

DISTRICT OF COLUMBIA CONTRACT APPEALS BOARD

PROTEST OF:

SYSTEMS ASSESSMENT & RESEARCH, INC.)	
)	CAB No. P-0738
Under Solicitation No. GAGA-2006-R-0176)	

For the Protester: Julian H. Spirer, Esq., and Brian M. Lowinger, Esq., Spirer & Goldberg, P.C.
For the District of Columbia Public Schools: Aaron E. Price, Sr., Esq., Attorney-Advisor, District of Columbia Public Schools.

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

OPINION DENYING MOTION FOR RECONSIDERATION

Filing ID 15179746

Systems Assessment & Research, Inc. (“SAR”), now represented by counsel, moves for reconsideration of the Board’s decision of September 21, 2006, 54 D.C. Reg. 2033, dismissing SAR’s *pro se* protest of the award of a contract to Columbus Educational Services, LLC, as a special education services provider to assist the District of Columbia Public Schools (“DCPS”) in the implementation of a consent decree entered in the federal class action lawsuit, *Blackman v. District of Columbia, et al.*, 97-CV-1629 (D.D.C.) (“*Blackman* consent decree”). In our decision, we held that the protest should be dismissed because the federal court in *Blackman* exempted DCPS from the Procurement Practices Act (“PPA”) for procurements implementing the *Blackman* consent decree, and the solicitation at issue clearly implemented the consent decree and the PPA exemption. As discussed below, we see no legal error in our holding that the solicitation is not subject to the PPA, and that the Board has no protest jurisdiction over an award challenge. Accordingly, we deny the motion for reconsideration.

DISCUSSION

SAR does not contend that we erred in finding that the solicitation implemented the *Blackman* consent decree. We stated in our decision that DCPS “issued Solicitation No. GAGA-2006-R-0176 for the procurement of special education instructional and related services to assist in the implementation of the *Blackman* consent decree.” 54 D.C. Reg. at 2033. SAR contends rather that DCPS did not elect to waive the procurement laws in the solicitation as authorized in the *Blackman* consent decree. Further, SAR argues that the exemption provided in the *Blackman* consent decree applies “only to the procurement laws treating the contracting process” but is “not intended to wrest authority from the Board to review the contracts from the perspective minimally of due process and fundamental fairness.” (Motion for Reconsideration, at 1-2). The *Blackman* court entered an interim order providing in pertinent part:

Ordered that pending final approval of the Consent Decree, in order to implement the preliminary approved Consent Decree, the [District of Columbia Government is] not bound by the D.C. Procurement Practices Act or any other District or federal law relating to procurement, or any regulations thereunder.

54 D.C. Reg. at 2033. The final consent decree contains identical language. Although SAR focuses on the “not bound by” language in the consent decree as meaning something less than a complete exemption from the PPA, we cannot agree with its analysis. The language of the clause unambiguously provides a complete exemption from the PPA, and, therefore, from our jurisdiction pursuant to the PPA, if DCPS chose to elect the exemption. We concluded that the terms of the solicitation clearly showed that DCPS elected the exemption provided by the *Blackman* consent decree. There are at least 8 references in the solicitation to the *Blackman* litigation or the consent decree: Solicitation Synopsis and Section B.1 (“[DCPS] is seeking a qualified provider of Special Education Services to provide a variety of Special Education Personnel to assist in the implementation of the Blackman-Jones Consent Decree”); Section C.1.1 (“On December 19, 2005, the [District Government] and [DCPS], and the Plaintiffs in the Blackman-Jones class action lawsuit entered into a new consent Decree”); Section C.1.2 (referring to the filing of the Blackman-Jones lawsuits in 1997); Section C.1.3 (indicating that as a result of the Blackman-Jones lawsuits, DCPS seeks a qualified contractor to recruit and hire 46 special education professionals); Section C.2.8.1 (“The Contractor shall ensure [that] assessments and IEP’s meet the Blackman-Jones Consent Decree performance measures. To view the Consent Decree and the performance measures visit the DCPS website....”); Section C.4.4 (“The standards for performance are based on the performance measures for assessments outlined in the DCPS Blackman-Jones Action Plan.”); and Section C.4.7.1 (“Responsibilities shall include . . . collection and evaluation of data for performance measures required by the Consent Decree”).

Section L of the solicitation, entitled “Instructions, Conditions and Notices to Offerors,” contains Sections L.6 and L.8 but significantly omits Section L.7. As noted in our decision in *Banks, et al.*, CAB Nos. P-0743, P-0744, Jan. 9, 2007, 54 D.C. Reg. 2060, the missing DCPS standard solicitation provision in Section L.7 is entitled “Proposal Protests” and provides:

Any actual or prospective bidder, offeror, or contractor who is aggrieved in connection with the solicitation or award of a contract, must file with the D.C. Contract Appeals Board (Board) a protest no later than 10 business days after the basis of the protest is known or should have been known, whichever is earlier. A protest based on alleged improprieties in a solicitation which are apparent prior to the time set for receipt of initial protests shall be filed with the Board prior to bid opening or the time set for receipt of final proposals. . . .

54 D.C. Reg. at 2062. The incorporation of L.7 in *Banks* confirmed that DCPS did not invoke the *Blackman* consent decree waiver of the PPA and thus we had jurisdiction in that case to consider protests of the awards. *Id.* In the present case, however, the omission of the protest provision, coupled with the repeated references in the solicitation to implementing the *Blackman* consent decree, demonstrate the intent of DCPS to be exempt from the PPA and thus from the Board’s protest jurisdiction. We recommend for future procurements, where DCPS intends to invoke the *Blackman* consent decree’s procurement law waiver, that the contracting officer expressly invoke the procurement law waiver in the solicitation.

SAR also contends that DCPS “explicitly subjected the solicitation to the PPA” by including Solicitation Section I.1. (Supplement to Motion for Reconsideration, at 2), which provides:

The Standard Contract Provisions for use with District of Columbia Government Supply and Services Contracts dated November 2004, (Attachment J.1) the District of Columbia Procurement Practices Act of 1985, as amended, and Title 27 of the District of Columbia Municipal Regulations as amended are incorporated as part of the contract resulting from this solicitation.

This provision states that the PPA is applicable to the contract resulting from the solicitation. It does not make the PPA applicable to the solicitation itself.

Finally, SAR argues that the contracting officer effectively amended the solicitation to incorporate Board protest jurisdiction through an email sent to SAR’s representative. Attached to the Motion for Reconsideration is an exhibit containing two emails. The first email, dated June 23, 2006, was sent from Mr. Don Early of SAR to the contracting officer, Ms. Glorious Bazemore, and contains the following: “[SAR] is formally submitting an official protest to subject contract. Please review the attached documents and contact me if there are any questions. . . .” (Motion for Reconsideration, Ex. 1). Ms. Bazemore responded by email later on the evening of June 23, stating:

Any actual or prospective offeror or contractor who is aggrieved in connection with the solicitation or award of a contract, must file with the D.C. Contract Appeals Board (Board) a protest no later than 10 business days after the basis of the protest is known The protest shall be filed in writing, with the Contract Appeals Board The aggrieved person shall also mail a copy of the protest to the Contracting Officer for the solicitation. DCPS will not take any action on this informal notification.

(*Id.*). SAR contends that this communication “invoked the jurisdiction of the Board and bound both the Board and SAR to the use of the Board to resolve any dispute.” We believe that the contracting officer made an inadvertent error in suggesting that SAR should follow the protest procedures found in the standard solicitation protest provision (Section L.7) because, as we have discussed above, DCPS intentionally omitted Section L.7 as part of invoking the *Blackman* consent decree’s procurement law waiver. Although the contracting officer’s informal email responded to SAR’s equally informal email “protest”, there is no evidence that the contracting officer intended her email to constitute an amendment of the solicitation and a repudiation of DCPS’s earlier election of the *Blackman* consent decree’s procurement law exemption. DCPS subsequently confirmed its intent to rely on the *Blackman* exemption in its Agency Report by stating as a defense to the protest that “the United States District Court in [*Blackman*] waived the procurement laws of the District of Columbia as they apply to implementation of the Blackman/Jones Consent Decree.”

For the reasons discussed above, we deny SAR's motion for reconsideration.

SO ORDERED.

DATED: June 11, 2007

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

CONCURRING:

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