

¹ Solicitation DCGO-2011-B-0008 was issued on November 5, 2010, pursuant to which an award was made to the protester under Contract No. DCGO-2011-C-0008-E01.

Prior to the expiration of the Contract, on February 17, 2012, the District issued Solicitation No. Doc61044 (“Solicitation”) for school bus maintenance services. (District’s Mot. to Dismiss Exs. 1, 3.) The Solicitation contemplated that the District would award multiple contracts for five Award Groups. (*See id.*) The Solicitation provided notice to prospective bidders that bid protests were to be filed with CAB at 414 4th Street, N.W., Suite 350N. (District’s Mot. to Dismiss Ex. 9, at ¶ 4.) At the time of bid opening, on March 12, 2012, the protester was the lowest responsive bidder for Award Group 1. (District’s Mot. to Dismiss 3.) However, on May 14, 2012, the CO e-mailed protester a “Notice of Determination of Non-Responsibility – Solicitation No. Doc61044” (“Non-Responsibility Determination”) which stated that the District determined protester to be non-responsible due to its poor past performance under the Contract. (District’s Mot. to Dismiss Exs. 4, 5.) Consequently, protester was deemed not eligible for award under the Solicitation. (*Id.*)

On May 23, 2012, protester alleges that it hand delivered “a formal appeal” at CAB’s former address, 717 14th Street, N.W., Suite 430. Protester states, “[p]ursuant to Section L.11 of DCGO-2011-B-0008 (the ‘Agreement’), please accept this letter as notice that Commonwealth Service Operations’ protest of its termination as contractor under this Agreement.” (Protest 1.) However, despite having claimed that its letter was hand delivered to CAB, protester acknowledges being unaware of CAB’s changed location. (District’s Mot. to Dismiss Ex. 8.)

The CO, whose office is located at 2000 14th Street, N.W., confirms receipt of protester’s letter dated May 21, 2012, on or about May 23rd. (District’s Mot. to Dismiss Ex. 9, at ¶ 6.) Ms. Johnson is the CO for Solicitation Nos. DCGO-2011-B-0008 (under which Commonwealth performed the Contract) and Doc61044. (District’s Mot. to Dismiss Ex. 9, at ¶ 2.) She indicates that she “received a copy of a letter addressed to the Contract Appeals Board indicating that the bidder was filing a protest of its termination under the previous solicitation DCGO-2011-B-0008.” (District’s Mot. to Dismiss Ex. 9, at ¶ 6.) She also states that “[b]ecause the letter appeared to be a copy, I accepted it as such and assumed the original had been delivered to the Contract Appeals Board.” (*Id.*) It appears that the CO received only a copy of the May 21st letter, without any Supplemental Documents. Although the letter references the Contract between Commonwealth and the District, it does not include any reference to the Solicitation. (*See* Protest 1.)

On June 11, 2012, the CO received via email from Mr. Scott Bean, Commercial Fleet Manager, an inquiry on the status of protester’s letter which he indicated had been delivered to the CO’s office on May 23, 2012, and signed for by someone with the initials “BA.” (District’s Mot. to Dismiss Ex. 8.) The CO advised Mr. Bean that the letter should have been sent directly to CAB. (District’s Mot. to Dismiss Ex. 9, at ¶ 6.²) According to the CO, “[t]here is an Office of Contracting and Procurement employee with the initials of BA . . . located at 2000 14th Street, N.W., 3rd Floor.” (District’s Mot. to Dismiss Ex. 9, at ¶ 5.³) On June 13, 2012, CAB received and docketed the instant protest.⁴

² The Board notes the existence of a typographical error in the District’s motion to dismiss, Ex. 9, wherein paragraph numbers 5 and 6 are inadvertently repeated. In actuality, the correct numbering for this paragraph should have been paragraph 8.

³ Due to the typographical error discussed in footnote 2, the correct numbering for this paragraph should have been paragraph 7.

⁴ The filing with CAB consisted of a letter dated June 12, 2012, protesting the termination of the Contract along with the following Supplemental Documents: (i) a letter dated May 21, 2012, protesting Commonwealth’s termination as

On June 19, 2012, the District filed a “Determination and Findings to Proceed with Contract Performance while a Protest is Pending” (“D&F”). On June 20, 2012, protester filed a response challenging the D&F.⁵ On July 2, 2012, the District filed a motion to dismiss alleging that the protest had been filed untimely. Protester filed its response to the District’s motion on July 6, 2012. (Commonwealth Serv. Operations, Inc.’s Opp’n & Req. to Deny District’s Mot. to Dismiss.)

DISCUSSION

We exercise jurisdiction over this protest and its underlying allegations pursuant to D.C. Code §2-360.03(a)(1)(2011).

One of the threshold issues for this Board to examine prior to considering the merits of a protest is whether the protest has been filed timely in accordance with the statutory requirements and Board Rules. The statutory requirements pertaining to timeliness are codified in D.C. Code §§ 2-360.08(b)(1)-(2) and are similar to those contained in the Board Rules as set forth in D.C. Mun. Regs. tit. 27, §§ 302.2(a)-(b) (2002). The statute provides:

- (b)(1) 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.
- (2) In cases other than those covered in paragraph (1) of this subsection, protests shall be filed not later than 10 business days after the basis of the protest is known or should have been known, whichever is earlier.

D.C. Code § 2-360.08.

On May 14, 2012, protester received a Non-Responsibility Determination which resulted in its ineligibility for award under the Solicitation. As a result of this adverse action, Commonwealth was required to file its protest by May 29, 2012, within ten business days after receipt of the District’s Non-Responsibility Determination. Failure by Commonwealth to file its protest by May 29th renders the Board without jurisdiction to adjudicate the merits of its claims.

Contractor under the Agreement, addressed to CAB at its current address of 441 4th Street, N.W., Suite 350N (however, if this letter and accompanying documents had in fact been sent to CAB at its current address on or about that date, upon its receipt, the Board would have immediately accepted the filing and docketed the protest in accordance with Board Rule 303.1(a)); (ii) an undated 4-page letter also contesting the purported termination of the Contract; (iii) a copy of the envelope addressed to CAB which had been signed for by an individual with the initials “BA”; (iv) the Non-Responsibility Determination notice letter; (v) the Contractor Performance Evaluation Form 4001; and (vi) a copy of the envelope containing the protest sent to CAB via certified return receipt dated June 12, 2012.

⁵This Order renders moot the D&F and protester’s challenge thereto.

In its filing with the Board dated June 12, 2012, protester alleges that on May 23, 2012, it hand delivered its May 21st letter at CAB's former address, 717 14th Street, N.W.⁶ Protester also alleges that an individual with the initials "BA" signed for receipt of the letter which was addressed to CAB. The CO confirms receipt of the letter on or about May 23rd; however, she indicates that because the letter appeared to be a copy, she assumed that the original had been delivered to CAB.⁷

The District alleges that the protest is untimely because it was filed with the Board on June 13, 2012, well after the applicable May 29th deadline. Consistent with the relevant statutory and regulatory provisions on time limitations when filing a protest, this Board has routinely held that a protest must be filed within 10 business days after the basis of the protest is known or should have been known. *See, Clothes Barn*, CAB No. P-0121, 38 D.C. Reg. 2980 (Oct. 3, 1989); *Sigal Constr. Corp.*, CAB No. P-0690, *et al.*, 52 D.C. Reg. 4243 (Nov. 24, 2004); *Prof'l Recruiters, Inc.* CAB No. P-0700, 52 D.C. Reg. 4258 (Dec. 21, 2004); *Our Future, Inc.*, CAB No. P-0860, 2011 WL 7402960 (Jan. 20, 2011). Therefore, at issue is whether protester's earlier May 21st letter which ostensibly was delivered at 2000 14th Street, N.W., on May 23, 2012, constitutes a protest of the Solicitation.

Protester has argued that its May 21st letter which was addressed to (but not delivered at) CAB and signed for by an individual with the initials "BA" on May 23, 2012, should serve to meet the protest's filing requirements. In that vein, protester cites *Fort Myer Construction Corp.*, CAB No. P-0452, 44 D.C. Reg. 6476 (July 23, 1996), to support its contention that the CO's receipt of a copy of the May 21st letter should constitute notice of the protest. However, the facts in *Fort Myer* are readily distinguishable from the facts in the present case. In *Fort Myer*, the protester "submitted a 5-page letter addressed to DPW's contracting officer, entitled 'PROTEST' . . . DPW's contracting officer acknowledged receipt of the . . . protest letter and advised Fort Myer that '[a]ll protests are to be filed with the District of Columbia Contract Appeals Board.'" *Id.* at 6477. When Fort Myer later refiled the identical protest with the Board, the District then filed a motion to dismiss the protest as untimely. The Board held that "[t]reating an otherwise proper protest directed to the contracting officer within the 10-working-day statutory period as functionally equivalent to filing with the Board, and resolving the protest on its merits, promotes fair and equitable treatment of all participants while safeguarding and maintaining a procurement system of quality and integrity." *Id.* at 6479. Critical to the Board's analysis and holding was that "Fort Myer's letter was unambiguously a protest from the standpoint of form and content." *Id.* at 6481.

By contrast, protester's May 21st letter was clearly not an unambiguous protest. The letter stated that it was providing notice of Commonwealth's protest of its termination as contractor under the Agreement.⁸ It was also delivered at 2000 14th Street, N.W., despite the Solicitation's specific instruction

⁶ Protester's claim that it hand delivered the May 21st letter to CAB on May 23, 2012, strains credulity since CAB relocated from 717 14th Street, NW., Suite 410 in September 2010, and, therefore, any attempt at hand delivery at CAB's former address would have been unsuccessful.

⁷ In an e-mail to the CO dated June 11, 2012, protester appears to contradict its own account of where the May 21st letter had been submitted. In that instance, protester's Commercial Fleet Manager stated that the letter was delivered at the CO's office [located at 2000 14th Street, N.W.] and that they were told that the letter would be forwarded to CAB. (District's Mot. to Dismiss Ex. 8.)

⁸ To the extent that Commonwealth seeks to appeal the CO's decision to not exercise the option under the Contract, pursuant to Board Rule 200.1, CAB's jurisdiction to hear the appeal and issue a decision on the merits can only

that bid protests were to be filed with CAB at 441 4th Street, N.W., Suite 350N. The letter was not addressed to the CO and it did not contain any reference to the present Solicitation or any language signaling a challenge to the Non-Responsibility Determination. Therefore, upon receiving a copy of the May 21st letter, the CO was justifiably unaware that Commonwealth intended to protest the Solicitation. Indeed, it was logical for the CO to assume that she was merely in possession of a copy of a contractor's appeal letter which had been sent to CAB. *See, e.g., Respiratory Therapy Specialists of America, Inc.*, CAB No. P-0662, 50 D.C. Reg. 7472 (Dec. 6, 2002) (an untimely Board protest is not made timely where the letters relied upon by the protester as functionally equivalent to a protest are ambiguous); *see also Mont "T" Que Inc.*, CAB No. P-0911, 2012 WL 4753875 (Aug. 29, 2012) (protester's failure to provide a clear and concise statement of the legal and factual protest grounds resulted in dismissal of the protest). Protester's May 21st letter did not meet the standards set forth in Board Rule 301.1 which details the requirements for form and content of a protest:

All protests shall be in writing, addressed to the Board, and shall include the following:

- (a) the name, address, and telephone and facsimile numbers of the protester;
- (b) *the identity of the contracting agency, the number and date of the solicitation, . . . ;*
- (c) *a clear and concise statement of the legal and factual grounds of the protest, including copies of relevant documents, and citations to statutes, regulations, or solicitation provisions claimed to be violated;*
- (d) information establishing the timeliness of the protest . . . ;
- (e) information establishing that the protester is an aggrieved person for the purpose of filing the protest . . . ; and
- (f) the relief sought by the protester.

Board Rule 301.1. (emphasis added)

The chronology of events in the present protest makes clear that the District did not receive timely notice due to the May 21st letter's deficiency in form and content and Commonwealth's delivery of it to a location other than the offices of the CAB. Indeed, if the Board were to recognize Commonwealth's misdelivered and ambiguous May 21st letter as a protest, it would serve to undermine the administration of justice by depriving the District of timely and proper notice. As such, we find that protester's letter which was forwarded to the CO on or about May 23, 2012, did not constitute timely submission of a protest to the Solicitation. As a result, Commonwealth did not file a protest of sufficient form and content until June 13, 2012, when CAB received and docketed the instant untimely protest.

CONCLUSION

occur following contractor's request to the CO for a final decision. Contractor may then file an appeal of the CO's decision with the Board following receipt of a final decision or if there is a deemed denial of contractor's claims.

For the reasons set forth herein, the Board finds that the protester failed to file a protest, in sufficient form and content, within 10 business days as required by D.C. Code § 2-360.08 (b)(2) (2011). The District's motion is sustained and the Board dismisses the present protest with prejudice.

SO ORDERED:

DATED: October 23, 2012

/s/ Maxine E. McBean
MAXINE E. MCBEAN
Administrative Judge

CONCURRING:

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

/s/ Monica C. Parchment
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