

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD**

PROTEST OF:

JONES & WOOD, INC.)	
)	CAB No. P-130
Under IFB No. 4998-72-A1-88,)	
IFB No. 5043-73-A1-88 and)	
RFP No. 5131-72-N1-88)	

For the Protestor: Leonard A. White, Esquire. For the Government: Nancy G. Dunn, Assistant Corporation Counsel.

Opinion by Administrative Judge Zoe Bush, with Administrative Judges Terry Hart Lee and Benjamin B. Terner concurring.

OPINION

Jones & Wood, Inc. (Protestor), protests the cancellation of the above-captioned Invitations for Bids (IFB) and the issuance of the above-captioned Request for Proposals (RFP) concerning the Kenilworth Courts/Parkside Addition Modernization. Protestor challenges the September 7, 1988, cancellation of bids, and the reissuance of the project under an RFP and asserts that the actions of the contracting officer are not in accordance with the Procurement Practices Act of 1985.

According to the Protestor, on May 5, 1988, it received a formal notice from the District government indicating that its bid for Package 1, Mechanical, Plumbing & Site Utilities was being accepted and, therefore, Protestor asserts that it has a contract with the District. Protestor argues that the District is wrong to try to reject its "bid" because the provisions of D.C. Code §1-1183.3(e) require that a contract be awarded with reasonable promptness by written notice. According to Protestor, D.C. Code §1-1189.15 makes the notice determination final and conclusive as a matter of law.

Protestor also argues that issuance of the RFP includes in it the identical mechanical package as the cancelled IFB and therefore seeks to obligate the same public funds twice. Finally, Protestor argues that it is arbitrary and capricious for the District to use "two step sealed bidding" with a time frame which calls for Step 1 proposals on September 27, and evaluation on September 28; receipt of Step 2 proposals on September 29, and award on September 30th. This protest was filed on September 16, 1988.

The District's agency report was filed on November 22, 1988. The report states that Jones & Wood bid only on IFB 4998-72-A1-88 and did not bid on either IFB 5043-73-A1-88 or on RFP No. 5131-72-N1-88. In its report, the District explains that on May 5, 1988, it sent a Notice of Bid Acceptance to Jones & Wood concerning IFB 4990-72-A1-88. However, the District disputes that this Notice is tantamount to a contract with Protestor, as claimed by Protestor. According to the District, a contract is deemed to have been awarded on the date the contracting officer signs the contract, pursuant to 27 DCMR §1541.5. The District further explains that it is undisputed that the contract was never signed by the contracting officer, and therefore the contract was never awarded.

The District further argues that at the time the protest was filed, counsel for Jones & Wood sought agency reconsideration of the cancellation of the IFB. As a result, the contracting officer issued a termination for convenience pursuant to Article 6 of Standard Contract Provisions. According to the District, in a telephone conversation on November 15, 1988, with agency counsel, counsel for Protestor stated that the termination for convenience made the cancellation question "moot" and left only the issuance of RFP 5131-72-A1-88 unresolved. In its December 14, 1988, response to the agency report, Protestor acknowledges that the bid cancellation was converted to a termination for convenience under Article 6 and Protestor takes the position that this action precludes any further "protest" concerning that bid.

The Board agrees with the parties that the termination for convenience renders the issue of whether the Protestor had a "contract" under the canceled IFB moot.

With regard to the Protestor's contention that public funds were twice obligated, the District asserts that that argument is absurd because once the bids were rejected, and the IFB cancelled the funds were no longer obligated. The District further asserts that use of two-step sealed bidding, as well as the time period for evaluating the proposals is totally within the discretion of the contracting officer, pursuant to 27 DCMR §1553.2. The Board finds the District's arguments persuasive on both points.

Protestor's response to the agency report was filed on December 14, 1988. In its response, Protestor takes issue with a statement made in the chronology of events set forth in the agency report. Under Section B of the Chronology, for March 2, 1988 it is stated:

The Department sent notice to all bidders advising that all bids were rejected and negotiation would be held with the most responsive bidders.

Protestor asserts that in public procurement, the concept of determining which bidder is the "most" responsive is contrary to federal and District procurement acts and

regulations because it converts the sealed bid process into a guessing game. Protestor therefore concludes that the instant procurement process was illegal.

The Board does find most troubling the statement referenced in the chronology. However, upon review of the March 2, 1988 Notice, it becomes evident that the statement in the chronology is inaccurate. The March 2, 1988 Notice, concerning IFB No. 4998-72-A1-88, in fact, states:

All bids submitted on the Subject IFB have been rejected. The Department is authorized to negotiate with the responsible bidders for the work described in the IFB without re-advertising the solicitation.

You are hereby invited to submit a proposal for the bid packages you previously bid on.... (emphasis supplied).

This notice is consistent with District regulations for negotiation after cancellation of invitations for bids, 27 DCMR §1601.1, which provides:

If the Director has determined that an invitation for bids ("IFB") is to be canceled and that use of negotiation is appropriate to complete the procurement, the contracting officer may award after using negotiation procedures without issuing a new solicitation if all of the following conditions are met:

- (a) Notice of intention to use negotiation procedures and a reasonable opportunity to negotiate is given by the contracting officer to each responsible bidder that submitted a bid in response to the IFB;
- (b) The negotiated price is the lowest negotiated price offered by any responsible bidder; and
- (c) The negotiated price is lower than the lowest rejected bid price of a responsible bidder that was received under the IFB. (emphasis supplied.)

Clearly, the chronology in the agency report failed to accurately summarize the March 2, 1988 Notice. However, it is the Notice that is controlling here in determining whether the District has complied with applicable procurement regulations, not the chronology.

Protestor next claims that converting an IFB into an RFP is without precedent and contrary to the spirit, intent and authority of the D.C. procurement code. The

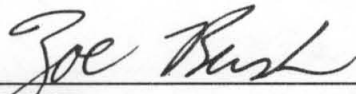
Board does not agree and refers Protestor to 27 DCMR §1601, Negotiation After Cancellation Of Invitation For Bids, quoted in part above.

Protestor challenges the District's assertion that it chose the two-step bidding method because of the complexity of the specifications and bids. The Board does not find merit in Protestor's challenge and refers Protestor to 27 DCMR §1550, Two-Step Sealed Bidding.

Upon review of the pleadings submitted, the Board finds that the District complied with applicable procurement regulations in cancelling the IFB's at issue (27 DCMR §1530), and subsequently issuing the RFP (15 DCMR §1601).

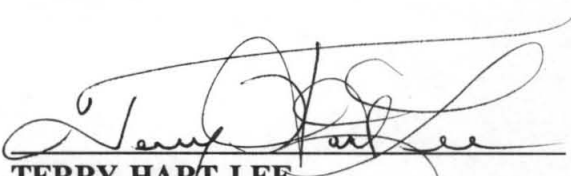
Therefore, the protest is DENIED.

DATE: February 13, 1992

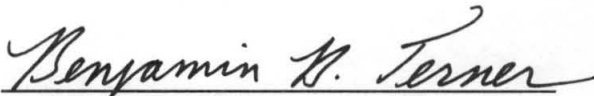


ZOE BUSH
Chief Administrative Judge

CONCUR:



TERRY HART LEE
Administrative Judge



BENJAMIN B. TURNER
Administrative Judge