

GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

PROTEST OF:

M.C. DEAN, INC.)	
)	CAB No. P-0654
Under IFB No. 01-0157-AA-2-0-KA)	

For the Protester, M.C. Dean, Inc.: Fred A. Mendicino, Esq., Watt, Tieder, Hoffar & Fitzgerald, LLP. For Fort Myer Construction Corp.: Christopher M. Kerns, Esq. For the Government: Howard Schwartz, Esq., Assistant Corporation Counsel.

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

OPINION

CourtLink Filing ID 829563

M.C. Dean, Inc., protests the award of a contract to Fort Myer Construction Co., alleging that Fort Myer failed to meet the solicitation requirement of having an electrical contractor's license, that the employee designated by Fort Myer in its bid as having the requisite certification for performing certain traffic signal work will not actually be performing that work, and that Fort Myer's bid is unrealistically low. The contracting officer determined that Fort Myer recently received the proper electrical contractor license, was a responsible contractor, and had the lowest responsive bid. Because M.C. Dean has not demonstrated any violation of law, regulation, or the terms of the solicitation, we deny the protest.

BACKGROUND

On March 15, 2002, the Department of Public Works ("DPW") issued IFB No. 01-0157-AA-2-0-KA for FY-02 City Wide Traffic Signal Bulb Replacement. (Agency Report ("AR"), Ex. 1). The IFB sought a contractor to furnish all necessary labor, materials, and equipment necessary to replace all incandescent vehicular and pedestrian signal heads with light emitting diode ("LED") modules at all signalized intersections and at all mid-block flashing signals or warning devices in the District. The proposed contract was for one year, with an option to extend the contract for an additional year.

Section A of the IFB required the prime contractor to be an electrical contractor licensed and bonded in the District. IFB section 19 states:

A minimum of one of the contractor's employees must have demonstrated experience in the installation of traffic signal heads. This employee must be at least Level II IMSA Certified, and have experience working in and around the Type 170 microprocessor based solid state traffic signal controller. Proof of certification shall be a requirement for consideration as a responsive bidder. A copy of the employee's Level II IMSA certification shall be submitted with the contractor's bid. The contractor will be required

to retain an employee with these minimum credentials during the entire contract. This is the only contractor employee who will be permitted access to the controller cabinet.

(AR Ex. 1, at 11).

On April 17, 2002, DPW opened three bids. (AR Ex. 2). Fort Myer submitted the lowest priced bid in the amount of \$7,888,551, and had attached to its bid the Level II IMSA certificate of Mr. Michael Holland. (AR Ex. 2, 3). M.C. Dean submitted the next lowest bid in the amount of \$9,199,125, and attached the Level II IMSA certificate of Mr. Jerome Thomas. (AR Exs. 2, 4).

On May 1, 2002, M.C. Dean filed its protest with the Board. The District filed its Agency Report on May 22, 2002, noting that DPW was still evaluating the bids and had not made a determination concerning Fort Myer's responsibility. For those reasons, the District was unable to address the merits of M.C. Dean's protest grounds.

Fort Myer responded to the protest on May 31, 2002. Responding to M.C. Dean's responsibility challenge, Fort Myer states that it has been given final approval for its electrical contractor license. Addressing M.C. Dean's claim that the Fort Myer employee designated in its bid as the IMSA Level II certified technician will not actually perform the work, Fort Myer states that it will provide the appropriate Level II IMSA certified personnel for contract performance. Fort Myer argues that the solicitation does not mandate that only the specific employee named in its bid can perform the fieldwork under the contract. Addendum No. 2, issued April 2, 2002, contained answers to bidder questions raised at and after the pre-bid conference, including the following question tendered by M.C. Dean:

Question: Will you consider addressing the issue on whether or not the IMSA Level II person has to be a current employee upon submission of the bid, or a prospective employee upon award?

Answer: Yes. Page 11 and 12, Paragraph 3 of Special Provision 19 states that the employee's Level II IMSA certification shall be submitted with the contractor's bid. The employee named on the certificate must be on the contractor's payroll when the sealed bid is submitted. This is to affirm the bid award is not compromised if employment of the certified employee is not executed.

(Protest, Ex. 2, Addendum No. 2, at 10-11). Fort Myer contends that this provision makes clear that it may have an employee other than the designated employee perform fieldwork so long as the employee is properly certified. Regarding M.C. Dean's argument that Fort Myer's bid is unrealistically low, Fort Myer states that it has confirmed that its bid is realistic and has shown the contracting officer how it calculated its bid prices. Although it concedes that its bid for pay item 9 (retrofitting signal head sections) is considerably lower than M.C. Dean's bid for the same pay item, Fort Myer points out that several other pay items in its bid were over twice as high as M.C. Dean's. (Fort Myer Response, at 6-7). Fort Myer also challenges the pricing estimates contained in the McIntosh affidavit (Protest, Ex. 4) submitted by M.C. Dean, arguing that the affiant failed to properly estimate the time required to replace a signal head section. (Fort Myer Response, at 5-6).

On June 10, 2002, the District filed the contracting officer's June 7, 2002 determination and findings which states that Fort Myer's bid was responsive and that Fort Myer was a responsible contractor. The District's determination and findings attached a copy of Fort Myer's electrical contractor license, dated May 29, 2002.

DISCUSSION

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

The Procurement Practices Act and the procurement regulations require that the District award contracts only to responsible contractors. D.C. Code § 2-303.03(e); 27 DCMR § 2200. Generally, licensing is a matter of responsibility, not responsiveness. *Diversified Information Systems, Inc.*, CAB No. P-0454, Sept. 4, 1996, 44 D.C. Reg. 6495, 6496; *C&D Tree Service, Inc.*, CAB No. P-0440, Mar. 11, 1996, 44 D.C. Reg. 6426, 6434-6435. In the present case, the record contains a written determination by the contracting officer that Fort Myer is a responsible contractor and possesses the proper electrical contractor license required by the solicitation. We see no basis for disturbing the responsibility determination.

Regarding M.C. Dean's second protest ground, that Fort Myer did not intend to use the Level II IMSA certified employee designated in its bid for contract performance, we agree with Fort Myer that the contract terms do not require it to use only that designated employee for work involving the traffic signal controller. What the contract requires is that the contractor retain an employee with the Level II IMSA credentials during the entire term of the contract and that at least one employee who is Level II IMSA certified be present whenever access is required to a traffic signal controller cabinet. (AR Ex. 1).

Finally, M.C. Dean claims that Fort Myer's bid price is unrealistically low. The record does not show that Fort Myer's bid is below the cost of performance. Even if the evidence supported such a finding, we have held that a bid price below the cost of performance is not objectionable for that reason alone. *C.P.F. Corp.*, CAB No. P-0521, Jan. 12, 1998, 45 D.C. Reg. 8697, 8700. Whether the contract can be performed at a price below the cost of performance is a matter of bidder responsibility. We are satisfied from the record that the contracting officer has considered bid pricing when it determined Fort Myer to be responsible.

CONCLUSION

We have carefully considered each of M.C. Dean's protest arguments. Having concluded that M.C. Dean has not shown that the District violated law, regulation, or the terms of the solicitation in evaluating Fort Myer's responsibility and selecting it for award, we deny M.C. Dean's protest.

SO ORDERED.

DATED: July 30, 2002

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

CONCURRING:

/s/ Lorilyn E. Simkins
LORILYN E. SIMKINS
Chief Administrative Judge

/s/ Matthew S. Watson
MATTHEW S. WATSON
Administrative Judge