

**GOVERNMENT OF THE DISTRICT OF COLUMBIA  
CONTRACT APPEALS BOARD**

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February 22, 1999

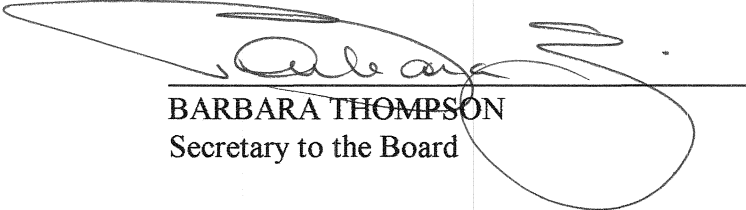
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SUBJECT: CAB No. **P-569**, (Protest Of: **The Answer Temps Services, Inc.**)

Attached is a copy of the Board's Opinion sustaining the protest and directing the District to promptly terminate the sole source contract that was awarded to H & B on January 28, 1999, and award a contract to the low, responsible bidder under the competitive solicitation, IFB No. DCPS-E-99018-OT.



BARBARA THOMPSON  
Secretary to the Board

GOVERNMENT OF THE DISTRICT OF COLUMBIA  
CONTRACT APPEALS BOARD

PROTESTS OF:

THE ANSWER TEMPS, INC.	)	
	)	CAB No. P-569
Under Contract No. DCPS-C-99018-4789-OT	)	

For the Protester, The Answer Temps, Inc.: Laurence Schor, Esq., Brian T. Scher, Esq., McManus, Schor, Asmar & Darden, L.L.P. For the Intervenor, Horton & Barber Professional Services, Inc.: Ronald L. Thomas, Esq. For the Government: Howard S. Schwartz, Esq., and H. Christopher Malone, Esq., Assistants Corporation Counsel.

Opinion by Administrative Judge Jonathan D. Zischkau, with Chief Administrative Judge Lorilyn E. Simkins and Administrative Judge Phyllis W. Jackson, concurring.

**OPINION**

Recently, we sustained a protest of The Answer Temps, Inc. ("TAT") challenging an emergency, sole source award by the District of Columbia Public Schools ("DCPS") to Horton and Barber Professional Services, Inc. ("H&B") for transportation of special education students. *The Answer Temps, Inc.*, CAB Nos. P-564, P-567, Jan. 28, 1999, 10 P.D. 7651. TAT now challenges another DCPS emergency, sole source contract award to H&B for the period January 29 through February 27, 1999. The District claims that the latest sole source award is justified by emergency conditions and that competition was not practicable based on a DCPS survey in December 1998 which purports to show that no entity other than H&B could meet DCPS's short-term requirements.

We conclude that DCPS has not justified an emergency award under D.C. Code § 1-1183.12 because this unfortunate, last minute award resulted from inadequate advance procurement planning and improper handling of the procurement by DCPS and the Office of the Chief Procurement Officer ("CPO"). In addition, neither the CPO's determination and findings nor DCPS's survey rationally support the decision to award a sole source contract to H&B without obtaining at least some competition from other bidders such as TAT. The District has failed to submit adequate evidence demonstrating that only H&B could provide bus drivers and attendants for DCPS's short-term requirements. At the Board's suggestion, the District conducted a new emergency procurement for the short-term requirements and received four competitive bids. This fact further shows that adequate competition was possible.

Accordingly, we sustain the protest. The District shall promptly terminate Contract No. DCPS-C-99018-4789-OT and make an award to the low, responsible bidder under the recent competitive solicitation, DCPS-E-99018-OT.

## BACKGROUND

A detailed statement of facts concerning DCPS's procurement efforts during the second half of 1998 for bus drivers and attendants for special education students is set forth in our recent protest decision in CAB Nos. P-564 and P-567. *See* 10 P.D. at 7651-54. For the present case, the following summary is sufficient.

DCPS requires a minimum of 150 contractor-supplied bus drivers and attendants for transportation of special education school children. TAT had a contract with DCPS, which expired on September 30, 1998, for providing bus drivers and attendants. Prior to expiration of that contract, DCPS solicited a successor long-term contract through sealed bids. Shortly before TAT's contract was to expire, the CPO cancelled the solicitation due to specification deficiencies. On September 28, 1998, DCPS entered into a letter contract with H&B (the low bidder on the cancelled solicitation) to provide bus drivers and attendants through October 31, 1998. DCPS's stated intent was to assure temporary driver and attendant services for the special education students pending a resolicitation for a long-term contract. Because the emergency contract had a legal limit of 120 days, the DCPS contracting officer and the CPO knew that a resolicitation for DCPS's long-term requirements had to be done promptly in order to meet a performance start date of no later than February 1, 1999. Unfortunately, a new solicitation for these critical services was not promptly issued in October 1998. One District employee states that he was assigned to work on the resolicitation in early November 1998. (AR Ex. 6 (Piunno Aff. ¶ 1)). A DCPS supervisory contract specialist was also assigned to work on the solicitation in early December 1998. (AR Ex. 2 (Hatcher Aff. ¶¶ 1-2)). At some point in either December 1998 or January 1999, the Deputy CPO decided that it was necessary to change the form of the solicitation from sealed bidding to sealed proposals. (*Id.* ¶ 3). The solicitation for the long-term requirements was not issued until January 22, 1999. In the meantime, DCPS extended what was essentially a sole source letter contract through November 1998, then through December 1998, and finally through January 28, 1999.

On the day the letter contract expired, January 28, 1999, the CPO awarded a new sole source, emergency contract to H&B for a minimum of 150 and a maximum of 230 bus drivers and attendants for the period January 29, 1999, through February 27, 1999. The award was accompanied by a Determination and Finding for an Emergency Contract, dated January 29, 1999. The D&F states that the decision not to solicit competition is supported by a market survey:

During December 1998, a market survey was conducted to determine if there were any companies who could provide bus drivers and attendants who could begin work immediately and meet DCPS's programmatic requirements. It was discovered that there were no companies available that could immediately supply drivers and attendants to meet DCPS's requirements for drug and alcohol testing, CDL drivers' license, DCPS bus driver's license "face card", FBI background checks, medical examinations, and training.

(AR Ex. 1, D&F at 2). In the D&F, the CPO added that no firm other than H&B could be awarded a contract and "immediately perform the services required . . ." (*Id.*). Although no written record of the

December 1998 survey exists (AR Ex. 3 (Fitzgerald Aff. ¶ 1)), the District included in the Agency Report affidavits from Ms. Kathy Hatcher, the DCPS supervisory contract specialist,<sup>1</sup> and Mr. John Piunno, whose position within the District government is not made clear in the record. In her affidavit, Ms. Hatcher states with regard to the survey:

4. I had to determine whether a contractor that specialized in providing transportation services could provide school bus transportation services on an emergency basis for a short period of time until a new long-term contract was awarded. I learned from Kevin West, Chief of the Transportation Division, DCPS, that there were two nationally known contractors that specialized in these services: Laidlaw Transportation Inc. ("LTI") and Ryder Company. This was subsequently confirmed by a search on the Internet.

5. On or about December 16, 1998, I spoke to a representative of LTI. I determined the following:

- a. LTI would require a transition period of four to six weeks to adequately test, certify, train, and perform FBI background investigations.
- b. LTI would not commit to delivering required services within 24 hours, since they indicated that even the incumbent contractor's employees would need to be appropriately qualified to perform.

....

d. LTI would not participate in a competitive emergency procurement for the required transportation requirements on a short-term basis (120 days).

6. I considered that the response from LTI was representative of the response that I would have received from Ryder and other contractors that specialized in transportation services. I did not contact Answer Temps since this is a company that specializes in providing temporary personnel services and the District determined that the requirements were for specialized transportation services.

In an effort to support the CPO's D&F for a sole source contract to H&B, the Deputy CPO for Public Safety and Education states in an affidavit:

Based on the limited available information, the District believes there is reasonable doubt that The Answer Temps ("TAT") and Horton and Barber Professional Services, Inc. ("H&B") are not qualified and specialized providers in transportation services.

(AR Ex. 3, Fitzgerald Aff. ¶ 3). Notwithstanding the ambiguities in this statement, the Deputy CPO also states that "in the interim, H&B was satisfactorily performing and capable of continuing to provide services with minimal disruption to the special education children." (*Id.* ¶ 7). Currently, H&B is providing 216 bus drivers and 213 attendants, each of whom meets all contract requirements. (AR at 5-6; AR Exs. 4-5).

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<sup>1</sup> Ms. Hatcher signed the D&F on January 28, 1999, as a DCPS contracting officer.

TAT has filed an affidavit and supporting documents indicating that it is capable of providing bus drivers and attendants meeting all of the contract requirements. (Declaration of Allene Graves, filed February 8, 1999).

TAT filed its protest of the new sole source, emergency contract on January 29, 1999. The Board held a conference with the parties and issued an order on February 1, 1999, indicating *inter alia* that the CPO and DCPS should issue a competitive, emergency solicitation for short-term driver and attendant services in order to avoid disruption of the services should the Board sustain the protest on the ground that the January 28 sole source award was improper. We have been advised that the CPO and DCPS issued an emergency solicitation, DCPS-E-99018-OT, that four firms (McLean Transportation Service, Inc., H&B, C. Price & Associates, and TAT) responded to the solicitation, and that H&B was the low bidder. (TAT filing of February 16, 1999; District filing of February 17, 1999).<sup>2</sup>

### DISCUSSION

We exercise protest jurisdiction pursuant to D.C. Code § 1-1189.3 (Supp. 1998).

The first issue presented by the protest is whether the DCPS and the CPO properly determined that the circumstances justified an emergency procurement when the thrice-extended letter contract expired January 28, 1999. We conclude that a valid emergency, as defined by D.C. Code § 1-1183.12 and 27 DCMR § 1710, did not exist. DCPS and the CPO knew long before January 28, 1999, that they would need another short-term contract to bridge between the January 28, 1999 expiration of H&B's letter contract and the commencement of performance by a contractor under the contract resulting from the long-term solicitation. When the re-issuance of a new long-term solicitation failed to occur in October 1998, as planned, DCPS and the CPO knew or should have known that a timely long-term contract start (*i.e.*, February 1, 1999) was in jeopardy. Certainly by the beginning of November 1998, DCPS and the CPO should have known that a short-term contract would be needed beyond January 28, 1999. DCPS and the CPO also understood that any contractor who did not have current access to a pool of trained drivers and attendants would need at least a month of transition time to satisfy all of the minimum requirements prior to commencing performance. Thus, by the time that Mr. Piunno in early November 1998 and Ms. Hatcher in early December 1998 were conducting their "survey", DCPS and the CPO knew or should have known that a short-term contract would be needed to bridge the period from January 29, 1999, through the start of performance under the long-term contract whose solicitation was not issued until January 22, 1999. Because the "emergency" that was declared on January 28, 1999, was caused solely by poor procurement planning by the responsible District contracting personnel, there was no legally justifiable emergency as that term is defined by statute and regulation. It is clear from the facts that DCPS and the CPO had sufficient time in October, November, and December 1998, to solicit competitive bids for its short-term needs, with

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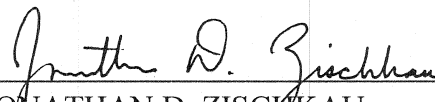
<sup>2</sup> H&B misfiled a protest of this new emergency solicitation with the DCPS contracting officer on February 16, 1999, which District counsel forwarded to the Board on February 17, 1999, and was docketed as CAB No. P-573. H&B has withdrawn that protest apparently because it was the low bidder. (H&B filing of February 17, 1999).

ample opportunity for transition by the winning contractor.

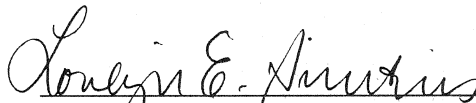
Even if there had been grounds for a valid emergency procurement, the January 29, 1999 sole source award to H&B was improper for essentially the same reasons set forth in our decision in CAB Nos. P-564 and P-567. DCPS and the CPO repeated the same procurement violations as before by failing to obtain "as much competition as is maximally practicable under the circumstances." D.C. Code § 1-1183.12; 27 DCMR § 1712.3. The recent emergency solicitation which yielded competitive bids from four contractors, including H&B and TAT, confirms that competition was possible and that DCPS and the CPO erred in determining that no adequate competition existed.


Accordingly, we sustain TAT's protest and direct the District promptly to terminate the sole source contract that was awarded to H&B on January 28, 1999, and award a contract to the low, responsible bidder under the competitive solicitation, IFB No. DCPS-E-99018-OT.

DATED: February 18, 1999

  
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JONATHAN D. ZISCHKAU  
Administrative Judge

CONCURRING:

  
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LORILYN E. SIMKINS  
Chief Administrative Judge

  
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PHYLLIS W. JACKSON  
Administrative Judge