

GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

PROTEST OF:

CITI-CHEM, INC.)	
)	CAB No. P-426
Under Solicitation No. - [unspecified])	

For the Protestor: Calvin M. King, President, *pro se*. For the Government: Howard Schwartz, Esquire, and Anne Cauman, Esquire, Assistants Corporation Counsel.

Opinion by Administrative Judge Cynthia G. Hawkins-León, with Administrative Judges Lorilyn E. Simkins and Jonathan D. Zischkau, concurring.

OPINION AND ORDER ON MOTION TO DISMISS

On December 7, 1994, Citi-Chem, Inc. ("Protestor" or "Citi-Chem") filed the above-captioned protest of an unspecified solicitation or contract. Although Protestor's filing was far from clear, by reviewing the District's Motion to Dismiss, the Board has ascertained the following: Protestor is protesting the methods used to evaluate Citi-Chem's laboratory data as it related to the use of chemicals in two "trials" involving the centrifuge de-watering process at the Blue Plains Wastewater Treatment Facility.¹ In its filing, Protestor alleged that important data was ignored during one of the trials which resulted in an increase in the chemical dose. In the second trial, Protestor alleged that "one of the plant operator's (sic) dumped 3800 gallons of chemical needed to continue the trial." Protestor contended that this action caused the trial to be ended prior to completion. As a remedy, Protestor requested either an opportunity to re-run the trials or "have data corrected according to standard analytical methods used throughout the United States...."

The Board learned from the District's Motion to Dismiss filed on January 12, 1995 that the protest concerned the testing of two chemicals -- namely, centrifuge polymer and dissolved air flotation polymer -- to determine their usage rates for the wastewater treatment program at Blue Plains.

¹ Although, in its filing, the Protestor vaguely describes trials for two different chemicals, it is unclear how the trials were done; whether the two trials were done concurrently; and whether the two trials were the subject of two separate solicitations or two parts of the same solicitation. Due to the lack of specificity in the filing, to ascertain additional facts, the Board held a telephone conference on March 8, 1995.

The District's Motion to Dismiss presents the following separate grounds for the dismissal of the protest: (1) the Protestor failed to set forth a clear and concise statement of the legal and factual grounds of the protest; (2) the Board lacks jurisdiction over the protest because the Protestor has not established that it was a prospective or actual bidder, offeror, or contractor and (3) the protest issue regarding dissolved air flotation polymer is untimely, therefore, the Board is without jurisdiction to hear this portion of the protest. Although the District briefly referenced three emergency contracts containing usage rates for the polymers in question that were awarded by the Department of Public Works during the months of November and December of 1994, it was unclear from the District's motion whether the two trials being protested relate to any of those three contracts.

The Protestor did not respond to the January 12, 1995 Motion to Dismiss. Pursuant to Board Rule 307.4, 36 D.C. Reg. 2714 (1989), when a protestor fails to file comments on an agency report or dispositive motion filed in lieu thereof, the factual allegations in the protest that are not admitted by the District, or otherwise corroborated on the record, may be disregarded. In this case, as will be discussed below, because the Board will not make a determination on the merits, it will not be necessary for the Board to determine whether it should disregard any or all of the factual allegations. Alternatively, in accordance with Board Rule 110.5, 36 D.C. Reg. 2692 (1989), in light of Protestor's failure to file a timely opposition to the District's motion, the Board may, if it so chooses, treat the motion as conceded. *Heller Electric Co., Inc.*, CAB NO. P-244, December 23, 1991, 39 D.C. Reg. 4373; *Barcode Technologies, Inc.*, CAB No. P-298, January 16, 1992, 39 D.C. Reg. 4387.

As previously stated, in an attempt to clarify matters already in the record, the Board held two telephone conferences with the parties -- the first on March 8, 1995 and the second conference on March 9, 1995. See Board Rule 310, 36 D.C. Reg. 2714-2715 (1989). At both conferences, the District was represented by Howard Schwartz, Esquire, Assistant Corporation Counsel and the Protestor was represented by Calvin King, President, *pro se*. During the first telephone conference, in response to the Board's questioning, the Board determined that the two trials occurred in September and November of 1994. In addition, the Board discovered that the trials were separate applications of the same polymer rather than trials for two different polymers. Most importantly, it was suggested to the Board that, contrary to the suggestion of the documents of record, the two trials were not performed subsequent to the three emergency procurements issued by the Department of Public Works in November and December of 1994 -- rather, the trials were performed in anticipation of and in preparation for the issuance of a long-term solicitation for polymer which had not yet been issued at the time the trials were performed.²

The second telephone conference was held at the request of the District. The District wanted to provide clarification to statements made by the Protestor the day before. Contrary to previous statements by the Protestor, the District contended that the two trials were indeed held in

² IFB No. OMS-5055-AA-CW for polymer flocculent (utilizing Citi-Chem's trial statistics) was issued by DPW on March 20, 1995. Bid opening has been scheduled for April 25, 1995 at 2:00 p.m.

conjunction with one or more of the three emergency solicitations issued by DPW in November and December of 1994. The Protestor confirmed when the final two trials occurred (the last two of a total of six trials), but conceded that he was not certain that the trials were performed in anticipation and in preparation of the prospective long-term solicitation and not in conjunction with one or more of the three emergency solicitations. In light of the unusual circumstances, the District was given until March 17, 1994 to submit supporting documentation to the Board. In addition, the Protestor was given leave to provide the Board with supplemental information if any -- by March 17, 1995. In turn, the District was allowed seven days (until March 28, 1995) to respond to any such filings by the Protestor. *See* Board Rule 116.1, 36 D.C. Reg. 2696 (1989). At the District's request, an extension of time was granted to allow the parties until March 24, 1995 to respond to the Board's inquiries.

Pursuant to the original schedule established during the two telephone conferences, Protestor filed additional information for the Board's review on March 17, 1995. In response to the content of these filings, the District requested a third telephone conference on March 20, 1995. During the conference, the Board reiterated its desire to, in effect, bifurcate the protest by seeking only information on the record about the Board's jurisdiction to hear the protest. The Board assured the parties that should the Board determine that it does indeed have jurisdiction over the protest, the District would be given an opportunity to respond to the Protestor's March 17 filing. *See* Board Orders issued on March 16, 1995; March 17, 1995; and March 20, 1995.

In light of the extenuating circumstances surrounding this protest, the Board relaxed its rules and allowed the parties to make additional submissions for the record with the purpose of providing the Board additional information and evidence. Board Rule 100.5, 36 D.C. Reg. 2685 (1989). To this end, the Protestor filed an additional statement with exhibits on March 17, 1995. After careful review of the Protestor's submittal, the Board finds that the trials in question were all pre-bid trials that occurred prior to and in anticipation of and in preparation of the issuance of a number of emergency solicitations released by the District during November and December of 1994.

The District filed its response to the Board's inquiry on March 24, 1995. A careful review of this filing substantiated the Board's finding that the trials in question were performed prior to issuance of the solicitation for a long-term contract and one or more of the emergency solicitations issued in November and December of 1994. These trials were performed in conjunction with up to four emergency solicitations (namely, OMS-5078-AA-KH; OMS-5074-AA-CW; and OMS-5079-AA-KH; and OMS-5041-AA-GR) and the IFB for the long-term solicitation issued on March 20, 1995.

The Board's jurisdiction is established by section 903 of the Procurement Practices Act of 1985, D.C. Code § 1-1189.3 which states that:

[t]he Board shall be the exclusive hearing tribunal for, and shall have jurisdiction to review and determine de novo:

- (1) Any protest of a solicitation ... addressed to the Board by any actual or

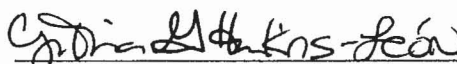
prospective bidder or offeror, or a contractor who is aggrieved in connection with the solicitation....

Thus, the protest fails to meet a most basic jurisdictional threshold since no solicitation is being protested. *See generally Commando K-9 Detectives et al.*, CAB Nos. P-405 and P-406, May 6, 1994, 7 P.D. 5858; *Wayne Mid-Atlantic*, CAB No. P-227, August 12, 1993, 41 D.C. Reg. 3594.³

Since the Board lacks jurisdiction to hear the protest, the Board is without authority to address the District's Motion to Dismiss.

ACCORDINGLY, based upon the facts, legal precedent and reasoning set forth above, the protest is hereby **DISMISSED**, with prejudice.

DATE: April 3, 1995


CYNTHIA G. HAWKINS-LEÓN
Administrative Judge

³ It should be noted that had the Protestor's filing been a protest under any of the emergency solicitations, the Board would have dismissed the filing as untimely. Section 908 (b) of the PPA, D.C. Code § 1-1189.8 (b), states that "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." *Chesapeake Bus & Equipment Company*, CAB No. P-404, June 30, 1994, 7 P.D. 5887; *Emerald Eviction Services*, CAB No. P-343, November 10, 1992, 40 D.C. Reg. 4700; *Eastern Shield Security Systems, Inc.*, CAB No. P-369, March 2, 1993, 40 D.C. Reg. 5001; *CUP Temporaries, Inc.*, CAB No. P-263, August 31, 1993, 41 D.C. Reg. 3615. The Board's rules, which serve to implement the PPA, require that a protest be filed not later than ten working days after the basis of the protest is known or should have been known, whichever is earlier. Rule 301.1, 36 D.C. Reg. 2710 (1989); *Anne Robertson Sellin*, CAB No. P-238, July 2, 1991, 39 D.C. Reg. 4247.

This ten-day filing requirement is a prerequisite to this Board's jurisdiction and cannot be waived. *Macton Construction, Inc.*, CAB No. P-203, December 19, 1991, 39 D.C. Reg. 4368 citing *MTI Construction Co., Inc.*, D.C. CAB (June 1, 1987) and *Southern International Corp.*, D.C. CAB (February 27, 1987). By Protestor's own admission, the various trials occurred from as long as two months before the protest was filed with the Board. In addition, the record shows that an award was made under one of the emergency solicitations in November.