

DISTRICT OF COLUMBIA CONTRACT APPEALS BOARD

PROTEST OF:

CNA CORPORATION)	
)	CAB No. P-0826
Solicitation No: DCKA-2009-B-0193)	

For the Protester, CNA Corporation: John C. Cheeks, CEO, *pro se*. For the District of Columbia Government: Alton E. Woods, Esq., Assistant Attorney General.

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

OPINION

Filing ID 29422218

Protester, CNA Corporation, challenges award of a contract and alleges that other bidders committed non-collusion affidavit violations. The District filed a motion to dismiss the protest, arguing that CNA's bid was nonresponsive, CNA lacks standing as the fourth lowest bidder, and CNA's protest lacks a clear and concise statement of its legal and factual grounds and is frivolous. We agree with the District that CNA's bid was nonresponsive and that its collusion allegations are meritless. Accordingly, we dismiss the protest with prejudice.

BACKGROUND

On August 25, 2009, the Office of Contracting and Procurement ("OCP") advertised Invitation for Bids No. DCKA-2009-B-0193 ("IFB") for the Citywide Safe Routes to School Project in the Washington Times and posted it on its website. The solicitation, issued on behalf of the District's Department of Transportation ("DDOT"), was for multiple contractors to provide the installation and reconstruction of small scale safety improvements on roadways and at intersections within the District of Columbia. (Motion to Dismiss Ex. 1(a)). Bids were due and received on September 28, 2009, as follows:

1. Anchor Construction	\$2,161,473
2. Capital Paving of DC	\$2,341,770
3. Fort Myer Construction	\$2,344,870
4. CNA	\$2,376,095.90 as corrected
5. Civil Construction	\$2,415,255
6. Prince Construction	\$2,440,235
7. Omni Excavators	\$2,617,405
8. A&M Concrete Corp.	\$2,682,519.35 as corrected
9. Potomac Construction Co.	\$2,847,280

(AR Ex. 5). Subsequent to the bid tabulation, the contracting officer informed CNA that a mathematical error had been discovered in line 1200 of its bid regarding mobilization, and that the amount had been adjusted to the allowable maximum amount of \$189,337.90.

The IFB required that bidders provide a bid security for a period of 90 working days after bid opening. The appropriate bid guaranty form was made a part of the bidding documents. (Motion to Dismiss Ex. 1 (a)). In the "Instructions to Bidders" section of the Standard Contract Provisions for Construction Projects, Article 12, Bond Requirements, bidders were informed that no bid will be accepted unless it is guaranteed by a bid bond with good and sufficient sureties, a certified check payable to the District Treasurer, negotiable United States bonds (at par value), or in an irrevocable letter of credit in an amount not less than 5 percent of the bid as a bid guaranty. The "bid bond" submitted by CNA is an unsigned letter to CNA from Tobi Wilkins of Quantum Corporate Funding, Ltd., dated September 25, 2009, stating:

RE: FY-09 CITY-WIDE SAFE ROUTES TO SCHOOL

GOVERNMENT OF THE DISTRICT OF COLUMBIA DEPARTMENT OF
TRANSPORTATION

DCKA-2009-B-0193 BID/CONTRACT AMOUNT \$3,194,813.00

OFFER EXPIRES: DECEMBER 25, 2009 @ 2:00 PM EST

This letter will verify that your letter of credit/factoring line (75%) is, indeed, in place. We will purchase whatever invoices you submit to us that we can verify in writing with your procurement officer that the work you are billing for has been performed and accepted or the services you are billing for has been rendered...dollar amount is correct and they will pay Quantum.

I am attaching the letter they would have to sign for their perusal and OK.

(Motion to Dismiss, Ex. 6).

On September 29, 2009, CNA filed its protest, asking the Board to: (1) grant its protest based on the "NON-COLLUSION AFFIDAVIT violations" of companies that responded to the IFB (except CNA); (2) "dismiss all companies listed who submitted bids by engaging or sharing common board of director(s), ownership affiliation, financial interest, family relations or Sub Contractor single tier price fixing and violation of non-collusion affidavit"; and (3) that "DC OCP/DC DOT release and suspend all affiliated companies listed, in violation of the NON-COLLUSION AFFIDAVIT, from bidding on solicitations and performing DC Public Works Contracts for a period of seven years each from 09/28/09 to 12/30/16." CNA has presented no documents or other evidence to support its allegations.

On October 19, 2009, the contracting officer, Mr. Jerry Carter, executed a declaration respecting the protest stating, in part, that:

5. In two prior protests before the CAB (P-0794 and P-0810), as in this protest, CNA has made the same allegation of collusive bidding by other contractors. In each case, in accordance with 27 DCMR § 1007.2, I requested that CNA provide documents to me to support the allegations. CNA never provided any documents to me to support the allegations.

6. On May 18, 2009, I attended a meeting with John C. Cheeks, CNA's CEO, to discuss bids that he had submitted on other solicitations, and to also discuss his allegation of collusive bidding among bidders. The meeting was held at the Office of Contracting and Procurement (OCP) and was also attended by Alton E. Woods, from the District's Office of the Attorney General. In this meeting Mr. Cheeks told me that he had documents to support all of the allegations and would provide them to me after the meeting. I told Mr. Cheeks that if he provided evidence to me to support the allegations of collusive bidding, that I would investigate the matter and refer the issue to the District's Chief Procurement Officer, as required by 27 DCMR § 1007.2. As of this date, Mr. Cheeks has not provided any information to me to support this assertion.

(Motion to Dismiss Ex. 5).

On October 19, 2009, the District filed a motion to dismiss. On November 9, 2009, CNA responded to the District's motion to dismiss. On November 30, 2009, the District filed a determination and finding to proceed with contract award and performance ("D&F"). On December 8, 2009, CNA filed its opposition to the D&F, and a statement at paragraph 3 that: "CNA shall continue to file bid protests with the approval of District of Columbia Contract Appeals Board each time when CNA is exposed to bid rigging, non-collusion violations, discrimination and/or contract steering. . . ."

DISCUSSION

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

A. Responsiveness of CNA's Bid

The IFB required that bidders provide a bid security for a period of 90 working days after bid opening. The appropriate bid guaranty form was made a part of the bidding documents. In the "Instructions to Bidders" section of the Standard Contract Provisions for Construction Projects, Article 12, Bond Requirements, bidders were informed that no bid will be accepted unless it is guaranteed by a bid bond with good and sufficient sureties, a certified check payable to the District Treasurer, negotiable United States bonds (at par value), or in an irrevocable letter of credit in an amount not less than 5 percent of the bid as a bid guaranty.

We have consistently recognized that a bid bond is a material requirement because it is a type of security that assures that a bidder will not withdraw its bid within the time specified

for acceptance and, if required, will execute a written contract and furnish payment and performance bonds. The purpose of a bid bond is to secure the liability of a surety to the government in the event the bidder fails to fulfill these obligations. When a bidder supplies a defective bond, the bid itself is rendered defective and must be considered nonresponsive. *Nation Capital Builders, LLC*, CAB No. P-0761, Nov. 20, 2007, 57 D.C. Reg. 741; *NAPA Development Corp.*, CAB No. P-0384, Nov. 19, 1993, 41 D.C. Reg. 3839.

Clearly, CNA did not submit with its bid a proper surety bond, but rather a letter from a company promising to purchase invoices from CNA upon the completion of performance, and only if the “procurement officer verifies that the work has been performed.” In this case, CNA’s failure to submit adequate bid security in strict accordance with the IFB instructions rendered its bid nonresponsive.

B. Standing

Because CNA’s bid is nonresponsive, it is not in line for award and therefore lacks standing to raise other challenges regarding an award. *C.P.F. Corp.*, CAB No. P-0521, Jan. 12, 1998, 45 D.C. Reg. 8697, 8699 (the Board will not consider protests by bidders who are not next in line for award if the protest is sustained).

C. Collusion Allegations

As detailed above, CNA has made a number of vague and unsupported allegations of collusion among the other bidders. Although CNA lacks standing, we address these allegations so that CNA will not repeat its baseless allegations in the future. Board Rule 301.1(c) requires that a protest contain “a clear and concise statement of the legal and factual grounds of the protest, including copies of relevant documents, citations to statutes, regulations, or solicitation provisions claimed to be violated.” In its response to the District’s motion to dismiss, CNA merely reargues its allegations of collusion and attaches a listing of various named individuals for the other bidders and their relationships with the other bidders’ representatives. Neither its protest nor its response to the District’s motion to dismiss provides support for its collusion allegations. Accordingly, we dismiss this protest ground as wholly unsupported and bordering on the frivolous. CNA has raised the issue of collusive bidding in two prior protests before the Board (P-0794 and P-0810) and in none of the cases has CNA supported its allegations. Both the PPA and the Board’s rules provide for sanctions where the Board determines that a protest is frivolous:

The Board may dismiss, at any stage of the proceedings, any protest, portion of a protest, it deems frivolous. In addition, the Board may require the protester to pay the agency attorney fees, at the rate of \$100 per hour, for the time counsel spent representing the agency in defending the frivolous protest or its frivolous parts. If the entire protest is dismissed on frivolous grounds, it may also assess the protester damages for each day the contract was suspended equal to the amount of liquidated damages specified in the contract for late completion of the contract. The Board shall not determine damages, if liquidated damages are not specified in the contract. In addition,

counsel for the protester may be suspended or barred from practicing before the Board.

D.C. Code § 2-309.08(g); Board Rule 308.2. Because CNA is represented by its owner, Mr. Cheeks, and not by counsel, we will not assess sanctions at this time. However, if CNA were to file similar unsupported allegations in the future, we will consider sanctions.

We dismiss the protest with prejudice.

SO ORDERED.

DATED: February 5, 2010

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

CONCURRING:

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