GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

PROTESTS OF:

CLW/CDM JOINT VENTURE	)	
	)	CAB Nos. P-0696, P-0697, P-0698, P-0701
Under Solicitation No. DCAE-2004-R-0014	)	(Consolidated)

For the Protester, CLW/CDM Joint Venture: Laura E. Jordan, Esq. For the District of Columbia Government: Howard Schwartz, Esq. and Talia S. Cohen, Esq., Assistant Attorneys General.

Opinion by Chief Administrative Judge Jonathan D. Zischkau, with Administrative Judge Matthew S. Watson, concurring.

OPINION

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CLW/CDM Joint Venture ("CLW") has filed four protests regarding the District's Request for Proposals ("RFP") for third party claims administration for the District government Worker's Compensation Program. In summary, CLW argues that (1) the RFP violates numerous provisions of procurement law and violates a court order entered in *Elizabeth Lightfoot, et al. v. District of Columbia, et al*, Civil Action No. 01-1484(CKK) (D.D.C.); (2) the District's decision not to exercise an option with CLW to continue its performance under a prior contract for third party claims administration, and the District's issuance of a flawed RFP evinces a pattern of bad faith dealings with CLW; (3) statements made by the Acting Director of the Office of Risk Management during a hearing before the City Council concerning an interim procurement solution show that the procurement process violates the law; and (4) the District violated law and regulation by disclosing CLW's confidential proposal information in a Superior Court pleading. We conclude that the District has mooted the challenges to the terms of the RFP through two subsequently issued RFP amendments, and that the record falls well short of showing bad faith by the District. Further, CLW has not demonstrated that the District violated law or prejudiced CLW in disclosing certain past performance questionnaires which were part of CLW's proposal. Accordingly, we deny in part and dismiss in part the protest grounds raised in CLW's consolidated protests.

BACKGROUND

On August 30, 2004, the District of Columbia's Office of Contracting and Procurement ("OCP"), on behalf of the Office of Risk Management, issued RFP No. DCAE-2004-R-0014 for third party claims administration and related services for the District government's Self-Insured Worker's Compensation Program, which covers approximately 33,378 District employees. (Agency Report ("AR"), Ex. 1).

On September 13, 2004 CLW filed with the Board its first protest (CAB No. P-0696) challenging the issuance and contents of the RFP. On September 24, 2004, OCP issued Amendment No. 2, which made extensive changes to the RFP in response to the issues raised by CLW in protest P-0696. (AR, Ex. 2). Amendment No. 2 extended the closing date of the RFP until October 7, 2004.

On September 27, 2004 CLW filed with the Board a second protest (CAB No. P-0697), alleging that Mr. James J. Jacobs, Acting Director, Office of Risk Management ("ORM"), during testimony presented to the City Council, spoke of an "interim solution" for the disability program procurement but refused to provide details or to state whether CLW was included or excluded from the solution. According to CLW, Jacobs' testimony showed that the District was not conducting a transparent and fair procurement process for awarding the worker's compensation program contract.

On October 5, 2004, CLW filed a third protest (CAB No. P-0698), alleging that the RFP had to be further amended or cancelled in light of a September 24, 2004 order entered in *Elizabeth Lightfoot, et al. v. District of Columbia, et al*. In that order, the court ruled that the District had violated the D.C. Administrative Procedures Act and due process when it terminated, suspended, or modified claimants' disability compensation without having in place published rules governing the process and providing notice to the claimants. According to CLW, the court order renders it nearly impossible for offerors to construct a realistic pricing structure or legally to comply with RFP sections that are predicated on the District's ability to terminate, suspend, or modify benefits.

On October 6, 2004, the District notified the Board and the CLW that on October 4, 2004, the Interim Chief Procurement Officer signed a Determination and Findings to Proceed with Award while a Protest is Pending ("D&F"). By letter dated October 7, 2004, the contracting officer notified CLW that the District did not intend to exercise an option to renew the contract with CLW for disability compensation services. Also, on October 7, OCP issued RFP Amendment No. 3 to address the quantity of claims and related price issues raised by CLW in CAB No. P-0698. Amendment No. 3 provides:

> Offerors shall identify the assumptions used regarding the quantity of claims per year used in determining its proposed fixed annual price. In addition, offerors shall state what effect on the price an increase or decrease in the amount of claims per year would have on the proposed price per year.

In addition, Amendment No. 3 extended the closing date to October 12, 2004. (AR, Ex. 2).

On October 8, 2004, OCP awarded Aon Risk Services, Inc., a sole source contract, DCRK-2005-C-0003, to provide on-site claims adjudication for disability compensation services on an interim basis to allow for evaluation and award under the protested RFP, with performance to begin on October 21, 2004, and end on February 28, 2005. On October 12, 2004, OCP issued RFP Amendment No. 4, which extended the closing time for proposal to October 12, 2004, at 2:00 p.m. (AR, Ex. 2). The District received a number of offers.

On October 14, 2004, the protester filed a motion challenging the October 4, 2004 D&F to proceed. The Board denied the motion. Also, on October 14, CLW filed a complaint and emergency petition for a temporary restraining order in D.C. Superior Court to enjoin the District from allowing performance under the interim contract with Aon. (P-0701 AR, Ex. 1).

On October 15, 2004, the District filed in Superior Court a memorandum opposing CLW's petition for a TRO. (P-0701 AR, Ex. 2). On October 18, 2004, the District filed in Superior Court a praecipe containing an affidavit of Ms. Phyllis Dailey, in support of its opposition to CLW's TRO

petition. On October 19, 2004, the Superior Court issued a TRO, with October 29, 2004, as the date of the hearing on the preliminary injunction. (P-0701 AR, Ex. 3). On October 29, 2004, the Superior Court dismissed CLW's request for a permanent injunction because CLW failed to file a bond.

On October 25, 2004, the District filed its Agency Report for the pending three protests. On November 2, 2004, the protester filed a fourth protest which was docketed as CAB No. P-0701. This protest alleges that the District illegally disclosed, in Exhibit 11 of the October 18 praecipe filed in Superior Court, confidential information from CLW's RFP proposal. Exhibit 11 consisted of CLW's proposal cover sheet, the technical proposal's table of contents, and two past performance questionnaires and addenda prepared by federal agencies evaluating CLW's performance under various federal contracts. CLW requests that the Board restore the status quo by canceling the RFP, terminating the interim award to Aon, restoring the recently expired contract with CLW, and awarding CLW its protest costs. Alternately CLW requests that, if the RFP is reissued, CLW be awarded all possible points in categories relating to the disclosed information. The Board consolidated this protest with the other three.

On November 10, 2004, CLW filed the following comments to Agency Report:

> Protester CLW/CDM Joint Venture ("CLW/CDM") hereby submits its response to the Agency Report in Protest Nos. P-0696, P-0697, and P-0698 ("protests") to RFP No. DCAE-2004-R-0014 ("RFP"), as amended. CLW/CDM notes that the Agency Report does not overcome the arguments of the protests. Accordingly, in light of the facts set forth in the protests, pursuant to Board Rule 307.3, CLW/CDM respectfully requests that the protests be decided on the existing record.

The District, on November 26, 2004, filed a motion to dismiss and Agency Report for CAB No. P-0701. On December 7, 2004, CLW filed its opposition.

DISCUSSION

We exercise jurisdiction pursuant to D.C. Code § 2-309.03(a)(1).

CAB No. P-0696

In CAB No. P-0696, the parties have agreed that grounds I-III of the protest are no longer at issue. We address the remaining issues seriatim.

In ground IV of P-0696, CLW contends that RFP section H.7.3 creates a conflict of interest in the event that the contractor became involved in "outside" litigation, that is, litigation not related to a disability claim. CLW also argues that the section violates D.C. Code § 2-301.01(b)(7), which sets forth one of the statutory purposes of the PPA, namely, "to insure the fair and equitable treatment of all persons who deal with the procurement system of the District government." We agree with the District that the RFP cannot be read to create a potential conflict with "outside" litigation. Accordingly, we see no violation of law or regulation based on a conflict of interest. Concerning the ground alleging a violation of the PPA's policy of fair and equitable treatment, CLW has failed to demonstrate how

section H.7.3 violates D.C. Code § 2-301.01(b)(7). In sum, we deny protest ground IV.

In ground V of P-0696, CLW contends that the Incentive - Disincentive scheme set forth in RFP section B.3 violates D.C. Code § 2-304.01(4) in that it does not provide an "unambiguous statement of the technical requirements and evaluation criteria necessary" to respond to the RFP. With regard to the various alleged deficiencies in the solicitation, including ambiguities with the composite audit score used for the incentive-disincentive scheme, the District has responded in the Agency Report that portions of Amendment 2, including sections G, VV, and Attachment 2, and RFP Attachment J.10, address the deficiencies raised by CLW. In its comments to the Agency Report, CLW has not rebutted any of the facts provided by the District as to the effect of Amendment 2 mooting the challenges, and thus those facts from the Agency Report are deemed conceded. *See* Board Rule 307.4. CLW further contends that ORM lacks the staff, resources, and competence to audit the performance of the contractor. Contract administration issues are not valid grounds for protest. CLW next contends that the measure of performance standards in the contract is improperly subjective and discretionary on the part of District officials. Having reviewed the standards, and the unrebutted facts set forth in the Agency Report, we do not agree with CLW that the amended solicitation violates law or regulation. Finally, CLW raises a number of challenges to various other specification sections. The District has responded to these grounds in its Agency Report, with references to the changes made by Amendment 2. Those facts stand unrebutted. In sum, we deny in part and dismiss in part protest ground V.

In grounds VI and VII of P-0696, CLW contends that the District issued the RFP and conducted the procurement in bad faith, violating its duties of good faith required by D.C. Code § 2-301.03. First, CLW points to OCP issuing the RFP after CLW had received a notice of intent to exercise an option on its then existing contract with the District for the same services. CLW correctly observes that a notice of intent to exercise an option does not bind the District to do so, but CLW argues that against the backdrop of its satisfactory performance, the District's issuance of the RFP "strongly implicates" D.C. Code § 2-301.03. As the District correctly observes, the issuance of an RFP after transmitting to the incumbent contractor a notice of intent to exercise an option, falls far short of evidence of bad faith dealings. Next, CLW argues that "the RFP includes many attempts to cloak an effort to circumvent D.C. Code § 2-325.01." That section provides:

> The Mayor shall not enter into any new contract for goods or services the cost of which exceeds the cost of an existing contract for the same goods or services, when the current contractor is willing to continue to provide the goods or services at the price of the existing contract, as long as the contractor is providing satisfactory service; nor shall the Mayor extend any existing contract for any amount over the price agreed to in the existing contract. Nothing contained in this section shall prohibit the Mayor from putting a contract out for bid for a lower price.

CLW alleges that the District structured the RFP to hide the true (presumably, higher) costs of performance under a new contract pursuant to the RFP to avoid having to extend the then existing contract with CLW. CLW identifies aspects of performance required by the RFP that make performance more expensive than that provided under CLW's existing contract. Since the services under CLW's existing contract and the services provided under the RFP are different in a number of significant ways, we do not see how section 2-325.01 applies here. Even if we were to find the section applicable, CLW has not convinced us from the record that the District engaged in any form of bad faith

conduct.

CLW further contends that all of the protest issues taken together "strongly suggest bad faith in the procurement process." As discussed above, none of the issues raised by CLW evince bad faith on the part of District contracting officials. We also conclude that when considering all of the issues together, still there is no evidence of bad faith.

Accordingly, we deny in part and dismiss in part the protest allegations raised in grounds IV through VII of P-0696.

CAB No. P-0697

In CAB No. P-0697, CLW states the following:

> Protestor . . . CLW/CDM attended and testified at a September 17, 2004 hearing of the Government Operations Committee of the District of Columbia Council to determine whether Acting Director James J. Jacobs should be confirmed as director of the Office of Risk Management ("ORM"). During his testimony, Mr. Jacobs made certain statements that provide the basis for this Protest.
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> Specifically, during his confirmation testimony, Committee Chairman Council Member Vincent Orange inquired of Mr. Jacobs regarding his plans for keeping the Disability Compensation Program ("DCP") operational during the pendancy of the RFP. Mr. Jacobs had earlier testified about an "interim solution" which he sought to implement. Mr. Orange asked Mr. Jacobs of what his interim solution consisted. Mr. Jacobs declined to provide specifics. Mr. Orange then asked Mr. Jacobs whether his "interim solution" involved CLW/CDM. Mr. Jacobs persisted in his failure to respond, saying that, because CLW/CDM had protested the RFP, he did not want to provide further information about the interim solution.
>
> The matters revealed by Mr. Jacobs' sworn testimony violate D.C. Code §§ 2-301.01(b) and 2-304.01(4). . . .

CLW argues that Mr. Jacobs' testimony shows that the procurement process is neither transparent nor open as required by D.C. Code § 2-301.01(b). We conclude that CLW has not articulated a valid protest ground. Jacobs' failure to elaborate on the agency's procurement plans at a Council hearing does not rise to the level of a violation of the PPA. The record does not reveal any violation of law or regulation in the manner that the RFP was issued to prospective offerors or in the on-going evaluation of offers.

CLW's other argument, that Mr. Jacob's testimony "reveals that there are technical requirements and evaluation criteria being used in the evaluation of the RFP that are not being made public," which it says violates D.C. Code § 2-304.01(4), similarly is not well taken. Section M of the RFP identifies the evaluation criteria being used in this procurement. CLW has presented no evidence that the contracting officer has failed to follow those evaluation criteria in evaluating the offers submitted pursuant to the RFP. The merits of the emergency interim award to one of the other offerors,

Aon Risk Services, is not at issue because CLW has never protested that award action.

Accordingly, we dismiss the protest grounds raised in P-0697.

CAB No. P-0698

In CAB P-0698, CLW alleges that the *Lightfoot* order of the United States District Court, dated September 24, 2004, requires the District to further amend or cancel the RFP. In the order, the court held *inter alia* that the District violated the DCAPA and due process when it terminated, suspended, or modified claimants' disability compensation without having in place published rules governing the process and providing notice to the claimants. CLW states that this court order significantly affects a number of provisions of the RFP, and requires that the RFP be revised to meet the program requirements imposed by the court order. CLW also argues that the District must cancel the RFP and continue the contract with CLW until the District corrects the deficiencies in the disability compensation program. The District responds that the District always has the ability to address any effects of the *Lightfoot* order by issuing addenda to the RFP or a change order during contract administration.

CLW claims that the *Lightfoot* order prohibiting the District from terminating, suspending, or modifying any disability benefits, until valid regulations are promulgated, renders it practically impossible for offerors to construct a realistic pricing structure or legally to comply with RFP sections that are predicated on the District's ability to terminate suspend or modify benefits. CLW identifies numerous sections. It claims that the problem permeates the entire RFP.

The District responds that RFP Addendum No. 3, section B, addresses the issue of pricing the fixed price contract based on variations in the number of claims, by requiring that the offerors identify the pricing assumptions and the effect on price if claims are decreased or increased during the year. Amendment No. 3, section B, states:

> Section L.4.4 is added as follows:
>
> > Offerors shall identify the assumptions used regarding the quantity of claims per year used in determining its proposed fixed annual price. In addition, offerors shall state what effect on the price an increase or decrease in the amount of claims per year would have on the proposed price per year.

The District argues that Amendment No. 3 provides a reasonable and fair method of pricing the contract in view of the *Lightfoot* order and addresses any other variance in the number of claims. In addition, regarding the ability of a contractor to perform the contract requirements consistent with the requirements of the *Lightfoot* order, the District responds that if the order prohibits the District or the contractor from performing a particular requirement, then the requirement will not be performed or enforced until such time as the District obtains a revised court order, a reversal of the court order, or promulgates regulations resolving the court's objections. Finally, the District notes that the RFP provisions state the District's reasonable minimum needs, subject to the dictates of the *Lightfoot* order.

CLW has not rebutted the facts articulated by the District in the Agency Report with regard to

the effect of Amendment No. 3 on the ability of offerors to formulate a valid offer to the amended RFP. We are not convinced from the record that the *Lightfoot* order renders it impossible for an offeror to submit a meaningful offer in response to the RFP. With regard to the provisions in the RFP which CLW claims would be impossible or illegal to perform, it is not the Board's role to enforce programmatic requirements specified in a court order.

CLW also repeats in P-0698 its earlier allegation that the District has violated the standards of good faith and fair dealings as well as the fundamental policies set out in D.C. Code 2-301.01(b). For the reasons discussed earlier, we deny these protest grounds.

CAB No. P-0701

CLW alleges that the District violated the law when it filed in D.C. Superior Court an affidavit with exhibits containing confidential information from CLW's proposal as part of the District's opposition to CLW's TRO petition in that court. The pleading at issue, styled "Praecipe Noting Filing Declaration of Phyllis Dailey in Support of the District of Columbia's Opposition to Plaintiff's Temporary Restraining Order", was filed in Superior Court on October 18, 2004. Ms. Dailey states in paragraph 8 of her affidavit:

> I further note that CLW/CDM says it will have to close its doors and that, according to Paragraph 32 of Mr. Weaver's declaration it will not be able to absorb the "hit." My review of his proposal for the new RFP issued August 30, 2004, and recently received by this office indicates, however, that there are at least two existing contracts in the millions of dollars with the Federal Transit Administration and the U.S. Department of Transportation, National Highway Safety Administration. See Exhibit 11, CLW/CDM On Site Technical Proposal, Solicitation 6FG-03-RAB-0002 Addendum to Past Performance Evaluation.

The referenced Exhibit 11 consists of a cover sheet entitled "A Proposal in Response to Solicitation # DCAE-2004-R-0014 for Third Party Claims Administration Services for the District's Self-Insured Worker's Compensation Program by CLW/CDM, JV", followed by a 2-page table of contents for the technical proposal, followed by two past performance questionnaires and addenda prepared by the Federal Transit Administration and the U.S. Department of Transportation's National Highway Transit Safety Administration evaluating CLW's performance under certain federal contracts. The questionnaires are marked at the top of each page "Source Selection Sensitive Information" and show the contract number, dollar value, period of performance, and a brief description of the type of contract work. The questionnaires also identify numerical ratings for quality of product or service, timeliness of performance, business relations, compliance with price estimates, customer satisfaction, and overall performance.

CLW claims that the District violated 27 DCMR § 1610.1 which provides:

> After receipt of proposals, the information contained in them and the number or identity of offerors shall not be made available to the public or to anyone in the District not required to have access to the information in the performance of his or her duties.

CLW argues that by not filing the pleading under seal or pursuant to a protective order, the information was "made available to the public." Further, according to CLW, the filing violated section 1610.3 which prohibits releasing information to a prospective contractor that might "give the prospective contractor an advantage over others." Section 1610.3 provides:

> No District employee or agent shall furnish information to a prospective contractor if, alone or together with other information, it might give the prospective contractor an advantage over others. However, general information that is not prejudicial to others may be furnished upon request.

The District argues the protest is untimely because CLW filed it on November 2, 2004, 11 days after the October 18 date the pleading was filed in Superior Court. CLW counters that its counsel did not receive the pleading until the TRO hearing on October 19. The District has not rebutted CLW's sworn statement that its counsel received the pleading on October 19, which would make the protest timely. Accordingly, we decline to dismiss the protest on timeliness.

The District argues on the merits that disclosure of the past performance questionnaires did not violate law or regulation because none of the information was proprietary and CLW never attached a protective legend to its proposal identifying the information as proprietary. In addition, the District states that CLW waived any claim of confidentiality by failing to seek a protective order either in Superior Court or before the Board. Finally, says the District, disclosure of the past performance data (ratings were either outstanding or excellent in all categories) did not competitively harm CLW. CLW responds that the information is confidential because it is not readily ascertainable by proper means and confers economic value from its disclosure or use.

D.C. Code § 2-303.17(d) states:

> The District Government Procurement Regulations shall provide that information which has been designated as confidential or proprietary by a business, and which has been submitted by that business as a part of its response to an invitation for bids, a request for proposals, or competitive sealed proposals, is to be treated by the Director, an employee of that office, or any other employee of the District in a confidential manner, and is to be disclosed only to District employees for use in the procurement process and is not to be disclosed to other persons or parties without the prior written consent of that business.

We do not need to reach the question of whether the District disclosed proprietary information because it is clear that the disclosure cannot prejudice CLW in this RFP competition. There is nothing in the table of contents or past performance questionnaires that could provide an advantage to another offeror or a disadvantage to CLW. In other words, the disclosure will have no effect on the District's evaluation and selection pursuant to the RFP. CLW also challenges the disclosure as a violation of the District's obligation of good faith and other policies specified in D.C. Code § 2-301.01. For the same reasons discussed above, we deny these additional protest grounds.

CONCLUSION

Based on our review of the consolidated protest record in P-0696, P-0697, P-0698, and P-0701, we deny in part and dismiss in part the protest grounds raised by CLW.

SO ORDERED.

DATED: February 4, 2005

/s/ Jonathan D. Zischkau
JONATHAN D. ZISCHKAU
Chief Administrative Judge

CONCURRING:

/s/ Matthew S. Watson
MATTHEW S. WATSON
Administrative Judge