

GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

PROTEST OF:

FAITH CONSTRUCTION COMPANY)	
)	CAB No. P-75
Under IFB No. 87-0074-AA-2-0-KA)	

For the Protester: Carroll B. Harvey, Chairman/CEO. For the Government:
John D. Turner Jr., Assistant Corporation Counsel, D.C.

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

OPINION

This protest was filed by the Faith Construction Company (Faith).^{1/} As the second low bidder, Faith protests the contract award to the low bidder, Espina Stone Company (Espina), pursuant to Invitation for Bids No. 87-0074-AA-2-0-KA (IFB). The IFB was issued to solicit bids for the project: Traffic Signal System Pavement Repair Contract No. 2. See the agency report, Exh. Nos. 3A and 3B.

Included among other documents in the IFB package is a form captioned: Certification District of Columbia Department of Public Works Disadvantaged Business Enterprise/Women-Owned Business Enterprise Solicitation (certification form). This form reads in pertinent part as follows:

* * *

[First Par.]	I certify that I have read, understand and will comply with the United States Department of Transportation Regulations, 49 CFR Part 23, as amended, that establishes Disadvantaged and Women-Owned Business Enterprise goals for Federally-assisted construction contracts.
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[Second Par.]	Further, I certify that as a certified Disadvantaged Business Enterprise, I will meet the DBE goal for this Sheltered Market contract. I am also aware that a goal of 2% of the
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^{1/}This case originated during the period when the District of Columbia Contract Appeals Board was functioning pursuant to Commissioner's Order No. 9, D.C. Code, Supplement V (1978), as amended by Mayor's Order 86-65, 33 DCR 3006 (May 16, 1986). Pursuant to the D.C. Procurement Practices Act of 1985 (PPA), D.C. Code, § 1-1189.1 (1987), a new independent agency denominated as the Contract Appeals Board was created. This new Board became operational on August 1, 1988, and succeeded to the jurisdiction of all cases pending before the previously established Board.

contract price has been established for performance by Women-Owned firms. I will meet the goals or demonstrate reasonable, sufficient good faith efforts to meet the goals.

[Third Par] Additionally, I certify that, I am aware that, in order to remain in consideration for award of this contract after bid opening, I will furnish with my bid proposal a DBE/WBE plan in accordance with the Special Provisions entitled "DISADVANTAGED/WOMEN-OWNED BUSINESS ENTERPRISE PARTICIPATION" on the day of the bid opening.

* * *

[Fifth Par.] A bidder's failure to submit this certification or submission of a false certification shall render his/her bid non-responsive.
(Underlining original.)

Faith alleges that the apparent low bidder Espina failed to submit the required DBE/WBE plan with its bid proposal as was mandated by paragraph three of the certification. The signing of the DBE/WBE certification form by Espina, says Faith, when the specified DBE/WBE plan was not included with Espina's bid submission means that the certification (" . . . I am aware that, in order to remain in consideration for award of this contract. . . I will furnish with my bid proposal a DBE/WBE plan. . . ") was in fact false. Faith next alleges that the language of paragraph five of the certification mandates that Espina be disqualified, as nonresponsive, from receiving the contract award. Relying on the previously stated allegations, Faith alleges that it is the lowest responsible and responsive bidder. See protest letter at 1 and 2.

The District does not dispute Faith's allegation that Espina did not include in its bid submission the DBE/WBE plan specified in the certification form.^{2/} Nor does the District refute Faith's allegation that Espina's signing of the certification when the DBE/WBE plan had not been included means the certification is false. Essentially, the District's position is that Espina's failure to include the DBE/WBE plan with its bid was not fatal to contract award because the matter of the plan submission goes to responsibility and not responsiveness. In support of this argument, the District contends:

1. The IFB's Specifications use responsibility language and do not unambiguously state a requirement that the DBE/WBE plan be furnished with the bid submission;

^{2/}According to the District, Espina's DBE/WBE plan was submitted on October 22, 1987. See the agency report at 1. The bid opening occurred on October 16, 1987. Id.

2. The DBE/WBE plan does not effect bid price, quality or a firm's ability to properly perform the task prescribed in the IFB specifications; and
3. The acceptance of Espina's bid would create a valid and binding contract requiring Espina to perform in accordance with the terms of the IFB, and the information sought by the DBE/WBE plan concerns only how Espina's contractual commitment would be fulfilled.

Espina submitted comments on the agency report. As Espina argues similarly to the District, we do not detail its arguments but proceed with our discussion of the merits of Faith's protest.

This case presents two issues for resolution: (1) whether a bidder's failure to furnish the DBE/WBE plan by bid submission time results in the bidder being nonresponsive, and (2) whether the fifth paragraph of the DBE/WBE certification form mandates that a bidder be deemed nonresponsive where it submits a false certification as alleged by Faith.

The Board has had on at least three previous occasions the opportunity to address the failure to furnish issue vis a vis a responsive/responsible bidder. Forrester Constructors, Inc., 1 P.D. 74, 78-79 (D.C. CAB 1987); ZAV Electrical Contractors, Inc., CAB No. P-76 (D.C. CAB 1988); and W.M. Schlosser Co., Inc., CAB No. P-70 (D.C. CAB 1988). A discussion of these cases seriatim is helpful to the resolution of the instant matter.

In Forrester, the Board pointed out the important distinction between the implications of the terms "responsive" and "responsible". There it said, a bid that is nonresponsive "is not curable after the bid is opened," whereas a "lack of bidder responsibility is curable after the bids are opened." Most importantly, as Espina points out, the Board also stated in Forrester at n.6 that:

In light of the definition of "responsive bidder" in [the PPA] § 1-1181.7 (41), merely stating that a requirement is a responsive matter will not suffice to make it so. In all cases, the rationale underlying the responsiveness characterization must establish a "material" term to the invitation for bid.

This statement makes clear that the controlling test for determining whether a particular provision relates to responsiveness is whether the provision establishes a material term to the invitation for bid.^{3/}

^{3/}The PPA definition of responsible bidder and responsive bidder is found at § 1-1181.7 (40)(41) respectively and reads as follows:

The responsiveness/responsibility controversy in Forrester centered on a special provision in the IFB which required the bidders (prime contractors) to include with their bids a minority business enterprise (MBE) program providing for a minimum participation of 49% of the total contract dollars by MBE subcontractors. Of particular significance was the special provision's requirement that the minority subcontracting firms be certified by the District as minority business enterprises at the time of bid opening. The protester (Forrester) alleged that the bidder (McGaughan), whose bid it was challenging, was non-responsive because one of the minority firms it included in its bid list had not been certified at bid opening, thus causing the minority subcontracting program to be in actuality less than the required 49% minimum at the time of bid submission. The Board concluded that despite its finding that certain language used in the special provision was at variance with the concept of responsibility, the special provision related to responsibility and not responsiveness because it solicited information bearing on a bidder's likely ability to meet the minimum minority subcontracting participation requirement of 49%. The Board also concluded that insofar as it was relevant to the protest, the material requirement of the invitation was that bidders commit themselves to the MBE goals of the special provision. The Board held that since McGaughan had committed itself to the MBE participation goals, its bid was not nonresponsive because as it turned out, the MBE program submitted with the bid was less than 49% of the total contract dollars. McGaughan's deficient MBE subcontracting program was, we said, a correctable minor informality. See Forrester at 82 and 86.

In ZAV, the responsiveness/responsibility question concerned the List of Trades provision in the invitation at issue. This provision stated that each bidder was required to submit with its bid a listing of all trades to be utilized during the construction of the project. The protester (ZAV) contended that even though it did not submit a list of trades with its bid, the bid was responsive. The Board viewed the listing requirement of the List of Trades provision as being analogous to the subcontractor listing requirement at issue in Forrester, *supra*. In reaching the conclusion that the District erred in making the determination that ZAV's bid was nonresponsive for failure to supply a list of trades with its bid, the Board made the following observation.

In light of Forrester, it would seem apparent here that the IFB's list of trades requirement also relates to bidder responsibility. The Board finds that the only meaningful purpose the information requested by the List of Trades provision could serve would be to assist the procurement officials in assessing a bidder's ability to perform the contract work in accordance with

(40) "Responsible bidder or offeror" means a person who has the capability in all respects to perform fully the contract requirements and the integrity and ability which will assure good faith performance.

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

the material specifications. In addition, the Board finds that the List of Trades provision does not call for any information relating to the IFB specifications themselves or impose any legal obligations. The provision therefore is not a material one for purposes of [the PPA] § 1-1181.7(41). It is not clear what trades must be utilized in performing the contract but whatever they may be, ZAV must have them, and whether it does or does not is a question of bidder responsibility. Unquestionably, ZAV's mere failure to provide the list of trades with its bid does not say anything, one way or another, respecting its intention or promise to perform the contract in accordance with the IFB specifications. Thus, contrary to what PTI [intervenor] seems to assert, the Board does not see how ZAV's failure to submit the list of trades with its bid could have affected its obligation to perform the contract or the District's right to contract performance in accordance with the IFB specifications. The fact that the IFB states each bidder is required to submit the trade list with its bid is of no consequence, as such language is insufficient, in and of itself, to convert a matter otherwise relating to responsibility to one going to responsiveness. See ZAV at 10 and 11.

In Schlosser, the responsiveness/responsibility issue involved the provision in the IFB that instructed bidders to submit with their bids, a pay item-by-pay item breakdown of their total bid prices. The then current procurement regulations defined "material" for responsiveness purposes to mean that which affects price, quantity, quality or delivery of items offered. We concluded in Schlosser 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 non-responsive 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 non-responsive for the reason alleged.

See Schlosser at 9 and 10.

We think it is clear from these three decisions of the Board that the "failure to furnish" issue boils down to a question of whether the certification provision directing bidders to furnish a DBE/WBE plan with their bids affects price, quantity, quality or delivery of the items offered, [establishes a specification in the invitation or imposes any

legal obligations.] The clear answer to this question is that it does none of these things. By the expressed terms of the DBE/WBE certification form, when Espina signed and submitted the form it legally obligated itself to perform the contract in a manner that satisfied the specified DBE/WBE regulations and goals. The DBE/WBE plan would therefore do no more than tell the District how a bidder proposed to meet its legal obligation.^{4/} The District, after examining the information, could then assess the likelihood that the bidder would be able to satisfy the established DBE/WBE participation goals. The PPA, § 1-1181.7(40), makes clear that information bearing on a bidder's ability to perform relates to responsibility and not responsiveness.

Although it causes us some discomfort, we do agree with the District that there are other provisions in the IFB which support the conclusion that the requirement to furnish a DBE/WBE plan at bid opening relates to responsibility. The first of these provisions reads:

All bidders are required to submit a written certification that they have read, understand and will comply with these requirements. A bidder's failure to submit this certification or submission of a false certification may render the bid non-responsive.

See the agency report, Exh. No. 3A (Specifications), Appendix, Disadvantaged/Women-Owned Business Enterprise Participation at 1. (Underlining original.)

The second provision reads:

This DBE/WBE Program must be submitted within five (5) days subsequent to the bid proposal. DBE/WBE certifications must be valid on the day of the bid opening. Any current apparent low responsible bidder must submit this DBE/WBE Program or the bid may be declared non-responsive.

Id. at 3. (Emphasis added.) While the DBE/WBE certification form provisions speak in responsiveness terms (albeit improperly) the above-quoted provisions in the specifications, in one case, speak in inclusive terms ("may render the bid non-responsive" and in another case, they speak in responsibility terms ("must be submitted within five (5) days subsequent to the bid proposals.") To say the least, the specifications are inconsistent with the IFB certification form regarding the matter of when the DBE/WBE plan was to be furnished. For purposes of future procurements, this inconsistency should be resolved.

^{4/}For this reason, the District may wish to consider in the future asking only the bidder which is being focused on for contract award (rather than all bidders) to submit the DBE/WBE plan.

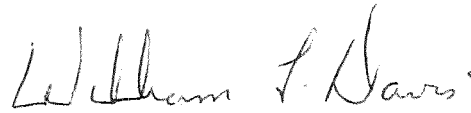
As we noted earlier, Espina did not furnish a DBE/WBE plan until after bid opening. Thus, there is no question but that Espina's certification ("I will furnish with my bid proposal a DBE/WBE plan") is an erroneous statement. Faith would urge upon us that under the fifth paragraph of the certification form, the erroneous statement is sufficient to constitute a false certification for the purpose of rendering Espina's bid non-responsive. We are of a different view. Considering, as we have already stated, that the District improperly instructed the bidders to furnish DBE/WBE plans at bid opening, the error, which is at the basis of the alleged false certification, was caused by the District; and since Espina had nothing to do with the drafting of the certification form, we see no reason for imputing the error to it. Moreover, we are of the view that the error that we speak of here is not the kind of error the false certification provision contemplates as rendering a bid nonresponsive.

We therefore find no basis to disturb the award to Espina since its bid was not nonresponsive to the IFB.

ORDER

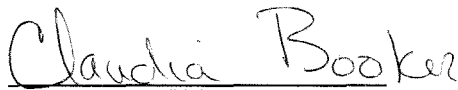
The protest is DENIED.

DATE: March 7, 1990

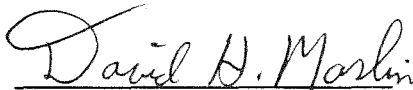


WILLIAM L. DAVIS
Chief Administrative Judge

CONCUR:



CLAUDIA D. BOOKER
Administrative Judge



DAVID H. MARLIN
Administrative Judge