

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

PROTEST OF:

ALEXANDRIA SCALE)	
t/a BAY SCALE, INC.)	
)	CAB No. P-361
Under Contract No. OMS-1097-AA-NJ)	

For the Protestor: Tom LaFalce, Service Administrator, Bay Scale, Inc. For the Government: Anne Cauman and Nancy Hapeman, Assistants Corporation Counsel.

Opinion by Administrative Judge Terry Hart Lee, with Administrative Judge Zoe Bush concurring.^{1/}

OPINION

On January 14, 1993, Bay Scale (hereinafter "protestor" or "Bay Scale") filed a protest with the Board, challenging award to Alweighs Hamilton Scale Company (hereinafter "Alweighs" or "awardee") of Items 1 to 10 and 11 to 15 under Contract No. OMS-1097-AA-NJ. The bases for the protest are: (1) that the awardee failed to comply with section 3 of the SPECIFICATIONS (ORIGINAL PARTS) because it is not an authorized distributor of Toledo/Masstron-based equipment, and therefore, does not have direct access to original parts; (2) that the awardee failed to comply with section 2 of the SPECIFICATIONS because it does not have properly trained personnel; (3) that the awardee does not meet the requirements of section 14 of the SPECIAL CONDITIONS because it does not maintain service facilities in the District of Columbia Metropolitan area; and (4) that because the awardee does not have a local service facility or properly trained personnel, it failed to comply with section 2 of the SPECIFICATIONS with respect to maintenance of equipment to a standard that would ensure operational readiness.

On February 16, 1993, the District of Columbia (hereinafter "District" or "government") filed an agency report.^{2/} Therein, the District contended that the protest

^{1/}Administrative Judge Benjamin B. Turner did not take part in this decision because of an extended illness.

^{2/}Accompanying the agency report was a letter to the Board from government counsel, which advised that attachments to Exhibits 5 and 6 to the agency report were not sent to either protestor or Alweighs because they were confidential in nature. After review of the documents withheld, the Board, on February 18, 1993, ordered the District to comply fully with Rule 305.3 of the Board's Rules of Practice (36 DCR 2713) by explaining why release of the materials would give a competitive advantage or that the materials were entitled to confidentiality by law or regulation. The Board also ordered the District to provide to protestor a list of the documents withheld, a brief description of each document and the bases for withholding the documents. By submission dated March 1, 1993, the District responded to the Board's February 18 Order. Therein, the
(continued...)

should be dismissed on the bases of untimeliness and lack of Board jurisdiction, the latter because the matters raised in the protest concerned contract administration. The government also claimed that the contracting officer properly determined that Alweighs was a responsible bidder and that absent a showing of fraud or bad faith, or failure to comply with definitive responsibility criteria, the Board should not disturb the contracting officer's determination.

On February 17, 1993, protestor submitted additional information in support of its protest, specifically copies of letters from Toledo Scale, which allegedly confirmed that Alweighs is not an authorized Toledo distributor and would, therefore, not have access to parts and technical support in order to maintain the District's equipment.

On February 23, 1993, the government submitted a supplemental agency report. Therein, it contended that protestor's February 17, 1993, submission raised no new issues and did not affect the propriety of the award because it contained post-award information not in existence at the time of award. The government continued to assert that the protest was untimely and concerned matters of contract administration outside of the Board's jurisdiction.

By submission dated February 24, 1993, protestor made additional allegations specifically relating to alleged fraud on the part of Alweighs. In support of its position, protestor asserted (using copies of telephone book pages) that Alweighs' location in Fairfax, VA did not exist and that Alweighs never produced "Toledo Certificates of Training" for its employees trained on the Toledo TSM 5000 and TSM 3000 computers, the equipment used by the District.

On March 9, 1993, the District filed a second supplement to the agency report. Therein, with additional documentation, the government argued that the determination of responsibility on Alweighs was indeed proper in that there was ample evidence of the awardee's responsibility and that protestor had failed to make a showing of fraud or bad faith.

^{2/}(...continued)

government advised that after consultation with Alweighs, it was releasing many of the attachments to Exhibit 5 of the agency report. The government also listed and described the documents that it was continuing to withhold. The District advised that it was continuing to withhold certain documents because they were confidential and proprietary to Alweighs and included names of customers, personnel and financial information. Subsequently, on March 8, 1993, the government submitted a second response to the Board's February 18 Order, this time advising that after further consultation with Alweighs and its attorney, it was releasing additional documents or parts of documents previously withheld. The government continued to withhold materials relating to names of Alweighs' past and present customers, rates (other than those to the District) and information on one of Alweighs' private customers. In this second submission, the government, for the first time cited regulatory support for its position.

On March 10, 1993, Alweighs, by and through counsel, submitted a motion to dismiss the protest.^{3/}

Timeliness

The District argued that the protest should be dismissed as untimely because it was not filed within 10 working days of when protestor knew or should have known of the basis for its protest, in violation of D.C. Code § 1-1189.8(b) and Rule 300.1 of the Board's Rules of Practice. In support of its position, the government claimed that protestor knew or should have known of the basis for its protest on June 23, 1992, the date it sent a letter to the Department of Public Works (DPW) complaining that Alweighs could not perform as required by the solicitation.^{4/} The June 23 letter set forth essentially the same allegations as those raised in the instant protest; and consequently, claimed the government, Bay Scale should have filed its protest by no later than July 8, 1992.

The relevant facts show that bid opening occurred on June 12, 1992, the date originally scheduled. (Agency Report, Exhibits 1 and 7).^{5/} Alweighs was the apparent lowest bidder on all other aggregate items. (AR, Ex. 2). On June 23, 1992, protestor wrote to DPW and complained that Alweighs could not meet the specifications relating to local service repair and spare parts facilities, properly trained personnel and equipment.

The relevant facts also show that between June 18 and December 14, 1992, the contracting agency made inquiries to Alweighs regarding, *inter alia*, the allegations made in protestor's letter of June 23. (AR, Exs. 5 and 6). Thereafter, on December 22, 1992, a Determination and Findings (D&F) was issued regarding Alweighs' responsibility. (AR, Ex. 5). On January 5, 1993, a D&F was issued for award other than to the low bidder on aggregate items 11 to 15, due to protestor's failure to submit a bid on Item 15. (AR, Ex. 7). The Director, Department of Administrative Services (DAS) approved the latter D&F on January 5, 1993. (*Id.*). On January 7, 1993, awards were made to Alweighs for Items 1 to 10 and Items 11 to 15 and to Bay Scale for Items 16 to 21 and Items 22 to 26. (AR, Exs. 3 and 4). The protest was filed with the Board on January 14, 1993, seven (7) days after award.

^{3/}We will not consider the motion to dismiss, on the basis of untimeliness. Our records show that Alweighs was notified of the protest by letter dated January 28, 1993. For us to now entertain such a motion, filed over 30 days after notification of the protest, does not lend itself to the prompt and efficient disposition of bid protests. See *C&E Services, Inc.*, CAB No. P-360, March 12, 1993, 5 P.D. 5053.

^{4/}The June 23, 1992, letter is an attachment to Bay Scale's protest and to Exhibit 5 of the agency report.

^{5/}Hereinafter references to the agency report and accompanying exhibits shall be "AR, Ex(s). ____". References to the supplemental agency report shall be "ARI, Ex(s). ____"; and references to the second supplemental agency report and accompanying exhibits shall be "ARII, Ex(s). ____".

Recently, we held that where an RFP is the subject of a protest and a bidder has sought clarification during pre-award discussions, the 10-working-day time limit does not begin to run until the point where the government takes action adverse to the protestor's concerns. *Koba Associates, Inc.*, CAB Nos. P-344 and P-359, March 3, 1993, 5 P.D. 5034, 5036, citing *WF Systems Joint Venture*, CAB No. P-205, 39 DCR 4340, fn. 2 (June 1992). We reasoned that it would be premature for a bidder to file a protest at the time it seeks clarification because it would not have sufficient information to determine whether or not it had grounds for a protest. *Id.* Thus, the operative date which tolls the 10-day filing period is the date on which the bidder is notified of adverse agency action. See *Thresholds Unlimited, Inc.--Recon.*, B-248817.3, August 12, 1992, 92-2 CPD ¶ 102; *Scheduled Airlines Traffic Offices, Inc.--Recon.*, B-248852.2, March 11, 1992, 92-1 CPD ¶ 275.

The same principle applies to the facts of this case. Here, on June 12, 1992, Alweighs was considered to be the apparent low bidder on Items 1 to 10. However, because the company had not done business before with the District, a responsibility inquiry was undertaken, including consideration of the matters raised in protestor's June 23, 1992, letter. The evidence shows that it was not until January 7, 1993, the date awards were made, that Bay Scale knew with any certainty that Alweighs received award for certain aggregate items. It filed the protest seven days thereafter. Thus, under the facts and circumstances extant, the protest was filed in a timely manner and in compliance with applicable law.^{6/}

Board Jurisdiction

In its agency report, the District claimed that the matters raised by Bay Scale concern matters of contract administration and are, therefore, not the proper subject matter for the Board's protest jurisdiction.

^{6/}In support of its position, the District cited *Ideal Electronic Security Co.*, CAB No. P-116, June 13, 1989, 38 DCR 2941 (May 1991). That protest concerned the minority certification of successful bidder, which certification was attached to its bid. The facts set forth in the decision also showed that the protestor filed a letter with the contracting officer on May 18, 1988, six days after bid opening, but did not file a protest with the Board until June 9, 1988, almost a month after bid opening. There, the Board held that the 10-working-day period began to run on May 18, 1988, the date protestor notified the agency of its challenge to the award.

While the accuracy of the decision on its facts is questionable, there is no indication that any determinations were made concerning the awardee as a result of the protestor's letter to the agency, which determination delayed contract award. Furthermore, the facts do indicate that because a minority certification was attached to the awardee's bid, and because protestor apparently was challenging that fact, protestor knew or should have known of the basis for its protest at the time of bid opening (or shortly thereafter, as found by the Board).

The facts herein are clearly distinguishable.

In order to make this determination, we must review protestor's allegations in conjunction with the solicitation requirements. Bay Scale's first issue was that because Alweighs was not an authorized Toledo/Masstron-based equipment distributor, it could not meet section 3 of the SPECIFICATIONS, which stated:

ORIGINAL PARTS: Parts that are produced only by the original equipment manufacturer of the scale under repair.

Bay Scale's second issue concerned Alweighs' alleged noncompliance with section 2, paragraphs 2 and 3 of the SPECIFICATIONS because Alweighs allegedly did not have properly trained personnel. These paragraphs state, in pertinent part:

The equipment shall be maintained to a standard which will ensure operational readiness to perform its intended purposes and in accordance with the equipment manufacturer's recommended maintenance. . . (emphasis added).

All work performed under this contract shall be done by properly trained personnel experienced in the field of truck scale repair, in accordance with the manufacturer's recommendations, and in accordance with good trade practices. . . . (emphasis added).

Protestor's final issue concerned the awardee's alleged noncompliance with section 14 of the SPECIAL CONDITIONS, which states, in pertinent part:

SERVICE FACILITIES

The bidder must maintain service repair and spare parts facilities available to the District of Columbia on twenty-four (24) hours notice. Bidder shall have local service facilities within the Metropolitan Area of the District of Columbia. . . . (emphasis added).

Citing as primary support the decision of *Markhurd Aerial Surveys, Inc.*, B-210108, January 17, 1983, 83-1 CPD ¶ 51, the District argued that protestor's allegations encompass matters that Alweighs may not perform the contract properly. In this, we agree; but only to the extent that the matters raised do not concern bid protest issues. The solicitation language in question, with its use of clauses or phrases like "[t]he equipment shall be maintained" or "[a]ll work performed" or "[t]he bidder must maintain", indicate contract performance requirements or specifications, not responsibility criteria. *Id.*

However, that the matters raised are not for resolution under our bid protest procedures does not mean that we lack jurisdiction over this protest. Indeed, there is no question that we have jurisdiction over this protest, in accordance with D.C. Code § 1-1189.3(1), in that Bay Scale was an actual bidder on the solicitation and became "aggrieved" by virtue of award to Alweighs of certain aggregate items. That the subject matter of the

protest is not for our consideration has no effect on our jurisdiction to make just that determination. See, e.g., *Group Insurance Administration, Inc.*, CAB No. P-354, February 2, 1993, 5 P.D. 4066, 4070, citing *Shane Meat Company*, CAB No. P-339, P-347 and P-349, January 8, 1993, 5 P.D. 4018.^{2/}

Propriety of Award

Section 2200.1 of 27 DCMR (July 1988) requires that awards be made only to responsible contractors. Section 2200.3 of the regulation states, "In the absence of information clearly indicating that the prospective contractor is responsible, the contracting officer shall make a determination of nonresponsibility." In order to be determined responsible, a potential contractor must meet all of the criteria set forth in 27 DCMR § 2200.4. Moreover,

[i]t is well established that affirmative determinations of responsibility are based on information available at the time the determination is made; and we will not review such a determination absent a showing of fraud or bad faith or that definitive responsibility criteria in the solicitation were not met. (citations omitted).

J & L Contract Services, Inc., CAB No. P-313, October 2, 1992, 5 P.D. 2007, 2009; *Markhurd Aerial Surveys, Inc.*, *supra*.

In this regard, the facts demonstrate that the contracting agency performed a lengthy and detailed review to determine Alweighs' responsibility. (AR, Ex. 5). Thereafter, it issued a D&F setting forth its findings, conclusions and recommendation. (*Id.*). This D&F represented the subjective business judgment of the procuring officials and showed that there existed a reasonable basis on which to make a determination of responsibility. So long as that is the case, we will not disturb it. *J & L Contract Services, Inc.*, *supra*.

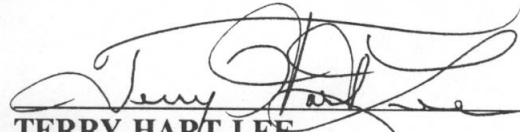
However, on February 24, 1993, protestor raised allegations of fraud, which related to Alweighs' location and trained personnel. These allegations are untimely because they raise a new and independent ground for the protest. In essence, where a protestor initially files a timely protest and later supplements it with new and independent grounds, the new allegations must independently satisfy the statutory timeliness requirements, *Onyx Computers, Inc.*, B-247663, May 11, 1992, 92-1 CPD ¶ 437; *G.H. Harlow Co., Inc.--Recon.*, B-

^{2/}Strictly speaking, we do not have jurisdiction over Bay Scale's protest regarding award of aggregate Items 11 to 15. This is so because the evidence shows that by virtue of protestor's failure to submit a bid on Item 15 (AR, Exs. 2 and 7), its bid was nonresponsive. Given this nonresponsiveness, protestor cannot be considered an aggrieved party under our statute. See *C&E Services, Inc.*, CAB No. P-356, February 10, 1993, 5 P.D. 4075.

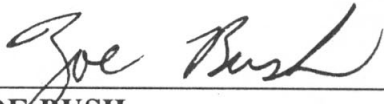
245050, B-245051, B-245050.2, B-245051.4, April 10, 1992, 92-1 CPD ¶ 357.^{8/} Our statute does not contemplate the unwarranted, piecemeal presentation of protest issues. *Onyx Computers, Inc., supra.*

In sum, protestor has failed to carry its burden that award of the aggregate items to Alweighs evidenced a material violation of law or regulation. *See AA Pipeline Cleaners, Inc., CAB No. P-315, November 5, 1992, 5 P.D. 3029.* Consequently, we hereby DISMISS, in part and DENY, in part, the instant protest.

DATE: March 25, 1993


TERRY HART LEE
Administrative Judge

CONCUR:


ZOE BUSH
Chief Administrative Judge

^{8/}Even if these allegations were timely, they lack merit because protestor has failed to overcome the presumption that procurement officials act in good faith, by showing some specific, malicious intent to harm the protestor. *Group Insurance Administration, Inc., CAB No. P-309-B, September 4, 1992, 5 P.D. 1127, 1160.*