

DISTRICT OF COLUMBIA CONTRACT APPEALS BOARD

PROTEST OF:

GINICORP)	
)	CAB No. P-0757
Under Solicitation No. GAGA 2007-I-0012)	

For the Protester GiniCorp: George A. Hawkins, Esq., Peterson Noll & Goodman PLC, and Virginia Master, CEO, GiniCorp. For the District of Columbia Public Schools: Edward C. Dolan, Esq., and Michael McGill, Esq., Hogan & Hartson, L.L.P., and Aaron E. Price, Sr., Esq., Attorney-Advisor, DCPS.

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

OPINION

Filing ID 15938473

In an April 23, 2007 letter, received and docketed at the Board on April 27, 2007, protester GiniCorp challenges the award to Tandem Conglomerate, LLC (“Tandem”) of a contract for resources and staff to maintain a program within the District of Columbia Public Schools (“DCPS”) called “DC STARS.” The District filed its initial Agency Report on June 11, 2007, more than 20 days late. After substitution of counsel, the District filed a combined motion to dismiss and supplemental Agency Report on July 11, 2007. DCPS asserts that the Board should dismiss the protest because DCPS’s contracting officer informed GiniCorp’s executive, Mr. Michael Masters, in January 2007 that DCPS had decided to exclude GiniCorp from the competitive range, and GiniCorp did not file its protest until April 27, 2007. We agree with DCPS that GiniCorp’s protest was filed long after it was informed of its exclusion from the competition. Accordingly, we deny the protest.

BACKGROUND

DCPS issued solicitation No. GAGA 2007-I-0012 in November 2006, for the procurement of information technology services and consulting in the implementation of the DC STARS student records information system. Three offerors (GiniCorp, Tandem, and Tecknomic) submitted timely proposals on November 20, 2006. A technical evaluation panel examined the proposals. In December 2006, the panel determined that GiniCorp’s proposal was technically unacceptable, containing numerous deficiencies, and that it should not be included in the competitive range. The contracting officer agreed with the panel’s assessment and excluded GiniCorp from the competitive range and continued to evaluate the remaining two proposals. The contracting officer states that he informed GiniCorp’s Michael Masters of this decision in a telephone conversation in January 2007:

Because GiniCorp was determined to not be in the competitive range, I informed GiniCorp through a January 2007 telephone conversation with Michael Masters of GiniCorp and through a January 2007 e-mail that GiniCorp had been excluded from the competition and that it would not be considered for an award. The call was very brief and Mr. Masters did not seem upset. . . .

(July 12, 2007 Toorie Affidavit (Corrected) ¶ 8). DCPS has not located a copy of the email Toorie states that he sent to GiniCorp. The only evidence presented by GiniCorp on this factual issue is the following statement of Michael Masters:

The DC Public Schools had not contacted GiniCorp during the previous five (5) months concerning its evaluation of GiniCorp's proposal nor had it verified any of GiniCorp's references. GiniCorp received no notices from the DC Public Schools requesting discussions or presentations to the DC Public Schools. GiniCorp received no notification for any best and final offer request.

(June 13, 2007 Masters Affidavit ¶ 8). This affidavit was filed several weeks before the Toorie affidavit was filed by DCPS. GiniCorp responded on July 18 with legal argument responding to Toorie's July 12 corrected affidavit and DCPS's July 11 supplemental Agency Report and motion to dismiss on timeliness, but GiniCorp never submitted any evidence directly and unequivocally rebutting Toorie's statement that he had a brief conversation with Masters sometime in January 2007 in which he informed Masters that GiniCorp was excluded from the competition. Masters' statement in his affidavit that DCPS "had not contacted GiniCorp during the previous five (5) months" is ambiguous as to timing and thus is not unambiguously inconsistent with Toorie having a telephone conversation with Masters between January 1 and January 12, 2007. GiniCorp had adequate opportunity to persuasively rebut Toorie's statement but failed to do so. On the evidence presented, we find that Toorie communicated to Masters in January 2007 that GiniCorp was excluded from the competition.

The contracting officer ultimately selected Tandem for award and DCPS entered into a letter contract with Tandem on March 15, 2007. DCPS definitized that contract on April 23, 2007. The Board received GiniCorp's protest on April 27, 2007.

In its protest, GiniCorp's chief executive officer, Virginia Masters, states that GiniCorp learned about the contract award to Tandem from an IBM employee assigned to the same work. Masters states that GiniCorp requested a meeting with Kevin Green, the subsequent DCPS contracting officer, two weeks before the date of its April 23, 2007 protest letter, *i.e.*, on April 9, 2007. GiniCorp states that Mr. Green refused to meet with GiniCorp. GiniCorp then mailed its protest and was received by the Board on April 27, 2007.

DCPS filed its initial Agency Report on June 11, 2007, more than 20 days late. Shortly thereafter, DCPS engaged outside counsel to represent it. DCPS filed a combined supplemental Agency Report and a motion to dismiss the protest on July 11, 2007. DCPS asserts that GiniCorp's protest, filed on April 27, 2007, was filed more than 10 days after it knew or should have known of the basis of its protest, and therefore, the protest should be

dismissed as untimely. On July 18, 2007, GiniCorp filed a motion to strike DCPS's July 11 submission and in the alternative addressed the merits of the DCPS filing.

DISCUSSION

We begin by addressing the threshold issue of whether GiniCorp's protest was timely filed. The Procurement Practices Act provides that protests, other than challenges to the terms of a solicitation, "shall be filed no later than ten (10) business days after the basis of protest is known or should have been known." D.C. Code §2-309.08(b)(2). *See Sigal Construction Corp.*, CAB No. P-0690, *et al.*, Nov. 24, 2004, 52 D.C. Reg. 4243, 4253-54; *Professional Recruiters, Inc.*, CAB No. P-0700, Dec. 21, 2004, 52 D.C. Reg. 4258, 4259-60.

In the motion to dismiss, DCPS asserts that GiniCorp filed its protest more than 10 days after the date in January 2007 that the contracting officer, by telephone and email, informed GiniCorp that its proposal was no longer in the competitive range. GiniCorp moved to strike DCPS's motion to dismiss, asserting that DCPS could not file a motion to dismiss after DCPS had already filed a late Agency Report. DCPS's supplementation of the deficient initial Agency Report was entirely consistent with our order on July 11 for such supplementation. Nothing in our order or in our rules prohibited DCPS from including a motion to dismiss on timeliness in this submission. GiniCorp did not request additional time to respond to the submission and we cannot conclude that GiniCorp was prejudiced by the supplemental submissions of DCPS. Indeed, we find merit in DCPS's argument that GiniCorp untimely filed its protest.

Although the protest record was extended unnecessarily by DCPS's failure to file its initial June 11 Agency Report in a timely manner, and further by DCPS's failure to raise the timeliness issue in that submission, DCPS cured its inadequate June 11 submission when its newly retained outside counsel filed the supplemental pleadings on July 11 and July 12, 2007. The protest record also has been hampered by DCPS's failure to locate and file a copy of the email message which Toorie states he sent to Masters in January 2007. Notwithstanding DCPS's poor record keeping on this procurement, a situation we expect will not be repeated in the future, we find that the uncontradicted statement by Toorie that he informed Masters by telephone in January 2007 that GiniCorp had been excluded from the competition, renders the April 27 protest of GiniCorp untimely. As we found above, nothing in Masters' affidavit directly and unambiguously contradicts Toorie's recollection of the January telephone conversation. Because GiniCorp filed its protest on April 27, 2007, more than 10 business days after learning of its exclusion from the competition in January 2007, GiniCorp's protest is untimely.

We have concerns about the methods used by DCPS to notify unsuccessful offerors about significant procurement actions. In this matter, the original contracting officer, no longer employed by DCPS, notified the offeror by telephone and email that the offeror had been excluded from the competitive range. The contracting officer should have documented contemporaneously his actions in the contract file, not leaving it to an affidavit after a protest has been filed. Moreover, contracting officers should notify bidders and offerors *in writing*

and *without delay* when making determinations such as to award or not to consider further a firm's bid or offer.

CONCLUSION

For the reasons discussed above, we dismiss GiniCorp's protest as untimely filed.

DATED: August 14, 2007

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

CONCURRING:

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