

GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD


DATE: November 25, 1988

TO: Andrew Schlosser, President
W.M. Schlosser Co., Inc.
2400 51st Place
Hyattsville, MD 20781

Warren J. Nash
Assistant Corporation Counsel
Public Works Division
2000 14th Street, N.W., 6th Floor
Washington, D.C. 20009

RE: Protest of W. M. Schlosser Co., Inc., CAB No. P-70

Enclosed is a copy of the Board's decision in the above-referenced case.



ROSE M. GILLISON
Clerk to the Board

Enc.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

PROTEST OF:

W.M. SCHLOSSER CO., INC.

Under IFB No. 87-0152-AA-2-0-CC

)
) CAB No. P-70
)

For the protester: Andrew Schlosser, President. For the Government: Warren J. Nash, Assistant Corporation Counsel, D.C.

Opinion by Administrative Judge Sharpe¹ with Administrative Judges Booker and Marlin concurring.

SUMMARY OF OPINION

RESPONSIVENESS--FAILURE TO FURNISH IFB REQUESTED INFORMATION. Protest by second low bidder that the low bidder's failure to furnish a pay item breakdown of its bid price by bid opening as requested by the IFB renders the bid nonresponsive is without legal merit since (1) the low bidder entered a total bid price on the IFB Bid Form, (2) the breakdown of the bid price by pay items was not needed to properly evaluate the bid prices submitted and (3) the failure to submit a pay item breakdown of the bid price did not to any extent qualify the low bidder's promise or commitment to complete the entire construction project as specified at the quoted bid price.

RESPONSIVENESS--MATERIALITY OF IFB PROVISION--PRICE EVALUATION. In order for a bid to be responsive, the PPA provides that it must conform in all "material" respects to the IFB. At the time the procurement at issue was being solicited, the term "material" meant that which affected the price, quantity, quality or delivery of the terms offered. Thus, inasmuch as the IFB by its own terms contemplated an evaluation of bids based on a single firm, fixed price covering all of the specified work without an evaluation of the pay item amounts and the award of one contract, it was the bid price provision of the Bid Form which called for the bidders to submit a total bid price that reflected the material term of the IFB and not the pay item schedule which only called for the entry of the same bid price entered on the Bid Form preceded by a pay item breakdown showing how the bid price was calculated. Further, because the pay item amounts would only be used for contract payments and adjustments, the IFB provision requesting a breakdown of the total bid price

¹Judge Sharpe's participation in this case is pursuant to the authority contained in the D.C. Procurement Practices Act of 1985, D.C. Code, sec. 1-1189.2(c)(2) (1987 Replacement).

by pay items concerned matters relating to contract administration and not bid responsiveness.

RESPONSIVENESS--MATERIALITY OF IFB PROVISION--AGENCY CHARACTERIZATION. Protester's contention that certain IFB provisions and the District's long standing policy that all IFB requested items are to be submitted by bid opening established that a failure to submit the IFB requested pay item breakdown of the bid price rendered the bid nonresponsive lacks substance because these considerations, even if proven, could not override the PPA requirement that the rationale underlying the responsiveness characterization must in all cases establish a material term to the IFB.

OPINION

This case² concerns IFB No. 87-0152-AA-2-0-CC ("IFB") which sought bids for the construction project--Occoquan Complex Code Compliance, Occoquan, Virginia. The protester, W.M. Schlosser Co., Inc. ("Schlosser"), protests the Department of Public Works' determination that the bid of the apparent low bidder, Len Parker Mechanical and General Contractors, Inc. ("Len Parker"), was responsive to the IFB. See Schlosser's letter to the Board dated October 16, 1987, and filed on October 20, 1987 ("protest letter"). Schlosser is the apparent, second-low bidder. Schlosser alleges that Len Parker's bid is nonresponsive because it did not include the Itemized Construction Cost form ("ICC

²This case originated during a period of time when the District of Columbia Contract Appeals Board was functioning pursuant to Commissioner's Organization Order No. 9, D.C. Code, Supplement V (1978), as amended by Mayor's Order No. 82-224, 30 DCR 497 (January 28, 1983) and Mayor's Order 86-65, 33 DCR 3006 (May 16, 1986). Pursuant to sec. 1-1189.1, a new independent agency denominated as the Contract Appeals Board was created. This new Board became operational on August 1, 1988, and succeeded to jurisdiction of all protest cases pending before the previously established Board.

form") contained in the IFB.³ Schlosser requests that we declare Len Parker's bid to be nonresponsive and order the award of the contract to it as the lowest responsive bidder.

The ICC form lists 19 pay items (work categories comprising the construction project) with a corresponding column for the bidders to state a separate cost for each pay item. At the end of the ICC form is a line for the bidders to state their total itemized construction cost. Even though Len Parker did not submit the ICC form or the information requested by the form with its bid or by bid opening, it did include in its bid a bid price set forth in the provision provided for this purpose on the IFB document, Bid form (Construction Contract). See unmarked exhibit attached to the Agency Report of the District of Columbia dated December 17, 1987, and filed December 21, 1987 ("Agency Report"), document 03-1.

In support of its allegation, Schlosser contends that "[i]t has long been a policy of the [District] that all documents in the Bid Form and Proposal must be submitted to render the bid responsive to the Invitation." See protest letter at 1. It also contends that several provisions in the IFB made it mandatory that the ICC form be submitted with the IFB or prior to bid opening.

Contrarily, the District argues that the failure of Len Parker to submit the ICC form with its bid or before bid opening

³The ICC form is document 08-1 of the IFB (for the IFB, see unmarked exhibit attached to the Agency Report).

constitutes a minor informality (and therefore can be waived as such) because the lack of information requested by the form meant no more than the District could not compare the bid submitted on a pay item-by-pay item basis. See Agency Report at 1. In this connection, the District notes that bids could, however, be compared on the basis of the total contract prices that were quoted. Id.

The D.C. Procurement Practice Act of 1985 ("PPA"), D.C. Code, sec. 1-1183.3(e) (1987 Replacement) states that contracts solicited by competitive sealed bidding, as is the case here, "shall be awarded . . . to the responsive and responsible bidder whose bid will be most advantageous to the District, considering price and other factors." (Emphasis added.) As the parties are apparently well aware, "[a] bid that is not responsive is not curable after the bid is opened." Am. Combustion v. Minority Business Opportunity, 441 A.2d 660, 671 (D.C. 1982) (citations omitted). The criterion for determining a bid's responsiveness is stated in the PPA, sec. 1-1181.7(41), which defines "responsiveness" in the context of a "responsive bidder". Section 1-1181.7(41) reads:

"'Responsive bidder' means a person who has submitted a bid which conforms in all material respects to the invitation for bids."

Emphasis added.)⁴ This provision makes clear that in deciding a protest alleging that a certain bid omission renders the bid

⁴See also Am. Combustion, supra (" . . . a responsive bid is one that conforms to the material elements of an invitation to bid").

nonresponsive, a determination must be made as to whether the solicitation provision at the bottom of the controversy is a material term of the solicitation. Although the PPA does not go so far as to define "material", the procurement regulations in force at the time the IFB was issued, in effect, defined the word to mean that which affects price, quantity, quality or delivery of the items offered.⁵ See Materiel Management Manual, secs. 2620.13.B.2.e and 2620.14.A (for the effectivity of these sections, see Notice of Emergency and Proposed Rulemaking, 33 DCR 2698 and 2700 (May 2, 1986)). Given this definition, the question presented by this protest is whether the ICC form constitutes a material term of the IFB. For the reasons that follow, we conclude that it does not.

The IFB document, BID FORM (CONSTRUCTION CONTRACT) ("Bid Form") among other things, includes the following provision (hereinafter referred to as the "bid price provision"):

⁵Compare with the D.C. Procurement Regulations which became effective February 26, 1988, 35 DCR sec. 1599.1, 27 DCMR sec. 1599.1 (July, 1988):

"Minor informality or irregularity - some immaterial defect in a bid or variation of a bid from the exact requirements of the IFB that can be corrected or waived without being prejudicial to other bidders. The defect or variation is immaterial when the effect on price, quantity, quality, or delivery is negligible when contrasted with the total cost or scope of the requirement."

Also compare with minor informalities or irregularities in bids, Federal Acquisition Regulation, 48 CFR sec. 14.405 (1987):

"The defect or variation is immaterial when the effect on price, quantity, quality, or delivery is negligible when contrasted with the total cost or scope of the supplies or services being acquired."

"TO: CONTRACTING OFFICER, GOVERNMENT OF THE DISTRICT OF COLUMBIA

"In compliance with above invitation, the undersigned proposes to furnish all plant, labor and materials and perform required work per provisions as set forth in the Standard Contract Provisions, as amended, specifications, addenda, drawings, for the consideration of:
\$ _____"

See unmarked exhibit attached to the Agency Report. The language of this provision evidences that the IFB contemplated an evaluation of bids based on a single firm, fixed price covering all of the specified work without an evaluation of the separate pay items and the award of one contract. In this regard, the record reveals that Len Parker offered with its bid a firm, fixed price to perform the construction services that were specified in the IFB. This was done by Len Parker's insertion of the figure "2,466,000" on the blank line in the bid price provision. All that the ICC form called for was the entry (on the line, "Itemized Construction Cost _____ TOTAL") of the exact same contract price entered in the bid price provision preceded by a breakdown by the listed pay items of how this price was derived.

As mentioned earlier, the District points out that although the lack of a breakdown of Len Parker's bid price meant that the District could not compare the pay item prices composing its bid with the pay item prices of any other bid, the District could compare the total contract price bid by Len Parker with the total contract price bid by the other bidders. We agree. The significance of this is that where, as here, an evaluation of bids based on total prices is contemplated, all that is necessary

is that the District receives from the bidders a total contract price which is firm and fixed. Moreover, we find that the bid price provision language ("in compliance with above invitation, the undersigned proposes to furnish all plant, labor and materials and perform required work . . . for consideration of") is clear in that when a bidder inserted an amount in the bid price provision and affixed its signature to the Bid Form, the bidder was committing itself to complete the contract work for the amount inserted, if it were determined to be the lowest, responsive and responsible bidder.⁶ Having done this, Len Parker was without question bound to complete the entire construction project at the price stated in the bid price provision when the District awarded it the contract.

While the District may have wanted the bidders to provide with their bids a price breakdown by pay items for contract payment, contract adjustment or other contract administration purposes, the plain and simple matter is that the request in this regard was not a material requirement of the IFB. This is so because the price breakdown amounts were not needed to properly evaluate the bids, and the failure to provide them would not in and of itself qualify a bidder's promise or commitment to perform the specified work at the price inserted in the bid price provision. In other words, the pay item amounts related to

⁶See sec. 1-1183.3(e) which provides that in competitive sealed bidding procurements, "[t]he contract shall be awarded . . . to the responsive and responsible bidder whose bid will be most advantageous to the District, considering price and other factors."

matters concerning contract administration and not bid responsiveness.

With respect to Schlosser's allegation that "[i]t has long been a policy of the [District] that all documents in the Bid Form and proposal must be submitted to render the bid responsive . . .", we first note that the allegation has been made without any evidence to support it, and the District challenges its accuracy (see Agency Report at unnumbered page 4). Second, we note that if such a policy did exist, it would be inconsistent with the PPA. As we pointed out earlier, the PPA (sec. 1-1181.7(41)) articulates the criterion for determining a bid's responsiveness. Thus, we think it obvious that a responsiveness determination cannot turn on a policy which is inconsistent with the criterion enunciated in sec. 1-1181.7(41).

Lastly, Schlosser argues that certain provisions of the IFB make the omission of the ICC form a material deficiency. These provisions are the Title Page--Bid Forms and Proposals which states all forms are to be submitted; Standard Contract Provisions, Article 10 Price Schedule Interpretation which states "Price Schedule is prepared for the comparison of bids . . ."; and Instructions to Bidders, Article 18 Award or Rejection which states proposals will be considered irregular if they are submitted on a form not furnished by the District or an altered or partially detached form. We think we can best address this argument by taking it one step further. Even assuming that the IFB provisions Schlosser references went so far as to explicitly


state that the ICC form was a material requirement of the IFB and a bidder's failure to submit the document in a completed form or to provide the information called for by bid opening would result in a nonresponsive determination, the instruction or warning would not have been of any consequence. It would not have been of any consequence for the reason that "merely stating that a requirement is a responsive matter will not suffice to make it so. In all cases, the rationale underlying the responsive characterization must establish a material term to the invitation for bid." Forrester Constructors, Inc., 1 P.D. 74, 83 n.6. (D.C. CAB 1987).

In sum, we conclude that the bid price provision by calling for the bidders to quote a single firm, fixed price and thereby commit themselves to complete all of the specified construction work at the quoted price, insofar as is relevant here, reflects the material term of the IFB and not the ICC form which only requested that the bidders reiterate their bid price and provide a pay item breakdown of it. It therefore follows that since Len Parker's bid was not at variance with the bid price provision, it would have been improper for the District to have determined Len Parker's bid to be nonresponsive merely because it failed to submit by the time of bid opening the information requested by the ICC form. Because the pay item amounts were not relevant to bid evaluation and their omission did not qualify to any extent Len Parker's bid price as stated in the bid price provision, the omission of the pay item amounts could be properly waived by the


District as a minor informality. Accordingly, there is no legal merit to Schlosser's protest that Len Parker's bid was nonresponsive for the reason alleged.

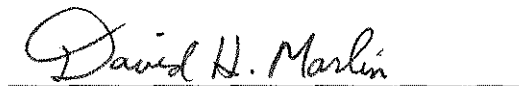
THE PROTEST IS DENIED.

DATED: November 25, 1988


SAMUEL S. SHARPE
Administrative Judge

CONCUR:


CLAUDIA D. BOOKER
Administrative Judge


DAVID H. MARLIN
Administrative Judge