

GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

PROTEST OF:

ELECTRONIC SYSTEMS USA, INC.

Under Contract No. 94-0043-AA-4-0-CC

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CAB No. P-412

For the Protestor: Tony Verner, Branch Sales Representative. For the Government: Anne Cauman and Howard S. Schwartz, Assistants Corporation Counsel.

Opinion by Administrative Judge Terry Hart Lee, with Administrative Judges Lorilyn E. Simkins and Jonathan D. Zischkau concurring.

OPINION AND ORDER ON MOTION TO DISMISS

This matter concerns a protest filed with the Board on July 18, 1994, by Electronic Systems USA, Inc. ("protestor" or "ESI") against Solicitation No. 94-0043-AA-4-0-CC ("IFB") for an annual maintenance contract for temperature and automated control systems for the District of Columbia Courthouse. The grounds for the protest are that the specifications were too restrictive and limited competition. On August 19, 1994, the District of Columbia ("District") filed a motion to dismiss the protest on the ground that it was untimely filed. Protestor did not respond to the District's motion.

For the reasons set forth below, we **GRANT** the District's motion to dismiss the protest.

The facts show that the Department of Public Works ("DPW") issued the IFB in the open market on May 25, 1994. (Motion to Dismiss, Exhibits 1 and 2).¹ Apparently, 308 prospective bidders were notified of the solicitation. (MD, Ex. 2). Bid opening was scheduled for June 29, 1994. (MD, Exs. 1 and 2). On June 6 DPW issued Addendum No. 1 to the IFB, which postponed the bid opening date to July 13, 1994. (MD, Ex. 3). Protestor picked up a copy of the addendum. (MD, Ex. 4).

By letter dated July 1, 1994, *i.e.*, prior to the revised bid opening date, ESI filed a protest with the DPW contract manager, alleging that the specifications allowed only one vendor, Honeywell, Inc., the opportunity to perform the work, thereby limiting competition. By letter dated July 7, 1994, the Acting Administrator of the Facilities Operation and Maintenance Administration, DPW, acknowledged ESI's protest but advised it that it should file its protest with the District of Columbia Contract Appeals Board. The Acting Administrator also informed protestor that bid opening was still scheduled for July 13, 1994. While we have no information as to when ESI received the July 7 letter, ESI filed its protest with the Board on July 18, 1994.²

¹Hereinafter, exhibits attached to the motion to dismiss will be referred to as "MD, Ex(s). ____."

²The facts show that bid opening occurred on July 13 and that Honeywell, Inc. was the only bidder. (MD, Ex. 5). Thus, it is possible that the protest may have had some merit. However, as will be discussed below, protestor's failure to comply with the statutory and regulatory requirements for filing a bid protest has prevented

Citing the 10-working-day requirement contained in section 908(b) of the Procurement Practices Act of 1985 (PPA), D.C. Code § 1-1189.8(b) (Supp. 1992), and our decision in *Koba Associates, Inc.*, CAB No. P-325, December 1, 1992, 40 DCR 4730, the District argues that protests based on alleged solicitation improprieties must be filed with the Board prior to the closing date for receipt of proposals or bid opening. According to the District, because ESI filed its protest with the Board after bid opening, its protest is untimely and must be dismissed.

The District is correct in that section 908(b) of the PPA requires that a protest must be filed with the Board within 10 working days after the aggrieved party knew or should have known of the basis for its protest. This 10-working-day filing requirement is jurisdictional and cannot be waived. *Chesapeake Bus & Equipment Co.*, CAB No. P-404, June 30, 1994, 7 P.D. 5887; *Interior Systems, Inc.*, CAB No. P-398, January 10, 1994, 6 P.D. 5544; *Roche Biomedical Laboratories, Inc.*, CAB No. P-374, June 17, 1993, 41 DCR 3479. Furthermore, we have held that where a bidder initially attempts to resolve its protest with the procuring agency, it is not excused from making the appropriate filing with the Board within the requisite time period. See *Emerald Eviction Services*, CAB No. P-343, November 10, 1992, 40 DCR 4700; *Genesis III, Inc.*, CAB No. P-304, October 15, 1992, 40 DCR 4630; *D.H. Kim Enterprises, Inc.*, CAB No. P-293, December 12, 1991, 39 DCR 4365. This is so because an aggrieved party is deemed, as a matter of law, to have constructive knowledge of the provisions of the PPA, the District's procurement regulations, the Board's rules and the Board's decisions because they are published in the District of Columbia Code, the District of Columbia Municipal Regulations and the District of Columbia Register. *Id.* See *Mercer Products & Manufacturing Co.—Recon.*, B-251126, November 30, 1992, 92-2 CPD ¶ 385; *Hersha Enterprises, Ltd. t/a Quality Inn—Riverfront*, B-244863, July 25, 1991, 91-2 CPD ¶ 93; *Hilda A. Phelps—Recon.*, B-242329, March 12, 1991, 91-1 CPD ¶ 273; *Irvin Technologies, Inc.*, GSBCA No. 11581-P, 92-1 BCA ¶ 24,640; *Rocky Mountain Trading Company Systems Division*, GSBCA No. 10925-P-R, 92-1 BCA ¶ 24,557.

Notwithstanding these rules, the District has certain legal obligations as well. By regulation the District is required to inform prospective bidders and offerors in each solicitation issued that protests must be filed in accordance with section 908 of the PPA. 27 DCMR § 3800.2 (July 1988). The facts of the present matter show that except for a vague reference to the PPA contained in an amendment to the Standard Contract Provisions,³ nothing contained in the IFB advised bidders of the requirement to file protests directly with the Board.⁴ Compare FAR §§ 33.106 and 52.233-2. We believe that by failing to do so, the agency may have violated District regulations to the prejudice of prospective bidders.⁵

our consideration of the issue.

³MD, Ex. 1, SPECIFICATION.

⁴Were it not for our careful review of the solicitation documents, this failure may not have come to our attention.


⁵Our earlier decisions on the filing of agency protests did not consider whether the solicitation contained a provision in compliance with 27 DCMR § 3800.2. In this regard, many prospective bidders are unsophisticated in the myriad of statutory and regulatory provisions which govern District procurements; and a vague reference to

Consequently, we now put parties to District procurements on notice that we will review all solicitation documents for inclusion of the required protest provision in the context of the timeliness of protests filed initially with the procurement agency.⁶ We are required to ensure, in accordance with the purposes of the PPA, that, *inter alia*, competition is enhanced, that parties will have a fair opportunity to present their cases and that protests will be resolved in an equitable and reasonably speedy manner—without unduly disrupting the procurement process. Thus, fairness and the overriding purposes of the PPA may dictate the need to change our application of the rules with respect to protests filed with the agency.⁷


Therefore, based upon all of the facts and circumstances and the reasons set forth herein, the District's motion to dismiss the protest is **GRANTED**; and it is hereby

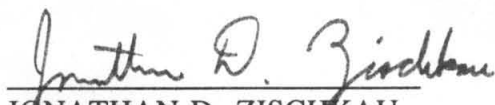
ORDERED, that the protest be, and the same is, **DISMISSED** with prejudice.

DATE: August 29, 1994


TERRY HART LEE
Administrative Judge

CONCUR:


LORILYN E. SIMKINS
Chief Administrative Judge


JONATHAN D. ZISCHKAU
Administrative Judge

the PPA does nothing to put bidders on notice of their rights and remedies in the event of a perceived defect in the procurement process. Cf., *C&E Services, Inc.*, CAB No. P-392(A), June 7, 1994, 7 P.D. 5864 (vague references to the Buy American Act fall far short of objective measurable criteria required to be set forth in a solicitation).

⁶See generally *Reichley v. District of Columbia Department of Employment Services*, 531 A.2d 244 (D.C. App. 1987) and *Mendes v. Johnson*, 389 A.2d 781 (D.C. App. 1978), which discuss the standards for an administrative tribunal's adjudication which announces a new rule of law and overrules a different rule established by prior adjudication.

⁷While the instant matter may be an anomaly, District procurement officials should review all solicitations before issuance to ensure that the required regulatory provision is included.