

GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

PROTEST OF:

RESPIRATORY THERAPY SPECIALISTS)	
OF AMERICA, INC.)	
)	CAB No. P-0662
Under Solicitation No. RM-02-C-2113-SJ)	

For the Protester: Reuben B. Collins, Esq., Turner & Collins, PLLC. For the District of Columbia Government: Howard Schwartz, Esq., and Warren J. Nash, Esq., Assistants Corporation Counsel.

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

OPINION

CourtLink Filing ID 1097881

Respiratory Therapy Specialists of America, Inc. (“RTSA”) protests award of a contract to Critical Link Associates, Inc. (“CLA”), alleging various procurement improprieties. The District moved to dismiss the protest as untimely filed. We agree with the District and dismiss the protest as untimely.

FACTS

On October 27, 2001, the Department of Mental Health (“DMH”) issued Solicitation No. RM-02-C-2113-SJ (“RFP”) for Respiratory Therapy Services at St. Elizabeth’s Hospital. (Motion Ex. 1). Section L.7.1 of the RFP notified RTSA that a protest must be filed with the Board within ten days of the time that RTSA knew or should have known of the basis of the protest. (Motion, Ex.7). By letter dated November 19, 2001, Mr. Lalith Gnansiri, project manager of RTSA, informed Mr. Donnie Bryant, Deputy Chief of the Office of Contracts and Procurement, of incidents at the workplace that occurred in the fall of 2001 regarding an unknown individual obtaining RTSA's business information. (Motion, Ex. 2). Specifically, Mr. Gnansiri complained that an unnamed individual attempted to talk with RTSA's employees and may have obtained confidential data about RTSA from agency employees. (Motion, Ex. 2).

The RFP closed on December 4, 2001. (Motion, Ex. 1). On February 20, 2002, Mr. Bryant orally informed RTSA that the contract had been awarded to CLA. On February 27, 2002, DMH awarded a letter contract to CLA. (Motion Ex. 4). By letter dated February 27, 2002, Mr. Bryant informed RTSA that the contract had been awarded to CLA. (Motion, Ex. 5). By letter dated March 11, 2002, to Joy Holland, Chief Executive Officer of St. Elizabeth's Hospital, RTSA alleged that fraudulent activities had taken place during the proposal process. (Motion, Ex. 6). The subject protest was filed with the Board on October 3, 2002, with the November 19, 2001 letter to Mr.

Bryant as an attachment. On October 24, 2002, the District moved to dismiss the protest as untimely filed.

DISCUSSION

Section 2-309.08(b)(2) of the D.C. Code provides that “protests shall be filed not later than 10 business days after the basis of protest is known or should have been known, whichever is earlier.”

RTSA acknowledges that it knew of the proposed award to another firm and discussed the contemplated award with Mr. Bryant on February 20, 2002. During this conversation, RTSA stated that it “would be filing a protest.” (Protest ¶ 12). A written notice of the contract award was sent to RTSA on February 27, 2002. Even ignoring the oral notice and accepting RTSA’s allegation that it did not receive this letter until the second week in March 2002 (Response, at 3), the protest should have been filed no later than March 29, 2002. The protest was filed with the Board on October 3, 2002.

On its face, the protest is untimely. RTSA filed the protest with the Board over 6 months after it received notice that the contract had been awarded to CLA. Citing our decision in *Fort Myer Construction Corp.*, CAB No. P-0452, July 23, 1996, 44 D.C. Reg. 6476, RTSA asserts that its November 19, 2001 letter to Mr. Bryant and its March 11, 2002 letter to the Chief Executive Officer of St. Elizabeth’s Hospital¹ were “the functional equivalent of filing with the Board” and thus the protest may be considered timely. (Response, at 2). We disagree. In *Fort Myer*, we held that “filing of [a timely] protest with the contracting officer was functionally equivalent to filing the protest with this Board and . . . [the Board] should not dismiss the protest as untimely.” 44 D.C. Reg. at 6481. The facts in this matter bear very little resemblance to the record in *Fort Myer*. In *Fort Myer*, a letter clearly intended to be a protest was mistakenly addressed to the contracting officer, rather than to the Board. The letter was filed by Fort Myer within one day of its learning of the contract award. The letter was captioned “PROTEST.” (*Id.* at 6477). “Fort Meyer’s letter was unambiguously a protest from the standpoint of form and content From the record there can be no ambiguity that the protester intended to file a protest.” (*Id.* at 6481). Upon notice that the protest was misfiled, Fort Myer immediately refiled the identical protest with the Board. (*Id.* at 6478).

In the instant matter, the two letters RTSA relies on as functionally equivalent to a protest were not denominated as protests, and did not otherwise indicate that they were intended as protests. Neither letter requested any specific relief. Indeed, both letters appear to disavow any intent to be recognized as protests. The November 19, 2001 letter to Mr. Bryant did not ask for any relief and concludes, “I thought it was important to keep you informed of developments.” (Protest, Ex. A, at 2). Similarly, the March 11, 2002 letter to the Director of St. Elizabeth’s Hospital did not request relief and concludes, “I felt it important to let you know the facts about this situation” (Motion, Ex. 6).

¹ Protester states that the “November 19, 2001 letter in particular” constituted the functional equivalent of filing with the Board. (Response, at 2).

From the record before us, the Board cannot conclude that the letters sent by RTSA in November 2001 and March 2002 were intended to be protests. Even if RTSA subjectively intended the letters to be protests, the letters certainly fail any objective test for expressing this intent. We cannot fault the contracting officer in this case for failing to recognize that the letters should be treated as protests and immediately forwarded to the Board as is required by our decision in *Fort Myer*. 44 D.C. Reg. at 6481. Since the actual filing with the Board did not occur until October 3, 2002, over 6 months after RTSA knew of the award of the contract to another contractor, its protest must be dismissed as untimely.

SO ORDERED.

DATED: December 6, 2002

/s/ Matthew S. Watson

MATTHEW S. WATSON
Administrative Judge

CONCURRING:

/s/ Jonathan D. Zischkau

JONATHAN D. ZISCHKAU
Chief Administrative Judge