

DISTRICT OF COLUMBIA CONTRACT APPEALS BOARD

PROTEST OF:

UNFOLDMENT, INC.)	
)	CAB No. P-0843
Solicitation No. TM 05-97)	

For the Protester, Unfoldment, Inc.: Kemi Morten, Esq. For the District of Columbia Government: Robert Schildkraut, Esq., Assistant Attorney General.

Opinion by Administrative Judge Jonathan D. Zischkau, with Administrative Judge Warren J. Nash concurring.

OPINION

Filing ID 34139257

Unfoldment, Inc., protests the Department of Child and Family Services Agency's ("CFSA") failure to award it a contract for teen mother and babies services in 1997. Unfoldment alleges that it only recently became aware of its grounds for protest as a result of discovery conducted in a pending contract dispute it has been litigating with CFSA. Unfoldment claims that the alleged newly discovered evidence shows that it was the top ranked offeror in the 1997 competition but the contracting officer failed to award it a contract in bad faith or for racially discriminatory reasons. We conclude that this protest is untimely, and accordingly, dismiss it.

BACKGROUND

CFSA, under the control of the LaShawn General Receiver, issued RFP No. TM 05-97, on February 18, 1997, for foster care services to assist pregnant teenagers and teen mothers and their children, with assistance including well-baby, parenting, and independent living skills. (CAB No. P-0502 Agency Report Ex. 2; Protest, Ex. 1). The RFP contained a provision under Section II ("Proposal Preparation & Submission"), Paragraph 13.a ("Proposal Protests"), stating:

Any Offeror may file a protest in connection with this solicitation or award of a contract in accordance with D.C. Law 6-85, Section 908, D.C. Code, Section 1-1189.8 (1987) and 27 DCMR 300 *et seq.* (33 DCR 5670, *et seq.* September 12, 1986).

All protests must [be] addressed to Director, Contracts, Grants and Procurement, Child and Family Services Agency, 900 Second Street, NE, Suite 221, Washington DC 20002.

Section 908 of the Procurement Practices Act referenced in Paragraph 13.a provides that protests of solicitations or awards must be filed within 10 business days after the basis of the protest is known or should have been known.

The amended closing date for proposals for the RFP was March 24, 1997. CFSA received 14 proposals which were evaluated from late March to early April 1997. (CAB P-0502 CFSA filing, dated Oct. 28, 1997). Unfoldment, Catholic Charities, Family and Child Services of Washington, D.C., Inc., and For Love of Children, Inc. ("FLOC"), were initially ranked as the top four proposals based on technical and price, and included in the competitive range, and the offerors were invited to submit best and final offers. The other 10 proposals were excluded from the competitive range, including the proposal of Sasha Bruce Youthworks, and those offerors were so informed by letters dated May 16, 1997. (CAB P-0502 Agency Report, Ex. 10; Oppedisano Statement of Facts, filed Sept. 8, 1997). CFSA prepared a "List of Offerors and Awardees (Bid Analysis and Spread Sheet)" most likely in approximately May 1997 after the request for best and final offers from the four top ranked offerors. Family and Child Services and FLOC apparently did not change their offers, while Catholic Charities increased the number of offered units from 8 to 20. Those three offerors are listed under the heading "Best and Final Offer Selections." Unfoldment is listed under the heading "Best and Final Offer Refused" and its BAFO appears to show a reduction in the number of units being offered from 24 to 12. (AR Ex. 11). Sasha Bruce, one of the offerors excluded from the competitive range, contended in a protest filed in 1997 that CFSA improperly refused to make awards to offerors who proposed less than 20 units.

Contracts with Family and Child Services, Catholic Charities, and For Love of Children were signed on June 4, June 6, and June 9, 1997, respectively. Sasha Bruce requested a debriefing and received its debriefing on June 23, 1997. During the debriefing, Sasha Bruce's representatives were told by CFSA's Oppedisano that:

CFSA negotiated with four vendors with the intention of awarding four contracts. Problems arose in one case and CFSA awarded contracts to three vendors. They are FLOC [For Love of Children], Family and Child Services, and Catholic Charities.

(CAB P-0502 Protest, Ex. II).

Unfoldment's executive director, Kemi Morten, asserts in an affidavit of April 13, 2010, that she received a notice of non-award in approximately July 1997, that after receiving the letter she contacted Oppedisano inquiring why Unfoldment had not received award, and that Oppedisano told her that Unfoldment's proposal did not fall within the competitive range. (Morten Declaration, Apr. 13, 2010, at ¶¶ 4-6). She asserts further that she asked Oppedisano "how and where I could file a protest of the Non-Award decision, as required in Section 13.1 of the Teen Mothers and Babies RFP TM 05-97 at page 8" (Id. ¶ 7). She claims that Oppedisano informed her that "the CFSA LaShawn Receivership was an independent agency, and the Receivership's decision not to award Unfoldment a Teen Mother and Babies Contract was final and non-appealable." Morten states in her affidavit that after speaking with Oppedisano, she "filed a formal, written protest regarding the non-award decision on Unfoldment's behalf with Contracts Director John Oppedisano" but that "Oppedisano did not respond to [her] letter" and that because Jerome Miller had resigned as CFSA Receiver "there was no one to whom I could appeal Mr. Oppedisano's non-award decision." (Id. ¶¶ 8-10). Morten is an attorney licensed to practice law in the District. Unfoldment has not submitted into the record any written protest from Unfoldment in 1997 as referenced in Morten's declaration. We accord little weight to Morten's recollections 13 years after the fact. Rather, we find the

1997 written record contained in Sasha Bruce's protest (CAB No. P-0502 and P-0523) far more reliable and find it more likely than not that Unfoldment never filed a formal written protest with the CFSA contracting officer. As a licensed attorney, Unfoldment's executive director was certainly as capable as the *pro se* protester in CAB No. P-0502 to vindicate its protest rights given the clarity of the Procurement Practices Act, the Board's published rules of practice governing protests, and the solicitation's clear invocation of the Procurement Practices Act for protests of awards.

Sasha Bruce, another offeror in the same Teen Mothers and Babies procurement, filed a protest as provided for in the District's Procurement Practices Act and as referenced in the RFP section noted by Unfoldment. On July 8, 1997, Sasha Bruce served a copy of its protest on Oppedisano at CFSA (during business hours) and delivered the original protest to the Board (arriving after business hours that same day). The Board docketed the protest as CAB No. P-0502 and concluded that the protest was filed timely with the Board based on July 8 date of service on the CFSA contracting officer. CFSA filed its Agency Report with exhibits on August 12, 1997. On September 8, 1997, CFSA filed a legal memorandum addressing the protest grounds, as well as Oppedisano's 3-page "Statement of Facts" regarding the procurement. CFSA supplemented the record with additional documentation on October 15 and 28, 1997. On November 17, 1997, Sasha Bruce filed a response to the Agency Report and supplemental submissions from CFSA. Sasha Bruce filed a supplemental protest, docketed as CAB No. P-0523, on November 10, 1997, based on the evaluation information disclosed by CFSA in its October 28 filing. The two protests were consolidated for further proceedings and the next significant event was a status conference among the parties and the Board on August 6, 1998, in which the Board indicated its view that CFSA's evaluation of proposals violated the procurement law and encouraged the parties to discuss settling the protests. The parties ultimately agreed upon a settlement and the Board dismissed the protests in an order dated August 21, 1998. Unfoldment never intervened in either P-0502 or P-0523, nor filed its own protest with the Board, during the pendency of Sasha Bruce's protests.

Unfoldment claims that it first became aware of the existence of the pleadings in CAB No. P-0502 when it was preparing for a deposition of Oppedisano in connection with a contract dispute case against the District and CFSA in CAB No. D-1062. In that dispute, Unfoldment claims that Oppedisano and another contracting official with CFSA breached in bad faith a contract entered into between CFSA and Unfoldment for group home services. Unfoldment claims that Oppedisano and the other representative held a racial animus against Unfoldment, a minority contractor. In her April 2010 declaration, Morten states: "Based on my knowledge of John Oppedisano's racial animus toward African Americans and the fact that Unfoldment was one of the largest African American controlled vendors doing business with CFSA in 1997 and 1998, I am of the opinion that Oppedisano refused to award the Teen Mothers and Babies contract to Unfoldment, the number one ranked bidder, in bad faith and/or for reasons in which race played an impermissible role."

DISCUSSION

The protest provision from the Procurement Practices Act cited in Section II, Paragraph 13.a, of the 1997 solicitation, which is the predecessor of the current provision found at D.C. Code § 2-309.08, states in relevant part:

- (a) This section shall apply to a protest of a solicitation or award of a contract addressed to the Board by any actual or prospective bidder, offeror, or contractor who is aggrieved in connection with the solicitation or award of a contract.
- (b) For a protest pursuant to subsection (1) of this section, the aggrieved person shall file a protest with the Board within 10 working days after the aggrieved person knew or should have known of the facts and circumstances upon which the protest is based.

Unfoldment argues that its protest filing on February 26, 2010, in the current case (CAB No. P-0843) is timely because Unfoldment first became aware of the pleadings in CAB No. P-0502 in early February 2010 when Morten was preparing for Oppedisano's February 12, 2010 deposition in CAB No. D-1062. The District urges *inter alia* that the long delay by Unfoldment in filing its protest renders the protest clearly untimely. We agree with the District.

Protests are serious matters which require effective and equitable procedural standards to assure both parties will have a fair opportunity to present their cases so that protests can be resolved without unduly disrupting the procurement process. *See Amerind Constr., Inc. – Recon.*, B-236686.2, Dec. 1, 1989, 89-2 CPD ¶ 508. For this reason, the Procurement Practices Act contains strict timeliness requirements for filing protests. Protesters have a duty to pursue diligently any information that reasonably would be expected to disclose whether a basis for a protest exists, and where a protester has not done so, we will not view the protest as having been timely filed. *Potomac Capital Investment Corp.*, CAB No. P-0383, Jan. 4, 1994, 41 D.C. Reg. 3885 n. 13. This includes diligently pursuing a debriefing, so that the protester may determine whether it in fact has a basis for protest, and if so, what it is. *Professional Rehabilitation Consultants, Inc.*, B-275871, Feb. 28, 1997, 97-1 CPD ¶ 94 (2 month delay in requesting a debriefing not a diligent pursuit of information); *Unicom System Inc.*, B-222601.4, Sept. 15, 1986, 86-2 CPD ¶ 297 (54 day delay in requesting a debriefing not a diligent pursuit).

Unlike Sasha Bruce, which requested a debriefing in the same procurement and received its debriefing on June 23, 1997, Unfoldment failed to request a debriefing. Unlike Sasha Bruce which filed its protest on July 8, 1997, Unfoldment did not file a protest until nearly 13 years after receiving notice in 1997 that it would not be receiving an award. Clearly, Unfoldment did not diligently pursue information that reasonably would be expected to disclose whether it had a basis for protest. Accordingly, we dismiss its protest as untimely.

SO ORDERED.

DATED: November 2, 2010

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

CONCURRING:

/s/ Warren J. Nash
WARREN J. NASH
Administrative Judge