

Government of the District of Columbia

CONTRACT APPEALS BOARD
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DATE: September 21, 1994

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SUBJECT: CAB P-415, Protest of Shannon and Luchs Commercial D.C., Inc.

Attached is a copy of the Board's opinion in the above-referenced matter.


ROSE M. GILLISON
Clerk to the Board

Attachment

RMG/mjh

GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

PROTEST OF:)
)
 SHANNON AND LUCHS COMMERCIAL D.C., INC.) CAB No. P-415
)
 Under RFP No. 007-AA-NS-0-3-BB)

For the Protestor: Barry A. Haberman, Esquire. For the District of Columbia Public Schools: Cecelia E. Wirtz, Legal Counsel and Christopher G. Lipscombe, Attorney-Advisor.

Opinion by Administrative Judge Terry Hart Lee, with Administrative Judges Lorilyn E. Simkins and Cynthia G. Hawkins-León concurring.

OPINION

This matter concerns an appeal filed by Shannon and Luchs Commercial D.C., Inc. ("protestor" or "S&L") of the denial of its protest against cancellation of Request for Proposal No. 007-AA-NS-0-3-BB ("RFP"), issued by the District of Columbia Public Schools ("DCPS"). For the reasons set forth below, we **DENY** the appeal of the denial of the protest.

FACTS

On February 18, 1993, DCPS issued the RFP for the procurement of real estate advisory services to facilitate the centralization and relocation of DCPS administrative offices by September 1995. (Agency Report, Tab A; Protest Exhibit 2).¹ The successful offeror was to act in the capacity as an agent for DCPS in the solicitation and evaluation of proposals for the construction of new DCPS headquarters. The RFP letter stated, in pertinent part:

Contract award will be made to the offeror whose proposal is most advantageous to the D.C. Public Schools. D.C. Public Schools reserves the right to reject a proposal at anytime [sic] after the closing date for proposal submission and

¹Hereinafter, references to the agency report filed on August 26, 1994, shall be "AR, Tab ____." Tab D of the agency report contains the DCPS legal response to the protest, with accompanying exhibits at Tab E. References to the latter tab shall be "AR, Tab E, Ex(s). ____." Protestor's exhibits attached to the April 12, 1994, protest (submitted to the Board as the detailed statement of the appeal of the denial of the protest) shall be referred to as "PEx(s). ____."

conduct negotiations to the extent that the D.C. Public Schools deems necessary and appropriate. . . .

(AR, Tab A; PEx. 2).

Section IV of the RFP set out the evaluation criteria and selection procedure. (*Id.*). Section 4.4 advised offerors that the evaluation process would focus on two areas: technical merit and financial cost. (*Id.*). Section 4.3, labeled "ACCEPTABLE AND UNACCEPTABLE PROPOSALS," stated, in part:

Any proposal deemed unacceptable will be rejected by DCPS. Rejection in its broadest terms means that DCPS identified other proposals more responsive to its relocation project. . . .

(*Id.*). Section B of the RFP set out SPECIAL REQUIREMENTS. Paragraph 8 of Section B stated:

An award will be made to the offeror whose proposal is determined to be in the best interest of the D.C. Public Schools. The D.C. Public Schools reserves the right to reject any proposal at any time after the closing date, to conduct negotiations to the extent D.C. Public Schools deems necessary and appropriate, and to make an award without further discussion and negotiations.

(*Id.*). Section F set out the GENERAL PROVISIONS and contained the TERMINATION (§3), CHANGES (§4), DISPUTE AND PROTEST PROCEDURE (§7), and INDEMNIFICATION (§8) clauses. (*Id.*). Paragraph 21 (d) and (e) of the GENERAL PROVISIONS advised offerors that the Rules of the District of Columbia Board of Education, Title 5, D.C. Municipal Regulations ("DCMR"), Section 3700, *et seq.* and the DCPS Procurement Procedure Manual, *as amended* ("PPM") were incorporated by reference in the RFP. (*Id.*).²

Section 3704.5 of 5 DCMR provides:

The award shall be made to the responsible offeror whose proposal is determined in writing to be the most advantageous to the school system, taking into consideration price and the evaluation factors set forth in the Request for Proposals.

Section 3-203.27 of the PPM states:

The Procurement Officer shall make a written determination showing the basis on which the award was found to be most advantageous to the School System based on the factors set forth in the Request for Proposal.

²Relevant portions of the PPM are provided in the agency report at Tab E, Exhibit 3.

Section 3-203.19 of the PPM, entitled "Discussions with Offerors", states, in pertinent part:

Discussions are held to promote understanding of the School System's requirements and the offerors' proposals and to facilitate arriving at a contract that will be most advantageous to the School System, taking into consideration price and the other evaluation factors set forth in the Request for Proposal.

Section 3-203.20, entitled "Conduct of Discussions," states, in pertinent part:

Offerors shall be accorded fair and equal treatment with respect to any opportunity for discussions and revisions of proposals. The Procurement Officer should establish procedures and schedules for conducting discussions. . . .

Section 3-300 of the PPM is entitled "CANCELLATION OF SOLICITATIONS: REJECTION OF BIDS OR PROPOSALS." Section 3-300.2 provides for cancellation of solicitations in accordance with procedures set forth in the manual and the rules of the Board of Education. Section 3-300.7 provides the authority and bases for rejection of bids or proposals after opening but prior to award. Section 3-300.10 specifically refers to proposals and states, in pertinent part:

Proposals need not be unconditionally accepted without alteration or correction, and the School System's stated requirements may be revised or clarified after proposals are submitted. This flexibility must be considered in determining whether reasons exist for rejecting all or any part of a proposal. Reasons for rejecting proposals include but are not limited to: . . .

- (b) The proposal ultimately . . . fails to meet the announced requirements of the School System in some substantive respect; or
- (c) The proposed price is clearly unreasonable.

On March 19, 1993, S&L submitted its response to the RFP. (AR, Tab B; PEx. 3). It was one of three offerors which responded. DCPS rejected as late one of the offers. (AR, Tab E, Ex. 1). On June 1, 1993, DCPS issued Addendum No. 1 to the RFP. (AF, Tab B; PEx. 3). The addendum deleted paragraph 3.3.1 to the Scope of Work in its entirety and added new paragraph 3.3.1, which in effect changed the requirement for solicitation and evaluation of proposals for construction of new DCPS headquarters to assistance in drafting an RFP for renovation of existing school buildings to serve as new DCPS headquarters. (*Id.*). Section 3.2.7 of the Scope of Work was also changed accordingly. (*Id.*). S&L acknowledged and submitted a formal response to Addendum No. 1 on June 9, 1993. (*Id.*).

DCPS evaluated protestor's and the other remaining offeror's proposals on June 16,

1993. (AR, Tab C).³ By memorandum dated July 8, 1993, the Director, Presidential Relocation Team recommended to the contracting officer, with the concurrence of the Superintendent of Public Schools ("Superintendent"),⁴ that a contract be awarded to protestor. (PEx. 4). By letter dated August 27, 1993, the contracting officer submitted a proposed contract to S&L for its review and comments. (PEx. 6). Therein, the contracting officer stated, "Based upon your comments a date will be set up for further negotiations. . . ." (*Id.*). He sought S&L's comments within five working days. (*Id.*).

On September 1, 1993, S&L responded to the August 27 letter and stated, in part, "We are confident that a mutually beneficial agreement can be negotiated between the D.C. Public Schools and Shannon & Luchs for the provision of real estate advisory services." (AR, Tab E, Ex. 5).

On September 20, 1993, counsel for S&L submitted to counsel for DCPS a "Marked to Show Changes" copy of the proposed contract. (PEx. 7). Approximately two months later, on November 19, 1993, DCPS counsel transmitted to S&L counsel a re-draft of the proposed contract which "substantially modified" S&L's earlier version. (PEx. 8). DCPS made it clear that the document represented "the starting point for negotiations." (*Id.*).⁵ By letter dated December 6, 1993, S&L counsel sent to DCPS counsel four executed copies of the agreement, "revised to reflect the changes required by [his] client." (PEx. 9).

By letter dated December 14, 1993, the Legal Counsel, DCPS, informed S&L counsel that the "substantial and material modifications" made to the proposed agreement were unacceptable. (PEx. 10). Specifically, Legal Counsel noted that the most significant change involved S&L's increased fee. Additionally, Legal Counsel stated:

Several other issues that D.C. Public Schools' staff felt consensus [sic] had been reached, in discussions with you, regarding provisions that DCPS as a public entity must have in the contract, apparently have now been reversed. . . .

(*Id.*). She went on to note that time was of the essence and that if S&L was interested in a last effort to reach a consensus on issues raised by the modifications, its counsel should contact DCPS by December 16, 1993. (*Id.*).

Apparently, counsel for the parties communicated with each other on December 16; and

³Section 4.1 of the RFP advised offerors that DCPS would establish an evaluation team to select the successful offeror. (AR, Tab A; PEx. 2).

⁴See Memorandum dated July 8, 1993, from Franklin L. Smith, Superintendent of Schools, to Nate Bush, Chairperson, Committee on Facilities Improvement and Maintenance (PEx. 5), advising of Smith's intent to award a contract to S&L.

⁵On September 30, 1993, DCPS notified the only other offeror that S&L had been determined to be the most responsive responsible offeror. (AR, Tab E, Ex. 4).

by letter dated December 21, 1993, S&L counsel sent, *inter alia*, a "Marked to Show Changes" copy of the proposed contract. (PEX. 11). By letter dated January 14, 1994, DCPS counsel submitted a final draft of the proposed agreement to S&L counsel. (PEX. 12). Therein, he advised S&L that the offeror's compensation remained the most outstanding issue. Thereafter, on February 7, 1994, S&L representatives met with the Superintendent and members of his staff to discuss the proposed agreement. (PEX. 13). It appears that after this meeting, DCPS prepared another "final draft" of the proposed agreement and forwarded it to S&L.⁶ On March 10, 1994, the Chief Executive Officer ("CEO") of S&L executed what was "hopefully the final contract" and forwarded it to the Superintendent. (PEX. 16).⁷

On March 30, 1994, the DCPS Procurement Officer notified protestor (and its counsel) that the RFP had been cancelled in the best interest of DCPS. (AR, Tab E, Ex. 6; PEX. 1). The cancellation was based upon the unacceptability of the contract terms proposed by S&L, including its compensation proposal. Additionally, the Procurement Officer advised S&L that it could "appeal" the cancellation in accordance with the "DISPUTE AND PROTEST" provision of the GENERAL PROVISIONS of the RFP. (*Id.*).

THE PROTEST

By letter dated April 12, 1994, S&L submitted a protest to the Procurement Officer, which challenged the propriety of the cancellation of the RFP, on the basis that DCPS allegedly failed to negotiate in good faith the contract that had already been awarded to S&L. By letter dated May 16, 1994, the Procurement Officer denied the protest and advised S&L of its right to appeal the denial to the Superintendent of Schools. (AR, Tab E, Ex. 7). S&L appealed the denial of the protest on May 25, 1994; and on June 15, 1994, the Superintendent denied S&L's appeal and advised that it could appeal that denial to the Contract Appeals Board. (AR, Tab E, Ex. 8). On July 14, 1994, S&L appealed the denial of the protest to the Board.⁸

In its protest, S&L claims that DCPS acted in bad faith and with a lack of commitment to complete and execute the contract which had been awarded to S&L on July 8, 1993, and that cancellation of the RFP was, therefore, improper. It seeks to have DCPS award the contract

⁶Sometime in February 1994, counsel for S&L's proposed construction manager appeared on the scene. The role of the construction manager was resolved, but its function entailed additional costs and development of new contract terms.

⁷Apparently, S&L's counsel was unaware of the action taken by the CEO; for he was attempting to finalize the contract between the parties after the CEO had executed it. (PEX. 15).

⁸As a result of the characterization of the protest as an appeal at the time of filing, the Board erroneously docketed the protest as an appeal of a contract dispute. On August 3, 1994, the Board realized its error and advised the parties accordingly.

to it or compensation for all proposal preparation and negotiation costs and expenses, including attorney's fees.

In its response to the protest appeal, DCPS asserts that the appeal should be dismissed as a result of S&L's failure to submit a clear and concise statement of the legal and factual grounds for the protest, in accordance with Rule 302.1 of the Board's Rules of Practice. Alternatively, DCPS asserts that the appeal should be denied because the evidence of record substantiates the propriety of the cancellation on the basis of the parties' inability to agree on final contract terms after seven months of good faith negotiations.

Protestor did not respond to the agency report.⁹

DISCUSSION

DCPS' Motion to Dismiss

DCPS argues that protestor's claims should be dismissed because of the alleged failure to comply with Rule 302.1(c) of the Board's Rules. That rule requires that a protest contain

[a] clear and concise statement of the legal and factual grounds of the protest, including copies of the relevant documents and citations to statutes, regulations or contract provisions claimed to be violated.

In support of its position, DCPS asserts that the August 17, 1994, statement of the protest, which incorporates the original April 12, 1994, protest (including exhibits) to the Procurement Officer contains unsubstantiated allegations of agency wrongdoing and is equivalent to a piecemeal approach of presentation specifically rejected by the Board in our decision in *U.S. Sprint Communications Co.*, 1 P.D. 33 (D.C. CAB 1987).

In our decision in *American Victorian Renovators*, CAB No. P-323, July 21, 1992, 40 DCR 4473, we stated that Rule 302.1 contemplates a statement which is sufficient to inform the Board and the contracting agency of the specific aspects of the procurement to which the protestor objects, rather than a simple disagreement with not having received an award. Thus, in order for a protest to be legally sufficient, it must provide, at a minimum, either allegations or evidence, if uncontroverted, to establish the likelihood of protestor's assertion of improper agency action. See *Chesapeake Bus & Equipment Company*, CAB No. P-404, June 30, 1994, 7 P.D. 5887; *Alascom, Inc.—Recon.*, B-250407, May 26, 1993, 93-1 CPD ¶ 411; *Renic Government Systems, Inc.—Recon.*, B-252643, April 29, 1993, 93-1 CPD ¶ 350; *Sierra Technologies, Inc.*, B-251460, December 21, 1992, 92-2 CPD ¶ 427.

⁹Rule 307, 36 DCR 2713 (April 21, 1989).

Based on the record before us, we conclude that the protest meets the requirements of Rule 302.1(c). Here, protestor objects to the manner in which negotiations were conducted and to the cancellation of the RFP, allegedly in the face of a binding agreement. In support, protestor submitted exhibits to show the numerous iterations of the proposed agreement and the parties' respective replies and concerns in a chronological and articulate fashion. As a result, neither the Board nor DCPS need speculate as to the bases for the protest against allegedly improper agency action. Moreover, there is nothing "piecemeal" about protestor's claims in that the protest grounds presented to the Board in a timely manner are the same as those presented to the Procurement Officer and Superintendent.¹⁰ Consequently, DCPS' motion to dismiss the protest is **DENIED**.

Contract Formation

In its appeal of the denial of the protest, S&L makes several allegations to the effect that DCPS awarded a contract to it on July 8, 1993. In support, it cites two memoranda dated July 8, one from Shelton E. Lee to Kalyan Rose (PEX. 4) and one from Franklin L. Smith to Nate Bush. (PEX. 5). In footnote 5 of the DCPS legal response, DCPS argues that a contract was not awarded to protestor because DCPS had not complied with the proper regulatory procedures for making an award. (PPM, §§ 3-203.26 and 3-203.28). DCPS asserts that because none of the required events occurred, the parties were unable to enter into a contract.

¹⁰DCPS appears to base its argument regarding protestor's alleged piecemeal approach on the fact that the "Notice of Appeal" originally filed with the Board did not set forth the bases for the protest and that it was not until after the Board notified the parties of its error that the grounds for the protest became known. (See fn. 7). A review of the "Notice of Appeal" shows that protestor may have been confused by the DCPS with respect to the procedures to be followed. For example, in her March 30, 1994, notice of cancellation, the Procurement Officer advised S&L that it could appeal the cancellation in accordance with the DISPUTE AND PROTEST provision of the RFP. (AR, Tab E, Ex. 6). Similarly, in her May 16, 1994, denial of the protest, the Procurement Officer advised S&L that it could appeal her decision to the Superintendent, who subsequently advised S&L that it could appeal his decision to the Board. (*Id.*, Exs. 7 and 8).

In addition, section 3714.4 of 5 DCMR provides that appeals from the decision of the procurement officer shall be in accordance with sections 3713.4 through 3713.9. Those sections specifically cover procedures for contract disputes for which the Board requires a detailed statement of the claim after a notice of appeal has been filed. (27 DCMR § 104). Compare with RFP, GENERAL PROVISIONS, ¶ 7(b) and (c), which refers to appeals or protests separately and delineates separate procedures for each type of action. Thus, it appears that protestor may have been confused by all of the references to an "appeal" and acted accordingly, thereafter submitting a statement of its claim, at the Board's request, once it was apprised of the proper procedures. This is not the type of "piecemeal" approach that is usually rejected by bid protest tribunals. See, e.g., *Acker Electric Company, Inc.—Recon.*, B-250673, August 30, 1993, 93-2 CPD ¶ 140; *Bendix Oceanics, Inc.*, B-247225, June 29, 1993, 93-2 CPD ¶ 25; *Laptops, Etc., Inc. v. Department of Transportation—Recon.*, GSBCE No. 10526-P-R, June 11, 1993, 93-3 BCA ¶ 26,149; *Federal Support Group, Inc. v. Department of the Army*, GSBCE No. 11803-P, May 4, 1992, 92-3 BCA ¶ 25,078. See also *US Sprint Communications Company*, 1 P.D. 33 (D.C. CAB 1987) (protestor should diligently pursue basis for protest before filing protest with CAB).

Paragraph 8 of Section B of the RFP provided that award would be made to the offeror whose proposal was determined to be in the best interest of DCPS. However, DCPS specifically reserved the right to, *inter alia*, conduct negotiations to the extent deemed necessary and appropriate. Negotiations (or discussions) with offerors are for the purpose of facilitating arrival at a contract that would be the most advantageous to DCPS. (PPM, § 3-203.19). Additionally, 5 DCMR § 3704.5 provides:

The award shall be made to the responsible offeror whose proposal is determined in writing to be the most advantageous to the school system, taking into consideration price and the evaluation factors set forth in the Request for Proposals. (emphasis added).

In compliance with the regulation, the PPM provides that in order for an appropriate award to occur, the Procurement Officer must make a written determination showing the basis on which the award was found to be most advantageous to DCPS. (PPM, § 3-203.27).

The facts of the instant matter show that none of the regulatory requirements were met to effect a proper and binding contract award, for no formal contract award documents were ever prepared or executed by DCPS. See *DeMatteo Construction Co. v. United States*, 600 F.2d 1384 (Ct. Cl. 1979); *D&S Universal Mining, Inc.*, B-200815, August 31, 1981, 81-2 CPD ¶ 186; *A.B. Machine Works, Inc.*, B-187563, September 7, 1977, 77-2 CPD ¶ 177.

In addition, the facts show that as far as DCPS was concerned, negotiations had not been completed because matters relating primarily to S&L's compensation proposal remained outstanding as late as March 1994. (AR, Tab E, Ex. 6; PEx. 1) As the Comptroller General said in *D&S Universal Mining, Inc.*:

In order for a binding contract to result, the contracting officer must unequivocally express an intent to accept an offer. Also, the acceptance of a contractor's offer by the government must be clear and unconditional; it must appear that both parties intended to make a binding agreement at the time of the acceptance of the contractor's offer. (citation omitted).

In view of the fact that negotiations were ongoing, there is no evidence of an unequivocal intent on the part of DCPS to accept the protestor's offer.

Finally, the conduct of the parties demonstrates that contrary to S&L's position, protestor clearly recognized that no contract award was made on July 8, 1993, or at any time thereafter. First, in its September 1, 1993, response to the contracting officer, S&L acknowledged that an agreement would have to be negotiated. (AR, Tab E, Ex. 5). Second, the two memoranda on

which S&L places great emphasis were clearly internal communications among DCPS officials.¹¹ Third, both memoranda evince only an intent (or recommendation) to make a contract award. Fourth, from the time DCPS sent the first iteration of the proposed contract to protestor, both parties consistently referred to the documents (collectively) as a "proposed agreement" or "draft agreement." (PExs. 6, 7, 8, 10, 11, 12 and 14). Finally, as late as March 10, 1993, the protestor expressed "hope" that a final agreement would be executed. (PEx. 16). Taken together, these facts contravene any conclusion that a binding agreement between the parties came into being. See *Northpoint Investors*, B-209816, May 17, 1983, 83-1 CPD ¶ 523.

Propriety of the Cancellation

Protestor claims that the DCPS cancellation of the RFP, based upon S&L's proposed compensation, was improper and demonstrated DCPS' lack of good faith and commitment to negotiate the terms of the contract in a fair and honest manner. In support of its position, S&L points to the evidence of extensive and protracted negotiations between the parties, during which DCPS allegedly changed contract terms without notice and consultation and allegedly failed in its commitment to execute a contract already awarded.

Section 3-203.20 of the PPM makes clear that "[o]fferors shall be accorded fair and equal treatment with respect to any opportunity for discussions and revisions of proposals. . . ." This policy is derived from the government's basic obligation, implied in any procurement, to fully and honestly consider bids and proposals. *Health Services Marketing and Development Corporation*, B-241830, March 5, 1991, 91-1 CPD ¶ 247. See also D.C. Code § 1-1181.3 (Supp. 1992). In the context of a negotiated procurement, the contracting officer has broad discretion in deciding whether to cancel a solicitation and need only have a reasonable basis for doing so.¹² *Xactex Corporation*, B-247139, May 5, 1992, 92-1 CPD ¶ 423; *Health Services Marketing and Development Corporation*, B-241830; *Technical Management Services Company—Recon.*, B-238216, July 17, 1990, 90-2 CPD ¶ 40; *Koba Associates*, B-213501, December 15, 1983, 83-2 CPD ¶ 693; *Northpoint Investors*, B-209816; *D&S Universal Mining, Inc.*, B-200815; *A.B. Machine Works, Inc.*, B-187563. See also *McMillan Limited Partnership*, CAB No. P-301, October 22, 1992, 40 DCR 4647, 4654, fn. 6 (in a negotiated procurement, agency must have a reasonable basis to support cancellation of an RFP).

¹¹That protestor could believe that the July 8, 1993, memoranda constituted a contract award strains credulity and is unreasonable in that neither memorandum was even addressed to protestor or its representatives, much less indicates an actual award to the protestor.

¹²There is a distinction between the standards required for cancellation of an invitation for bids and that required for cancellation of an RFP. In formally advertised procurements, "cogent and compelling reasons" are required to support a cancellation. See *First Federal Corporation*, CAB No. P-311, September 4, 1992, 40 DCR 4520; *Northpoint Investors*, B-209816, 83-1 CPD ¶ 523. This difference is based on the anti-competitive result of public disclosure of bids that occurs in advertised, but not negotiated, procurements. *First Federal Corporation*, 40 DCR at 4523, fn. 4; *Northpoint Investors*, B-209816.

In addition, the Comptroller General has upheld the cancellation of a solicitation as proper and not indicative of bad faith where extensive discussions were held, which led the agency to believe that it could not obtain a reasonable price. *E.g.*, *Xactex Corporation*, B-247139; *Koba Associates*, B-213501.

The record shows that between August 27, 1993, and March 10, 1994, the parties exchanged numerous iterations of the proposed contract, many of which concerned protestor's attempts, as DCPS puts it, "to redefine the scope of services by reducing S&L's contractual responsibilities and liability under the proposed contract." (AR, Agency Response, p. 8). Additionally, throughout negotiations, S&L attempted to modify or eliminate several standard contract provisions, *e.g.*, TERMINATION, CHANGES, DISPUTE AND PROTEST PROCEDURE and INDEMNIFICATION clauses. Finally, and significantly, S&L's compensation proposal remained excessive throughout the negotiations; and the parties' failure ultimately to agree on the protestor's compensation led to rejection of its proposal and cancellation of the RFP. In this regard, we find the DCPS actions to be reasonable under the circumstances and clearly in line with its regulations, the provisions of the PPM (§ 3-300.10) and the terms and conditions of the RFP.

When a protestor alleges bad faith on the part of government officials, it bears a heavy burden and must show, by irrefutable proof, that the officials had a specific and malicious intent to injure the protestor. *Recycling Solutions, Inc.*, CAB No. P-377, April 15, 1994, 7 P.D. 5811; *Washington Family Services Associates, Inc.*, CAB No. P-368, June 17, 1993, 41 DCR 3481; *Eaton-Kenway*, B-212575, June 20, 1984, 84-1 CPD ¶ 649; *Koba Associates*, B-213501. We will not attribute prejudicial motives to procurement officials on the basis of inference or supposition and will not find a discretionary action to be arbitrary, capricious or biased if the record indicates a reasonable basis for the action. *Id.*

The record amply demonstrates that the parties engaged in difficult and lengthy negotiations, with primary emphasis on proposed changes to the standard contract provisions, scope of work and protestor's compensation proposal. Considering that payment of excessive costs would not be in the best interest of DCPS and that such costs were the basis for the rejection of S&L's proposal and cancellation of the RFP, we can find no impropriety in DCPS' actions.¹³ Accordingly, we find that protestor has not made the requisite showing for bad faith to warrant our reversal of DCPS' actions. *Washington Family Services Associates, Inc.*, CAB No. P-368.

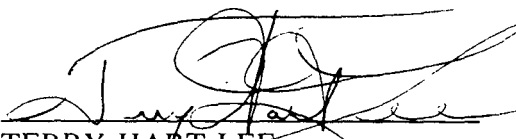
Because we have found no arbitrary, capricious or bad faith action on the part of DCPS as a result of our conclusion that the RFP was properly cancelled, we must reject S&L's claim for proposal preparation costs. *A.B. Machine Works, Inc.*, B-187563.¹⁴

¹³Compare "COMPENSATION" or "CONSIDERATION AND PAYMENTS" clauses in PExs. 3, 6, 7, 8, 9, 12 and 16.



¹⁴Even if we had determined that DCPS' actions were taken in bad faith, the Board has no authority to award attorney's fees. D.C. Code § 1-1189.8(e)(2) (Supp. 1992).

In sum, we find that DCPS' rejection of protestor's offer and cancellation of the RFP after extended, but fruitless, good faith negotiations were reasonable. Accordingly, based on all of the facts and circumstances, and the authorities cited herein, the appeal of the DCPS denial of the protest is **DENIED**.

DATE: September 21, 1994


TERRY HART LEE
Administrative Judge

CONCUR:


LORILYN E. SIMKINS
Chief Administrative Judge
CYNTHIA G. HAWKINS-LEÓN
Administrative Judge