

GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

PROTEST OF:

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| Anchor Construction Corporation |) | |
| |) | CAB No. P-0737 |
| Under Solicitation No. POAM-2006-B-003-AE |) | |

For the Protester Anchor Construction Corporation: Leonard A. White, Esq., White & Horton. For the District of Columbia Government: Howard Schwartz, Esq., Senior Assistant Attorney General, and Talia Cohen, Esq., Assistant Attorney General.

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

OPINION

(Lexis-Nexis Filing 13393125)

By letter to the Board dated June 16, 2006, protester Anchor Construction Corporation (“Anchor”) protests the responsibility of Consys Engineering, Inc. (“Consys”), and the responsiveness of the bid of K.C. Home Improvement & Construction Company (“KC Home”), submitted to the District of Columbia on June 8, 2006. The District filed a motion to dismiss the protest, asserting that the protest is premature because the District had not yet determined whether any of the bidders had submitted a responsive bid. The District withdrew the motion to dismiss after the contracting officer determined Consys to be a responsible bidder and filed an Agency Report, urging us to deny the protest because the record supports the determination that Consys is a responsible bidder. Although Anchor contends that Consys is incapable of performing at least 50 percent of the contract work with its own forces as required by the solicitation, we agree with the District that the record supports finding Consys responsible. Accordingly, we deny the protest.

FACTS

Anchor, Consys, KC Home, and Civil Construction submitted bids to the Office of Contracting and Procurement (“OCP”) on June 8, 2006, for the repaving of the parking lot at the District’s Department of Motor Vehicles Headquarters at 95 M Street, S.W., in Washington, D.C. Consys submitted the lowest priced bid, followed by KC Home and Anchor. On June 19, 2006, Anchor filed its protest, alleging that Consys is not a responsible bidder, and that KC Home did not submit a responsive bid because its bid did not include a proper bid bond.

The District initially responded by filing a motion to dismiss the protest, asserting that the District had not completed its analysis of the bids as of June 16, 2006, the date of the filing of the protest. By Determination and Findings dated August 9, 2006, and

transmitted to the Board on August 21, 2006, the contracting officer determined that Consys is a responsible bidder. By Determination and Findings to Proceed with Award after Receipt of a Protest dated August 10, 2006, the Chief Procurement Officer determined that Consys' bid is responsive and that Consys is a responsible bidder, and recommended award to Consys. On August 18, 2006, the protester filed its Response to the District of Columbia's Motion to Dismiss, Opposition to the District's Request to Award and Motion to Reject All Bids and Readvertise. On August 21, 2006, the District issued to Consys a letter notifying Consys of its intent to award the contract. On the same date, the District filed with the Board its request to withdraw its earlier motion to dismiss. On September 11, 2006, the District filed its Agency Report.

DISCUSSION

We exercise jurisdiction pursuant to D.C. Code § 2-309.03(a)(1).

We sustain the Chief Procurement Officer's ("CPO") determination to proceed with award to Consys. In the determination, the CPO sets forth an urgent need to proceed with award of the contract, namely that re-paving of the parking lot at the M Street facility was necessary to provide proper and safe movement of vehicles and access to the facility for citizens. Delay in completion of the parking lot also would disrupt the opening of an elementary school next to the lot. In its response, Anchor asserts that the District should not be allowed to use its own failure to timely procure the repaving services as a justification for proceeding during pendency of this protest. Anchor does not set forth any irreparable harm that would occur if the District proceeds with award and the Board retained the ability to make an effective remedy had we sustained the protest. See *Whitman-Walker Clinic, Inc.*, CAB Nos. P-0672, P-0674, July 25, 2003, 50 D.C. Reg. 7521.

On the merits, Anchor alleges that Consys is not a responsible bidder, and that KC Home did not submit a responsive bid because its bid did not include a proper bid bond. The latter protest ground is moot in light of our decision below sustaining the contracting officer's responsibility determination.

The contracting officer set forth in his determination for contractor responsibility that: (a) Consys has the necessary financial resources to adequately perform the contract; (b) Consys has the ability to comply with the required performance of the contract; (c) Consys has a satisfactory past performance record; (d) Consys has a satisfactory record of integrity and business ethics; (f) Consys is in compliance with the applicable District licensing and tax laws and regulations; (g) Consys has the necessary equipment or ability to obtain them; and (h) Consys meets the subcontracting requirements in Section M, including that Consys perform at least 50 percent of the on-site work with its own workforce. Although Anchor urges that Consys cannot perform at least 50 percent of the work with its own forces, there is no evidence in the record persuading us that the contracting officer erred in his determination. Anchor also implies that it was wrong for the contracting officer to consider responsibility data after bid opening, but the law is

clear that responsibility data may be obtained by the agency after bid opening but prior to contract award.

Because a responsibility determination requires the contracting officer to exercise business judgment, and we accord the contracting officer broad discretion in this determination, we will not reverse an affirmative determination of responsibility unless the protester shows that the determination was made in bad faith or lacked a reasonable basis, or that the bidder failed to adhere to definitive responsibility criteria. *C.P.F. Corporation*, CAB No. P-0413, Nov. 18, 1995, 42 D.C. Reg. 4902 (citing 27 DCMR §§ 2200, 2204; *Ideal Electrical Supply Corp.*, 41 D.C. Reg. 3603, 3606; *Dixon's Pest Control Services, Inc.*, CAB No. P-0401, Apr. 6, 1994, 42 D.C. Reg. 4528, 4529.

Anchor has not shown evidence of bad faith connected to the responsibility determination. Moreover, the record shows that the contracting officer had a reasonable basis for making the affirmative responsibility determination for Consys. Accordingly, we sustain the contracting officer's determination of responsibility and deny the protest.

SO ORDERED.

DATED: January 9, 2007

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

CONCURRING:

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