

GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

PROTEST OF:)	
)	
HORTON & BARBER PROFESSIONAL)	
SERVICES, INC.)	CAB No. P-0653
)	
Under IFB No. POHA-2002-B-0047)	

For the Protester: Will Purcell, Esq., Corporate Counsel. For the Government: Howard Schwartz, Esq. and Warren J. Nash, Esq., Assistants Corporation Counsel.

Opinion by Administrative Judge Matthew S. Watson, with Chief Administrative Judge Lorilyn E. Simkins and Administrative Judge Jonathan D. Zischkau, concurring.

OPINION

(Courtlink Filing ID 700223)

On January 25, 2002, the Office of Contracting and Procurement ("OCP") issued an open market IFB No. POHA-2002-B-0047, for Grass Cutting Services for the Department of Parks and Recreation ("DPR"). (Agency Report "AR" Ex. 1). On February 11, 2002, 11 bids were opened. (AR Ex. 2). H&B submitted the lowest bid in the amount of \$2,362,565.¹ (AR Exs. 2 and 3). Lawn Restoration Services, Inc. ("Lawn Restoration") submitted the next lowest bid of \$4,323,321.² (AR Exs. 2 and 7).

On February 27, 2002, the Contracting Officer signed the Determination and Findings for Unreasonable Bid Price ("H&B D&F"). (AR Ex. 4). In the H&B D&F, the Contracting Officer considered: 1) the original estimate of the Program Office, 2) the current price paid for the service, 3) the government estimate per acre, 4) the DOL wage rates, and 5) the number of man-hours needed for the work. (AR Ex. 4). Although, after bid opening, the contracting officer discussed other matters with protester's personnel, the District concedes that the contracting officer did not request verification of H&B's low bid or any justification of its amount. Nevertheless, the Contracting Officer determined that H&B's bid price was unreasonably low. Accordingly, H&B was determined to be nonresponsive.

¹ Bids were evaluated for the total price of the base year and 4 option years. The H&B base year price was \$516,595 for an average \$30 per acre.

² The Lawn Restoration base year price was \$ 752,939 for an average \$45 per acre.

On February 26, 2002,³ the Contracting Officer determined Lawn Restoration to be responsible. (AR Ex. 6 “Lawn Restoration D&F”). Subsequent to the contracting officer executing the two D&Fs, a successor contracting officer was appointed. On March 6, 2002, the Successor Contracting Officer awarded the contract to Lawn Restoration. (AR Ex. 7). Prior to award, the Successor Contracting Officer, who had not made the H&B nonresponsibility determination, discussed the H&B bid with an OCP cost analyst. The analyst considered the H&B price to be unrealistically low. The Successor Contracting Officer did not consider H&B’s low bid to have been a mistake by H&B, but rather believed that H&B was “buying in,” that is submitting an unreasonably low price with the expectation of recouping its losses through equitable adjustments. See FAR §3.501, The Successor Contracting Office did not request any further information from H&B. (AR Ex. 5 and AR Ex. 9).

On March 22, 2002, H&B filed the present protest contending that the District violated § 2204⁴ of the Procurement Regulations, Obtaining Information for Determination of Responsibility, by failing to request H&B to justify its low bid.⁵ In the absence of any request for verification or justification of the low bid, we find the Determination and Findings for Low Bid Price to be premature and sustain the protest.

Relying on § 2200.5 of the D.C. Procurement Regulations, 27 DCPR § 2200.5, the District asserts that the contracting officer may determine a bidder nonresponsive if its bid price is unreasonably low or unrealistic, without any discussion with the apparently low bidder.⁶ We disagree with this position. Although the referenced section does not itself include a direction that the contracting officer must permit the offeror to verify and explain its bid, the section specifically states that “the contracting officer may

³ No AR Explanation was given as to why the finding of responsibility of the second low bidder was AR Executed before the finding of nonresponsibility of the low bidder.

⁴ Protester also alleged a violation of § 2202.6 which requires reference of responsibility determinations of *certified* disadvantaged businesses to the Minority Business Opportunity Commission. The “grass cutting services” which are sought are categorized pursuant to National Institute of Government Purchase (NIGP) as Code 98836 “Grounds Maintenance: Mowing, Edging, Plant (Not Tree) Trimming, etc.” Although H&B is certified within NIGP Code 98852 “Landscaping (Including Design, Fertilizing, Planting, etc., But Not Grounds Maintenance or Tree Trimming Services,” it is not certified in NIGP Code 98836 which includes mowing. Thus H&B is not certified within the business category covering the contract services sought by this procurement and consequently lacks standing to raise issues regarding disadvantaged business status. See, *M&G Services, Inc.*, CAB No. P-0652, May 10, 2002, 13 P.D. 8239 (*Courtlink Filing ID 683921*). Since the subject procurement is not a “set-aside,” procurement, but rather an “open market” procurement, lack of certification does not effect H&B’s eligibility for award.

⁵ On April 4, 2002, the District notified the Board and the protester that OCP had issued the Determination to Proceed with Contract Performance while a Protest was Pending. Opposition to proceeding with the contract was not timely filed. *Order*, April 18, 2002 (*Courtlink Filing ID 640124*).

⁶ Section 2200.5 states:

If the contracting officer determines that the price bid or offered by a prospective contractor is so low as to appear unreasonable or unrealistic, the contracting officer may determine the prospective contractor to be nonresponsive.

determine the prospective contractor to be *nonresponsible* [emphasis supplied]” based on the unreasonably low bid.

In order to determine the bidder to be nonresponsible, the contracting officer must follow the instructions of § 2204 of the Procurement Regulations entitled “Obtaining Information for Determination of Responsibility.” Subsection 2204.2 requires that “[t]he contracting officer *shall* obtain information regarding the responsibility of a prospective contractor who is the apparent low bidder [emphasis supplied]” and the immediately following subsection, 2204.4, requires that “[t]he prospective contractor shall promptly supply information requested by the contracting officer regarding the responsibility of the prospective contractor.”

A bid believed to be unreasonably low may reasonably give rise to suspicion that the bidder has made a mistake in its bid. *See e.g., Foley Company*, B-241678, Feb. 8, 1995. In such event, a contracting officer is required to seek verification from the bidder. Section 1536.2 of the Procurement Regulations provides:

In cases of apparent mistakes and in cases where the contracting officer has reason to believe that a mistake may have been made, the contracting office *shall* request from the bidder a verification of the bid and call attention to the suspected mistake. [emphasis supplied]

The Successor Contracting Officer’s assertion that he did not believe that a mistake had been made, but rather that H&B had intentionally submitted an unreasonably low bid for the purpose of buying-in is neither persuasive nor reasonable. The Comptroller General has consistently held that buying-in, even if the bid is below cost, is not grounds for refusing to award a contract to the low bidder. *DOD Contracts, Inc.*, B-227689.2, Dec. 15, 1987, 87-2 CPD ¶ 591; *Salz Lock and Safe*, B-227547, July 6, 1987, 87-2 CPD ¶ 18; *American Maid Maintenance*, B-225571, Jan. 9, 1987, 87-1 CPD. ¶ 47. If buying-in were suspected, the District, after award, must insure that the contractor will live up to its obligations.

Without having requested a verification or explanation of the price from H&B, neither the Contracting Officer, nor the Successor Contracting Officer, had a reasonable basis to conclude that what they considered an unreasonably low bid was an attempt to buy in and not a mistake. “At a minimum, the information should have suggested to the contracting officer to conduct a more careful review of [the allegedly unreasonably low bid], including, for example, a request for information concerning the [low bidder’s] estimates of manhours and costs. *C.P.F. Corp.*, CAB No. P-0413, Nov. 18, 1994, 42 D.C. Reg. 4902.

Since H&B was never given an opportunity to explain its bid, we find that the rejection of its bid was premature. *See Contract Services Co., Inc.*, 66 Comp. Gen 468 (1987), 87 CPD ¶ 521. H&B has verified that its bid was intended and not mistaken by filing of this protest. H&B has also provided a logical explanation of why it believes that

it can perform the contract at a lower price, that it is the only bidder which garages its vehicles in the District and thus is closer to the job site, reducing travel time for the vehicles and personnel. We therefore sustain the protest.

The fact that we have found that the original determination to reject H&B's bid was premature is not a finding that H&B is responsible. That determination must be affirmatively made by the contracting officer. We therefore direct the Successor Contracting Officer reconsider H&B's responsibility, including raising his concerns about the price with H&B, and issue a further Determination and Finding of H&B's responsibility. In reconsidering the H&B's responsibility, the Successor Contracting Officer shall give great weight to the responses he receives from H&B. *See Bulloch International*, GSBCA No. 10168-P, Sept. 22, 1989, 90-1 BCA ¶ 22,296. If the Successor Contracting Officer determines that H&B is not responsible based on a finding that the bid price is unrealistically low, he shall make explicit reference in the D&F to each of H&B's positions in support of its bid, as well as specific findings and conclusions with respect to each. *See Kopff v. District of Columbia Alcoholic Beverage Control Bd.*, 381 A.2d 1372, 1384 (D.C. 1977)

If the successor contracting officer determines H&B to be responsible, the contract with Lawn Restoration shall be terminated and a contract for the remainder of the base year, together with the District's options for future years shall be awarded to H&B to commence performance no later than June 17, 2002. The successor contracting officer shall file his determination and finding with the Board no later than May 31, 2002.

As with any determination by a contracting officer, a finding of nonresponsibility may be protested to this Board.

SO ORDERED

DATED: May 20, 2002

MATTHEW S. WATSON
Administrative Judge

CONCURRING:

LORILYN E. SIMKINS
Chief Administrative Judge

JONATHAN D. ZISCHKAU
Administrative Judge