

GOVERNMENT OF DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD
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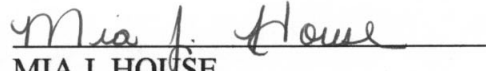
Date: September 16, 1998

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SUBJECT: CAB No. P-547, Protest of Kidd International Home Care Services, Inc.

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


MIA J. HOUSE
Clerical Assistant

Attachment

GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

PROTEST OF:

KIDD INTERNATIONAL HOME
CARE SERVICES, INC.

Under RFP No. JA-SC-CM-70010-01

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CAB No. P-547

For the Protester: Uduak Ubom, III, Esquire and Kathy A. White, Esquire. For the Government: H. Christopher Malone, Esquire, Warren J. Nash, Esquire, and Howard S. Schwartz, Esquire, Assistants Corporation Counsel.

Opinion by Judge Phyllis W. Jackson, with Chief Judge Lorilyn E. Simkins and Judge Claudia Booker, concurring.

OPINION

Kidd International Home Care Services, Inc. ("Kidd") has timely challenged: (1) the award of several 120-day letter contracts for the provision of residential services under solicitation number JA-SC-CM-70010-01 to undisclosed awardees; and (2) the proposed award of the case management component of the same contract. Having received the highest score on its proposal, Kidd argues that the District should have awarded the subject contract to it. Kidd further argues that the contracting officer's determination that Kidd was nonresponsible without any written explanation of what constituted the "non-responsible" determination and without an oral de-briefing is inequitable and a violation of law. For the reasons set forth below, we deny the protest.

BACKGROUND

On January 17, 1997, the Department of Human Services ("DHS"), Commission on Mental Health Services ("CMHS") issued RFP No. JA-SC-CM-70010-01 ("RFP 70010") to provide residential, case management and related supportive services for mentally ill persons. (Agency Report, ("AR"), Exhibit, ("Ex.") 1). The RFP provided for a closing date of February 21, 1997. On February 18, 1997, DHS issued Amendment No. 1 changing the closing date to March 7, 1997. (AR, Ex.2). On March 7, 1997, DHS issued Amendment No. 2 which substantively amended various provisions of the RFP and extended the closing date to March 21, 1997. (AR, Ex. 3). On March 21, 1997, DHS issued Amendment No. 3 extending the closing date to April 1, 1997. (AR, Ex. 4). On April 1, 1997, DHS issued Amendment No. 4 extending the closing date to April 11, 1997 (AR, Ex. 5). On April 7, 1997, DHS issued Amendment No. 5 that revised certain pages of the solicitation and provided responses to questions of prospective offerors. (AR, Ex. 6). On April 11, 1997,

thirteen offerors, including Kidd, submitted proposals to DHS.

Although RFP 70010 is the subject of this protest, an examination of two other contracts, Contract No. JA-AC-CM-70073-01 ("70073") and Contract No. JA-AC-CM-70074-01 ("70074") is relevant to the background of this protest. Kidd and the District executed Contract No. 70073 (AR, Ex. 7, Attachment B) on February 3, 1997. Contract No. 70073 was the subject of an investigation which arose out of allegations by Kidd employees of certain unlawful activities at facilities operated by Kidd. By memorandum dated January 7, 1998, to Dr. Scott Nelson, Office of the Receiver, the Acting Chief of the Office of Contracts and Procurement through Johnny Allem, the Deputy Commissioner on Mental Health, requested an investigation of Contract No. 70073. (AR, Ex. 7, Attachment A). DHS delayed the award of the subject contract pending the investigation of Contract No. 70073. By memorandum dated February 26, 1998, the Chief of the Office of Investigations and Compliance forwarded the results of the investigation to the Receiver for CMHS. (AR, Ex. 9). By letter dated March 23, 1998, DHS' Contracting Officer terminated for convenience Contract Nos. 70073 and 70074. (AR, Ex. 11). The March 23, 1998 termination letter was hand delivered to Kidd's address and received by Sandee Johnson. The termination letter recites the bases for the Contracting Officer's termination of Kidd. (AR, Ex. 11, Receipt Attachment). The termination letter states:

This decision is based on a report prepared by The Department of Human Services' Office of Inspection and Compliance (OIC) as the result of their investigation of alleged drug use and sexual misconduct in the resident (sic) located at # 50 K Street NW Washington, D.C. and the following violations:

1. Article II, Section D & E- Contractor shall maintain individual personnel filed for all Staff which contain required time and attendance, personnel and other employment related documentation, to include "notation of any allegations of professional or other misconduct" [], as well as, the contractor's actions in response to such allegations.
2. Article II, Section H- Ensure that direct care staff does not have any prior criminal record or convictions for drug possession or distribution.
3. Article VII, Section C- The contractor shall report unusual incidents within twenty four (24) hours. "An unusual incident is an event that affects staff or clients which is significantly different from the regular routine or established procedures.
4. Article XVII, Section B- Certification Regarding a Drug Free Workplace

(AR, Ex. 11).

On March 25, 1998, Kidd filed an appeal with the Board of the termination action in the

aforementioned two contracts (CAB No. D-1041).

By letter dated March 30, 1998, pursuant to the Freedom of Information Act (FOIA), Kidd requested a copy of the investigative report from the Acting Chief of Contracts and Procurement. (Ex. 12). The Contracting Officer issued a determination and findings dated March 31, 1998, finding Kidd nonresponsible for award under the RFP which is the subject of this protest. (AR, Ex. 13).¹⁷ In pertinent part, the Determination and Findings, states the following "facts which justify determination of nonresponsibility":

During the final stages of the solicitation process and prior to award, allegations of drug use, sexual misconduct, and failure to timely pay subcontractors were reported to the CMHS Program staff regarding Kidd International Home Care Services, Inc. As a result of these allegations, an investigation was conducted by the Office of Inspection and Compliance (OIC) of the Department of Human Services.

The investigation consisted of interviews with clients, former and current staff, neighbors of the residential facility, local police for clearance records, review of Kidd's personnel files, as well as review of the contract. Upon completion of the investigation OIC recommended that all contractual services with Kidd International Home Care Services, Inc. under contract JA-AC-CM-70073-01 be terminated based on the following:

- A. Violation of Article XVII, Section B- Certification Regarding a Drug-Free Workplace
- B. Violation of Article II, Sections D & E - Contractor shall maintain individual personnel files for all staff which contain required time and attendance, personnel and other employment related documentation, to include "notation of any allegations of professional or other misconduct", as well as the Contractor's actions in response to such allegations.
- C. Violation of Article II, Section H - Ensure that direct care staff does not have any prior criminal record or convictions for drug possession or distribution.
- D. Violation of Article VII, Section C - The Contractor shall report unusual incidents within 24 hours. An unusual incident is an event that affects staff or clients which is significantly different from the regular routine or established procedure.

¹⁷This Determination and Findings identifies Contract No. 70073 in its caption, although it describes RFP 70010 in the "Facts Which Justify Determination of Nonresponsibility." (AR, Ex. 13).

In conclusion, the Contracting Officer's determination states:

Based on the above findings from the Office of Inspection and Compliance and in accordance with 27 DCMR, Chapter 22, Section 2200, it is hereby determined that the contractor is non-responsible.

(AR, Ex. 13).

On March 31, 1998, the Contracting Officer issued a Determination and Findings For Award to Other Than the Highest Scored Offeror. (AR, Ex. 14). On April 1, 1998, the Chief Procurement Officer approved this "Determination and Findings for Award to Other Than the Highest Scored Offeror" (AR, Ex. 14). The Contracting Officer stated as basis for the need to award to other than the highest scored offeror the following:

"Currently contractors are providing services on a continued bases pending award from solicitation #JA-SC-CM-70010-01. The need to *award other than high score* (sic) is substantiated in the Determination and Finding of Nonresponsibility of Kidd International Home Care Services based on the investigation from the Department of Human Services, Office of Inspection and Compliance."

(AR, Ex. 14).

On May 1, 1998, CMHS issued a determination and findings approving the use and execution of letter contracts with seven offerors which provided for the period of the contracts not to exceed 120 days. (AR, Ex. 15). Thereafter, the following events took place:

- On May 1, 1998, Kidd again requested a copy of the investigation report pursuant to FOIA. (AR, Ex. 16).
- By undated letter to the CMHS Receiver, Kidd requested to be informed of the status of its proposals. (AR, Ex. 17).
- By letter dated May 14, 1998, to the Contracting Officer, Kidd requested that all copies of its proposal be returned. (AR, Ex. 18).
- By letter dated May 21, 1998, Kidd sent a letter to the Contracting Officer requesting a debriefing on the issuance of letter contracts under RFP 70010. (AR, Ex. 19).
- By letter dated June 5, 1998, the Contracting Officer responded to Kidd's letters. (AR, Ex. 20).

By the letter dated June 5, 1998, the Contracting Officer of CMHS: (a) denied Kidd's request for the return of its proposals; (b) advised Kidd that the CMHS, Office of Contracts and Procurement had issued 120 day letter contracts for the residential components of the above referenced solicitation and had not awarded the case management part of the solicitation; and (c) advised Kidd that the Contracting Officer's June 5, 1998 letter was to serve as a written debriefing. Regarding the debriefing, the Contracting Officer stated:

The purpose of a debriefing is to inform unsuccessful offerors of the weakness of their proposals. Your proposal in response to the aforementioned solicitation was the highest scored. The reason for not awarding a contract to your firm was based upon a nonresponsible determination which was made by the Contracting Officer of record. An oral debriefing will not provide any additional information. According, (sic) this letter serves as a written debriefing. (AR, Ex. 20)

On June 17, 1998, Kidd filed this protest with the Board. On July 24, 1998, the District filed the Agency Report. The Agency Report included twenty exhibits of which two - Exhibit No.9, "Report from Office of Investigations and Compliance to Receiver dated February 26, 1998" and Exhibit No. 10, "Memorandum from Community Programs to Receiver dated March 9, 1998" were filed *in camera*. Kidd did not file a response to the Agency Report.

DISCUSSION

Kidd argues that the failure to award to it based on the Contracting Officer's determination that Kidd was nonresponsible without explanation of what constituted the "non-responsible" determination and without granting Kidd's request for an oral de-briefing is inequitable and in violation of law.

Bidder responsibility is a prerequisite to award pursuant to an RFP. D.C. Code §1-1183.4. A responsible bidder is a "person who has the capability in all respects to perform fully the contract requirements, and the integrity and reliability which will assure good faith performance." *Id.* §1-1181.7(40). The procurement regulations require that the contracting officer make award only to responsible contractors, that the Contracting Officer make a responsibility determination in writing prior to award. 27 DCMR §§2200.1-2200.2. The procurement regulations also set forth responsibility requirements which include a satisfactory performance record and a satisfactory record of integrity and business ethics. 27 DCMR §§ 2200.4 (c) and (d). While our standard for reviewing a contracting officer's responsibility determination is a *de novo* review with no presumption of agency correctness (D.C. Code § 1-1189.3), the determination of responsibility is a matter of business judgment. The Board accords contracting officers broad discretion in this determination, consistent with well-settled procurement law principles that contracting officers shall have wide latitude to exercise business judgment. *Ideal Electrical Supply Corp.*, CAB No. P-372, Aug. 13, 1993, 41 D.C. Reg. 3603; 27 DCMR § 1003.4. Thus we will not overturn a determination of responsibility unless a protester can show fraud, bad faith, or a failure by the protester to adhere to definitive responsibility criteria, or that such a determination lacked a reasonable basis. *Central Armature/Fort Myer*, CAB No. P-478, June 6, 1997, 44 D.C. Reg. 6823, 6829; *Dixon's Pest Control Services, Inc.*, CAB No. P-401, Apr. 6, 1994, 42 D.C. Reg. 4528; *C.P.F. Corp.*, CAB No. P-413, Nov. 18, 1994, 42 D.C. Reg. 4902, 4909; *Alexandria Scale t/a Bay Scale, Inc.*, CAB No. P-361, Mar. 25, 1993, 40 D.C. Reg. 5055, 5060. A determination of responsibility is based on information available at the time the contracting officer makes the decision, and where the evidence shows that a contracting officer had a reasonable basis on which to determine the protester nonresponsible, we will not disturb such a determination. *J&L Contract Services, Inc.*, CAB No. P-313, July 2, 1993, 40 D.C. Reg. 4565,

4567.

This Board has held that nonresponsibility determinations may be based on the procuring agency's reasonable perception of inadequate prior performance, even where the contractor disputes the agency's interpretation of the facts. *Medical Extension Services, Inc.*, CAB No. P-378, Jan. 14, 1994, 41 D.C. Reg. 3918, 3924, citing *Firm Erich Bernion GmbH*, B-233106, 88-2 CPD ¶ 632. Therefore, the contracting officer may base his or her determination of nonresponsibility on record evidence without affording offerors the opportunity to explain or otherwise defend against the evidence; and there is no requirement that offerors be advised of the determination in advance of the award. *Id.*


We must ask therefore whether the basis upon which the contracting officer determined that Kidd was nonresponsible was reasonable. The contracting officer based his determination of nonresponsibility on the OIC investigative report. Here, the evidence shows that the contracting officer had a reasonable basis on which to determine the protestor nonresponsible. The Protester has neither alleged nor demonstrated bad faith by the District in determining Kidd nonresponsible.

When a contract is awarded on a basis other than price alone, the District is required to provide a debriefing unless the District determines that to do so would not be in the District's best interests. (27 DCMR §1630.5). In response to Kidd's request for a debriefing the Contracting Officer states that an oral debriefing will not provide any additional information and that the response itself is a written debriefing. While an oral debriefing may have led to additional details concerning the investigation, the termination letter for Contract No. 70073 and Contract No. 70074 provided the Protester with sufficient information regarding the reasons for the District's nonresponsibility determination. Kidd received this letter on March 26, 1998.


Although the District may not have technically conformed to the requirement to provide a debriefing in response to Kidd's written request in accordance with 27 DCMR § 1630.5, the District otherwise satisfied the underlying purpose of this debriefing requirement by providing sufficient information in the termination letter. The record clearly shows that Kidd had sufficient information regarding its deficiencies to understand the nature of the nonresponsibility determination. Therefore, we do not find that this technical lapse is enough to sustain this protest.

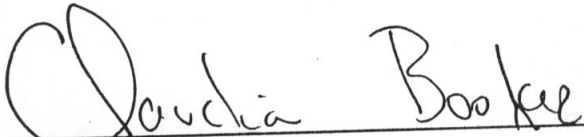
Therefore, based upon all of the facts and circumstances and the reasons set forth herein this protest is **DENIED**.

Date: September 15, 1998


PHYLLIS W. JACKSON
Administrative Judge

CONCURRING:


LORILYN E. SIMKINS
Chief Administrative Judge


CLAUDIA BOOKER
Administrative Judge