do not rise to the level of "clearly demonstrating bias . . . in favor of the protester." Accepting as true all of the facts asserted by the protester, each of the circumstances can have innocent, as well as biased interpretations. Protester gives no evidence to support its conclusion that the facts show anything other than the possibility of bias. If current employees are to be eligible for award of the contract, it cannot be concluded that the fact that the Receiver hired the employee automatically shows bias, since the function of the Receiver was to restaff the Jail clinic.

Similarly, in any small professional discipline, such as correctional medicine, it is likely that a large percentage of senior level personnel have at one time in their career worked with a large percentage of other such professionals. To determine that past relations as colleagues, without any

other proof, shows bias would make it almost impossible to secure competition to provide the Jail clinic.

Lastly, even if the Receiver did at some point indicate a preference for contracting with a nonprofit entity, the fact of such a preference, standing alone, is not sufficient to overcome the presumption of the good faith of Government employees.

CONCLUSION

The Board concludes that the Receiver did not act unreasonably in amending the solicitation and extending the date for submission of proposals. The amendment, combined with the extension, permits acceptance of the CCHPS proposal, notwithstanding the fact that CCHPS's initial proposal was late. The Board further concludes that protester has not shown any clear and convincing evidence of bias. The protest must be **DENIED**.

Although we do not believe that there are grounds to interfere with the award of this contract, the Receiver's actions, and the actions of the Jail Medical Director in competing on behalf of his newly-formed, private company may weaken public confidence in the procurement process. While the Receiver asserts that he "took steps to see that no offeror was unfairly advantaged or disadvantaged [and] [i]n particular, the procurement was designed to encourage outside companies as well as employee formed groups to participate" (AR, at 23), such actions are not apparent. As noted above, the late proposal submitted by CCHPS was mishandled in favor of CCHPS.

But, more importantly, the Receiver gave the outward impression of protecting the competitive position of the incumbent Jail Director. Although the Jail Director had access to all of the District employed staff, when it came to the Receiver's attention that "a prospective bidder had contacted staff working at the Central Detention Facility," the Receiver requested that "all offerors [, obviously other than the Director,] refrain from contacting existing staff." (AR Exh. Vol I, Tab 15). This directive followed a refusal by the Receiver to respond to a question by another potential offeror as to the salaries of the existing employees which were clearly known to the incumbent Director. (AR Exh. Vol I, Tab A, Q. 31). Whether or not the Receiver believed that such information was relevant or necessary to bid, since it was government data already known to CCHHS, it should have been made available to all offerors, particularly since government salaries are public record.

The Receiver further concedes that the Director used District equipment and facilities to prepare the proposal for his own private company. The Receiver's defense as to the use of government offices for preparing the proposal is not that the use did not occur, but that he "was not aware" that Dr. Harper conducted a meeting with Addus at the jail to prepare CCHPS's proposal. In addition, the Receiver does not deny that a District Government copying machine was used to duplicate the CCHPS proposal, but only that the copy being made was not "the copy that had been dispatched to Georgia for filing." The Receiver had an obligation to insure that his subordinate did not operate a private business, particularly one competing for a contract, out of their government offices. (District Personnel Manual §1806.1).

While not proof of bias sufficient to challenge the award, the Receiver's withholding of government information available to the incumbent Medical Director from other offerors, restricting access to current employee's, and failure to supervise the Director's improper use of government facilities, give an appearance not conducive to confidence in the fairness of this procurement.

The protest is **DENIED.**

SO ORDERED

DATED: May 24, 2000

MATTHEW S. WATSON
Administrative Judge

CONCURRING:

LORILYN E. SIMKINS
Chief Administrative Judge

JONATHAN D. ZISCHKAU
Administrative Judge