

GOVERNMENT OF THE DISTRICT OF COLUMBIA  
CONTRACT APPEALS BOARD

PROTEST OF:

VAIR CORPORATION

Under IFB No. 5123-95-E1-45-MM

)  
) CAB No. P-428  
)

For the Protestor: Philip J. Gardner, President, *pro se*. For the Government: Howard Schwartz, Esquire and Warren J. Nash, Esquire, Assistants Corporation Counsel.

Opinion by Administrative Judge Cynthia G. Hawkins-León, with Administrative Judges Lorilyn E. Simkins and Jonathan D. Zischkau, concurring.

**OPINION AND ORDER ON MOTION TO DISMISS**

**Procedural History**

On January 18, 1995, VAIR Corporation ("Protestor" or "VAIR") filed a protest of: (1) Aggregate Award Group A -- titled "Replacement Parts," Items 1 through 40; and (2) Aggregate Award Group J, Items 138 and 139 of Invitation for Bids No. 5123-95-E1-45-MM ("IFB").

VAIR is protesting individual portions of the specifications contained in the IFB -- namely, (1) the requirement that bidders supply only Bell & Gosset ("B&G") Pump Parts without any allowable substitutions for Items 1 through 40 of Aggregate Award Group A; and (2) the fact that Aggregate Award Group J, Items 138 and 139 of the specifications "lump[ ] together" the Rudd Condensing Units and "A" coils. Also in relation to Award Group J, VAIR protests the requirement that Rudd parts as opposed to Janitrol parts be utilized.

Pursuant to Board Rule 306.1, 36 D.C. Reg. 2713 (April 21, 1989), the District filed a Motion to Dismiss on February 17, 1995. The District's Motion was on the ground that the protest is outside of the Board's jurisdiction. The District contends that, in light of the fact that the protest is based on defective specifications, the protest should have been filed prior to bid opening: the protest is, therefore, untimely filed. *See* District's Motion to Dismiss.

VAIR did not respond to the Motion to Dismiss. Pursuant to Board Rule 307.4, 36 D.C. Reg. 2714 (1989), when a Protestor fails to file comments on an agency report or dispositive motion filed in lieu thereof, the factual allegations in the protest that are not admitted by the District, or otherwise corroborated on the record, may be disregarded. Alternatively, in accordance with Board Rule 110.5, 36 D.C. Reg. 2692 (1989), in light of Protestor's failure to file a timely opposition to the District's motion, the Board may, if it so chooses, treat the motion as conceded. *Heller Electric Co., Inc.*, CAB NO. P-244, December 23, 1991, 39 D.C. Reg.

- 2 -

CAB No. P-428, VAIR Corp.

4373; *Barcode Technologies, Inc.*, CAB No. P-298, January 16, 1992, 39 D.C. Reg. 4387. In this case, as will be discussed below, since the Board has determined that the protest is not timely filed, it will not be necessary for the Board to determine whether it should disregard any or all of the factual allegations.

### Facts

On December 29, 1994, the Department of Public and Assisted Housing ("DPAH") issued the IFB to provide DPAH heating and air conditioning supplies and parts on an emergency basis. District's Motion to Dismiss, Exhibit 1. The solicitation required that bids be submitted by and set bid opening for January 9, 1995 at 9:00 a.m. *Id.*

On January 9, 1995, seven bids were received and opened -- including the bid of VAIR. District's Motion to Dismiss, Exhibits 2 and 3.

In Aggregate Group "A"--"Replacement Parts," for Items 1 through 40, VAIR's bid substituted Armstrong parts for the B&G parts specified on the IFB form. District's Motion to Dismiss, Exhibit 3.

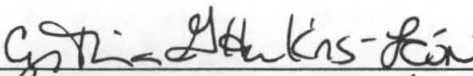
On January 18, 1995, VAIR filed the above-captioned protest with the Board.

### Decision


The Board finds the protest to be untimely filed. In keeping with the traditional rule of law in federal protest tribunals, the Board has held that "in order to timely challenge the terms of a solicitation, the protest must be filed prior to the closing date for receipt of proposals or bid opening." *Unfoldment, Inc.*, CAB No. P-358, September 17, 1993, 41 D.C. Reg. 3656, 3659, citing *Prince Construction Company Inc./District Paving Corporation, J.V.*, CAB No. P-375-A, August 20, 1993, 41 D.C. Reg. 3610; *Koba Associates, Inc.*, CAB No. P-325, December 1, 1992, 40 D.C. Reg. 4730. See also *Wayne Mid-Atlantic*, CAB No. P-242, February 27, 1992, 39 D.C. Reg. 4447. Bid opening in this matter was held on January 9, 1995. The Protestor did not file the instant protest until January 18, 1995.

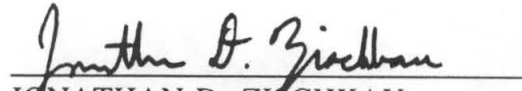
**ACCORDINGLY**, based upon the facts, legal precedent and reasoning set forth above, the protest is hereby **DISMISSED**, with prejudice.

DATE: April 3, 1995

  
CYNTHIA G. HAWKINS-LEÓN  
Administrative Judge

CONCUR:

  
LORILYN E. SIMKINS  
Chief Administrative Judge

  
JONATHAN D. ZISCHKAU  
Administrative Judge