DISTRICT OF COLUMBIA CONTRACT APPEALS BOARD

PROTEST OF:

C & E SERVICES, INC.	)	
	)	
	)	CAB No. P-0874
	)	
Under Solicitation No. RM-0ll-IFB-027-BYO-DJW	)	

OPINION

Filing ID 37692230

For the Protester: Warner H. Session, Esq. For the Government: Robert Schildkraut, Esq., Assistant Attorney General, D.C.

Opinion by Administrative Judge Warren J. Nash. Concurring Opinion filed by Chief Administrative Judge Marc D. Loud, Sr.

OPINION

On January 14, 2011, C&E Services, Inc. ("C&E") protested the Department of Mental Health ("DMH") determination that C&E was not a responsible bidder for the above solicitation. The protester alleged that it was responsible, and that the information held by the District's Office of Tax and Revenue ("OTR") regarding its tax filings was incorrect. The District responded in its Motion to Dismiss that the Contracting Officer ("CO") had acted properly, and that protester would not be next in line for award. Further, the District asserts that the protester did not suffer any competitive harm due to a lack of public bid opening or not reviewing other bids at the debriefing. We conclude that the Contracting Officer acted properly, and that we have no reason to void the contract awarded to the successful bidder, CRW Mechanical, Inc. ("CRW").

BACKGROUND

On October 19, 2010, DMH issued IFB No. RM-0ll-IFB-027-BYO-DJW (solicitation) seeking a contractor to supply and install Valve and Filter Corporation's Duplex Vertical Type Water Filter inside the mechanical room of the new St. Elizabeth's Hospital at 1100 Alabama Ave. SE, in Washington, DC. The prospective contractor's bid price would include all labor, equipment, tools, material, installation, and disposal charges resulting in a fixed price contract. The contractor would have 365 days to perform the contract. Bids were due by November 10, 2010, at noon. DMH received three bids on the amended bid opening date of November 17, 2010 (a fourth bid came in after the deadline). CMH awarded the contract to CRW on January 4, 2011. On January 6, 2011, C&E received a letter from Mr. Samuel Feinberg, CO, informing

C&E that C&E had not been chosen for award. C&E requested a debriefing, which occurred on January 12, 2011.

C&E asserts that at the debriefing, Mr. Feinberg presented to C&E a copy of a tax verification response that indicated that C&E was not in compliance with DC tax law requirements for bidders. C&E also asserts that it requested from Mr. Steinberg disclosure of public information from the bid opening, including the successful bidder and the contract price. C&E asserts that Mr. Feinberg refused to disclose that information, and the IFB debriefing meeting subsequently closed. After the debriefing, C&E contacted the District's OTR and discovered that the OTR had changed C&E's filing requirements, but had not updated its database to show that C&E was in compliance with the new filing protocols. C&E filed this protest on January 14, 2011. After several telephone conferences with the parties, the Board held an evidentiary hearing on March 29 and 31, 2011, to determine what remedies, if any, were available to C&E as a result of the events set forth above.

DISCUSSION

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

C&E sets forth two protest grounds. C&E alleges that the DMH CO erroneously rejected C&E's bid in response to the solicitation, and that the bid information, including the bidder's prices, should have been released to the public at a public bid opening. The Board's opinion will respond to those allegations in that order.

According to the District's Combined Motion to Dismiss and Agency Report, DMH made a request to OTR on November 29, 2010, to determine the tax status of the three timely bidders. (Exh. 10 and 11, District's Motion to Dismiss). OTR replied on December 1, 2010, stating that C&E, as well as American Combustion Industries (ACI), were not in compliance with the tax filing and payment requirements of the District of Columbia. (Exh. 7 and 11, District's Motion to Dismiss). On December 16, 2010, the Contracting Officer prepared a Determination and Findings of Nonresponsibility for both C&E and ACI, stating that they were not responsible bidders because neither bidder had complied with their tax obligations to the District. (Exh 6 and 11, District's Motion to Dismiss). On January 3, 2011, the CO sent letters to the nonresponsible bidders, notifying them that they were not eligible for award. (Exh 8, District's Motion to Dismiss). The CO awarded the contract to the remaining bidder on January 4, 2011. (Exh. 5 and 11, District's Motion to Dismiss). C&E requested a debriefing as soon as it received the non-award letter from the CO. The debriefing occurred on January 12, 2011, and C&E filed this protest on January 14, 2011. The CO did not inform C&E of the reason for the nonresponsibility finding until the debriefing. (Exh. C, Protest).

According to information provided by C&E, C&E contacted OTR immediately after the debriefing to determine C&E's true tax status. (Exh. D-1, Protest). C&E discovered that OTR had failed to update its tax payment records after OTR changed C&E's tax payment requirements (Exh. 9, District's Motion to Dismiss). C&E provided information to OTR on

January 12, 2011, that allowed OTR to update its records. (Exh. 10, District's Motion to Dismiss). OTR provided to C&E a statement dated January 12, 2011, stating that C&E was in compliance with the tax filing and payment requirements of the District. (Exh. 10, District's Motion to Dismiss).

On January 26, 2011, the District filed a Determination and Findings to Proceed with Contract Performance While a Protest is Pending with the Board. According to the CO, this particular project will alleviate poor water quality problems at the hospital which affect patient care and new equipment which has been installed at the facility. Therefore, according to the CO, the hospital has a need to continue with this project. The protester did not file an objection to the determination and findings to proceed.

C&E also complained of the CO's failure to disclose bid information of other bidders after bid opening. C&E alleges that the CO failed to disclose the names of the bidders and the prices of each bid at the debriefing, and that the CO did not allow C&E to examine the bids. C&E further alleges that it requested this information from the CO on two separate occasions, in the request for a debriefing and at the time of the debriefing. The District responded that the CO had failed to offer that information, but that the CO had an explanation for his failure which he offered at the hearing of March 29, 2011.

After several telephone conferences with the parties that included discussions of possible remedies, the Board held an evidentiary hearing on March 29 and March 31, 2011, to hear testimony from the parties regarding those remedies. Board Rule 314.4 (based on DC Code 2-309.08(f)(2) allows the Board to award to a protester reasonable bid or proposal preparation costs and the costs of pursuing the protest when the Board finds that the District government actions were arbitrary and capricious. Accordingly, the evidentiary hearing was limited to the issues set forth in the Order Granting Motion In Limine dated March 12, 2011, that is, 1) the current status of the delivery, furnishing, fabrication, and installation of the water filter at the hospital, and 2) the possible harm the District may suffer if the Board terminates the award to CRW and awards the contract to C&E. The District determined that it would not present at the hearing any additional evidence from OTR regarding the tax certifications.

At the hearing, the CO described the events leading up to the issuance of the solicitation. According to the CO, DMH thought that the price for the purchase and installation of the filter would be less than $100,000, and that DMH could purchase and install the filter by using an invoice, rather than a solicitation (Tr. 201). However, when the program managers in charge of construction of the new hospital could not provide a reliable estimate to the CO for the purchase and installation of the filter, the CO decided to use a solicitation as a vehicle for the work (Tr. 201-202). In the effort leading to the preparation of the solicitation, the CO failed to ensure that the solicitation contained the necessary provisions setting forth open bid requirements (Tr. 201-202). The CO characterized the failure as "an oversight of not including in the documentation the requirement for the bidding and the public bid opening." (Tr. 201). This oversight led to the CO failing to perform a public bid opening. To his credit, the CO also stated that he had never heard of C&E before this protest, and that he had no positive or negative feelings toward the company. (Tr. 202-203). He also stated that he had never heard of the awardee of this contract,

CRW, before this procurement. (Tr. 203). The CO stated that the original estimate for the purchase and installation of the filter system was $68,000, but that he was not comfortable with that estimate (Tr. 204-205). After evaluation of the CO's testimony regarding the public disclosure of the bids and the failure to include in the IFB the requirements for disclosure of those bids at the bid opening, the Board regards the CO's testimony as truthful. We are dismayed that the CO made the mistake, especially since this mistake was the first mistake of several included in this procurement. However, without further evidence of any intent by the CO to favor one contractor over another, and without any evidence that the CO had any experience with either contractor before this procurement, we cannot say that the CO's actions regarding the failure to publicly disclose the bids are an indication of bad faith. That analysis leads us to an evaluation of the finding of nonresponsibility, to determine whether there is any indicia of bad faith in that finding.

The parties agree that OTR's database contained incorrect information regarding C&E's tax status, and that C&E made efforts to correct the information as soon as possible after the debriefing. (Ex. 10, Reed Affidavit, paragraph 6). The information in the record shows that C&E had paid its taxes, and that OTR provided a statement dated January 12, 2011, that corrected the information in the database. At this point, we are required to analyze the CO's actions after the debriefing. Mr. C. Biggs testified that after he discovered the tax issue at the debriefing, one of his employees contacted OTR and cleared up the tax issue the same day (Tr. 37-39). That employee sent the information to the CO. (Tr. 37). Inexplicably, the CO proceeded with his prior course of action. We don't know if the CO had any reservations about the award that he had just made to CRW, but we do know that the CO did not testify about any remedial actions taken after that day. The CO also testified that he failed to notify the DSLBD that he had prepared a D&F for nonresponsibility regarding a local small business. (At this point, the CO had an opportunity to step back and re-evaluate his actions.) C&E filed its protest on January 14, 2011, thereby making the CO aware that C&E was not satisfied with the CO's award decision. The CO's first response to the protest was the preparation of a Determination and Findings to proceed with contract performance, which he signed on January 21, 2011, a full week after the filing of the protest. We have no indication in the record of any re-evaluation of the award that the CO may have performed after the filing of the protest, but the record does indicate that the CO should have received a fax copy of the OTR tax payment letter regarding C&E that had been prepared on January 12, 2011.

The problem for the Board on this issue is that we have never ordered a CO to look askance at a certification from OTR, and we have always assumed that OTR's certifications are correct. Yet, this record shows that OTR was not in command of its own data, and we are faced with the dilemma of deciding a course of action. The District concedes that the CO did not follow all of the rules that he should have followed, i.e., he failed to perform a public bid opening and he failed to notify DSLBD regarding C&E's nonresponsibility. The District argues that the CO followed regulations regarding OTR's certification of tax payments, and that the CO had no choice except to find C&E nonresponsible. However, in light of the action that OTR performed on January 12, 2011, that is, correcting OTR's records regarding C&E's tax payments, we are still faced with the dilemma of deciding a course of action.

To compound our analysis, we have to consider the effect of C&E's failure to file an objection to the D&F to proceed. An objection to the D&F would have allowed the Board to review the facts at some time before the filing date of the District's Motion to Dismiss, February 10, 2011. Our rules do not require a protester to object to a D&F to proceed, but the failure to make that objection does affect the time of our response.

C&E argues that the Board should follow the precedent set forth in *Prince Construction, et al.*, CAB Nos. P-530 et al, July 21, 1998, and determine that this contract is void ab initio due to the irregularities that occurred in the procurement process. C&E argues that in a procurement that does not involve a contract tainted by fraud or wrongdoing, the courts hold that contracts are void ab initio where the illegality is plain and material.

The general federal rule is that a government contract tainted by fraud or wrongdoing is void ab initio. See *Godley v. United States*, 5 F.3d 1473, 1475-76 (Fed Cir. 1993). If the contract is not tainted by fraud or wrongdoing, the courts hold that contracts are void ab initio where the illegality is plain and material. In these circumstances, the government is not estopped to deny the limitations on the contracting officer's authority, even though the contractor may have relied on the contracting officer's apparent authority to his detriment, for the contractor is charged with notice of all statutory and regulatory limitations. (See *Prince Construction, Inc.*, CAB No. P-530 et al., page 21). At this point, our analysis differs from the analysis set forth in Prince for the reasons set forth below.

DC Code § 2-302.05(d)(1), formerly DC Code 1-1182.5(d), requires the District to void any contract that has been entered in violation of the District's rules and regulations, unless the parties substantially comply with the procurement rules. The statute provides the following:

> 2-302.05(d)(1) Except as otherwise provided in this chapter, a contract which is entered into in violation of this chapter or the rules and regulations issued pursuant to this chapter is void, unless it is determined in a proceeding pursuant to this chapter or subsequent judicial review that good faith has been shown by all parties, and there has been substantial compliance with the provisions of the chapter and the rules and regulations.
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> (2) If a contract is void, a contractor who has entered into the contract in good faith, without directly contributing to a violation and without knowledge of any violation of the chapter or rules and regulations prior to the awarding of the contract, shall be compensated for costs actually incurred.

To void CRW's contract, C&E must show that the District or the CO acted in bad faith. In this procurement, C&E would have to show that OTR's mistake regarding C&E's tax payment is a mistake that indicates bad faith. C&E alternatively would have to show that the CO's actions regarding the non-disclosure of bid information, or the failure of the CO to inform DSLBD that C&E had been found nonresponsible, are actions in bad faith that affect the

procurement. C&E would also have to show that the actions set forth above, taken individually or cumulatively, show that there has been no substantial compliance with the District's procurement rules and regulations.

The actions protested by C&E were actions taken by the District. There is no showing that CRW did anything to induce the District to improperly award the contract to CRW. There is no evidence showing that CRW acted in bad faith during the procurement process. The evidence shows a difference in bid price of $2,000 on a $100,000 contract. (Ex. 4, District's Motion to Dismiss). The witnesses from the hospital testified about the need for the water filter and the ways that poor water quality affects patient care and hospital equipment.

Any discussion of bad faith by government officials must begin with an analysis of the conduct that constitutes the bad faith. *Kalvar Corporation, Inc. v. United States*, 211 Ct.Cl. 192, 543 F.2d 1298, (1976), involved a claim contending that the Government had shown bad faith or clear abuse of discretion in determining that films requested by one agency were beyond the scope of the primary source contract and that plaintiff had incurred costs that were recoverable under the termination for convenience clause of contract. In analyzing the proof needed to prove bad faith, the court stated:

> Any analysis of a question of Governmental bad faith must begin with the presumption that public officials act 'conscientiously in the discharge of their duties. Librach v. United States, 147 Ct.Cl. 605, 612 (1959). The court has always been 'loath to find to the contrary,' and it requires 'well-nigh irrefragable proof' to induce the court to abandon the presumption of good faith dealing. Knotts v. United States, 121 F.Supp. 630, 631, 128 Ct.Cl. 489, 492 (1954).
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> In the cases where the court has considered allegations of bad faith, the necessary 'irrefragable proof' has been equated with evidence of some specific intent to injure the plaintiff. Thus, in Gadsden v. United States, 78 F.Supp. 126, 127, 111 Ct.Cl. 487, 489-90 (1948), the court compared bad faith to actions which are 'motivated alone by malice.' In Knotts, supra, at 128 Ct.Cl. 500, 121 F.Supp. 636, the court found bad faith in a civilian pay suit only in view of a proven 'conspiracy * * * to get rid of plaintiff.' Similarly, the court in Struck Constr. Co. v. United States, 96 Ct.Cl. 186, 222 (1942) found bad faith when confronted by a course of Governmental conduct which was 'designedly oppressive.' But in Librach, supra, at 147 Ct.Cl. 614, the court found no bad faith because the officials involved were not 'actuated by animus toward the plaintiff.'

Bad faith cannot consist solely of mistakes, but it must also include some specific intent to injure the plaintiff. Without the intent to injure C&E, we find that the government's admitted mistakes in this procurement do not rise to the level that would require the Board to void the contract to CRW under D.C. Code § 2-302.059(d)(1) and applicable case law.

After reviewing the evidence presented by the District, this Board believes that termination of CRW's contract would not be in the best interests of the District. According to

the District's witness, Mr. Robert Poe, the new contractor would have to duplicate the engineering work that CRW has already completed. (Tr. 101-102). There is no evidence to show how much time the new contractor would need to complete the preliminary drawings. The factory has already started the process of fabricating the filter. And, the District set forth in the D&F to proceed with performance the reasons why CMH wanted to proceed with the project. We also note that the protest filed January 14, 2011, did not include as grounds the failure of the CO to notify DSLBD that C&E had been determined to be nonresponsible. The failure to notify DSLBD does not rise to the level necessary to require the remedy of termination of the contract. The Board also distinguishes Prince, infra, from the instant case in that Prince concerned company principals acting badly to commit fraud. Here, the contractors' principals did nothing wrong.

The CO at the hearing explained his failure to conduct a public bid opening. That failure is a violation of the regulations, but C&E fails to show that there was a specific intent to injure the protestor or how the failure prejudiced C&E. On the other hand, C&E was harmed by OTR's failure to keep adequate records. This failure caused the CO to determine that C&E had not paid its taxes, or had some unspecified tax issue. Without a showing of OTR intent to harm C&E, however, this failure does not show bad faith of the District against C&E. We have never required a CO to look behind the OTR certification regarding taxes to make his own determination that the certification is correct. Indeed, under our current system, there is no method that the CO can use to accomplish that task. It is clear to us that OTR's mistake is one of the main reasons for this protest. Hopefully, the problem has been solved and this particular mistake will not happen again. The tax mistake, while regrettable, does not show specific intent to harm C&E, and therefore does not show bad faith against C&E. Mr. Feinberg's failure to notify DSLBD of the C&E nonresponsibility finding also does not show bad faith against C&E. Finally, we cannot speculate about any possible outcomes that may have occurred if Mr. Feinberg would have picked up the telephone and asked OTR if they were sure about C&E's tax status after DMH received the second certification. To be sure, Mr. Feinberg had already made the award, but we cannot require contracting officers to verify tax certifications that have been provided by OTR. Accordingly, we have concluded that we will not order DMH to terminate the CRW contract.

DC Code § 2-309.08(f)(2) allows the Board to award reasonable bid preparation costs and the costs of pursuing the protest if the District acted in an arbitrary or capricious manner. That section provides:

> The Board may, when requested, award reasonable bid or proposal preparation costs and costs of pursuing the protest, not including legal fees, if it finds that the District government's actions toward the protester or claimant were arbitrary and capricious.

After reviewing the evidence presented, we cannot say that OTR's failure to keep adequate records (which kept C&E from being considered for award) was arbitrary and capricious. OTR's actions were regrettable, and a mistake, but we cannot say that they were arbitrary and capricious. See *Williams, Adley & Company*, P-0666, P-0667, April 14, 2003.

Accordingly, we cannot order DMH to award to C&E any bid preparation costs and the costs of pursuing this protest.

CONCLUSION

We conclude that the Contracting Officer acted properly, and that the Contracting Officer's actions were not arbitrary and capricious. Accordingly, we dismiss the protest.

SO ORDERED.

DATED: May 19, 2011

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

CONCURRING OPINION: I concur with my colleague that the appropriate test to void a District contract is codified at D.C. Code § 2-302.05(d)(1). As noted above, the voiding of a District contract requires a showing of bad faith as evidenced by a specific intent to injure the plaintiff or protester. In this case, there is no such evidence of bad faith by the Contracting Officer, the Office of Tax and Revenue (OTR), or the District government.

The contracting officer contacted OTR on November 29, 2010, to ascertain the tax status of each of the three timely bidders. On December 1, 2010, the OTR notified the contracting officer that two of the three bidders were non compliant with tax requirements, including the protester C&E. A nonresponsibility determination was completed as to C&E on December 16, 2010, and the contract was awarded to CRW on January 4, 2011.

It was reasonable for the contracting officer to find C&E nonresponsible on December 16, 2010, based on the tax status information forwarded by OTR two weeks earlier. Similarly, it was reasonable for the water filtration contract to be awarded to CRW on January 4, 2011, given the contracting officer's knowledge at the time of award.

Although the contracting officer learned of the OTR error one week after the award, there is no evidence in the record to conclude that his decision not to rescind C&E's nonresponsibility determination was based on bad faith (actuated by a "specific intent to injure" C&E). In fact, the evidence demonstrates that the contracting officer's decision to continue the forward momentum of the procurement with CRW was done to promptly stabilize the threat to St. Elizabeth's water quality presented by unacceptable levels of sediment and foreign materials in the water. (District's Motion To Proceed With Performance, January 26, 2011.)

The above good faith test and its application to these facts notwithstanding, there is something unsettling about the idea that the putative lowest, responsive and responsible bidder could potentially lose an award because of a contracting officer's good faith reliance on a sister

agency's erroneous record of tax non-compliance. This possibility suggests the clear urgency of the District taking immediate action to review and (where appropriate) promptly update the records upon which procurement officials rely in making responsibility (and other) evaluation determinations.

In cases such as this, where a favorable responsibility determination clearly hinges on the accuracy of tax (or other) records maintained by a District agency, the bad faith standard will continue to serve as the test for contract termination. Nonetheless, the Board should scrutinize the District's conduct very carefully in such cases, providing the protester adequate opportunity to present its evidence and directly challenge the District's in a proper forum (as happened instantly with the 2 day hearing). As noted, however, the record herein fails to support a finding of bad faith on the part of the District.

Concur:

/s/ Marc D. Loud, Sr.
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