GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

PROTEST OF:	)	
	)	
HORTON & BARBER PROFESSIONAL	)	
SERVICES, INC.	)	CAB No. P-634
	)	
Under IFB No. DOPR-2KMB-008-HMS and	)	
Purchase Order P/N No. HAOPO 175239	)	

For the Protester: Will Purcell, Esq., Corporate Counsel. For the Government: Howard Schwartz, Esq. and H. Chris Malone, Esq., Assistants Corporation Counsel.

Opinion by Administrative Judge Matthew S. Watson, with Administrative Judges Jonathan D. Zischkau and Phyllis Jackson, concurring.

OPINION

Horton and Barber Professional Services, Inc. ("H&B" or "Protester") protests the award to Lawn Restoration Service ("LRS") of a portion (Wards 3, 4, 5 and 8) of the services solicited in IFB No. DOPR-2KMB-008-HMS ("IFB") for citywide lawn mowing services during the summer of 2000 at parks and recreation centers and the emergency award of most of the remaining mowing services solicited in the IFB (Wards 1, 2 and 6) through an emergency purchase from TruGreen LandCare (P/N No. HAOPO 175239). Protester alleges that the award to LRS improperly used an evaluation criterion not disclosed in the IFB and that the emergency purchase failed to follow emergency procurement procedures.[1]

The District responded that the award to LRS followed the evaluation criteria set forth in the solicitation. We find that LRS's and H&B's bids were properly evaluated with regard to the services included in the contract with LRS.

The emergency contract was awarded June 26, 2000, for a period not to exceed 120 days. (Agency Report ("AR"), Ex. 9, Attachments 4 and 5). Thus, the completion date of the contract was no later than October 24, 2000. In addition, the contract was for lawn mowing during a growing season which has now past, obviating the future need for the services covered by the emergency contract. The protest was filed December 11, 2000. Since the contract period was completed over a month before the protest was filed, and since there is no longer a need for the services, any issues as to the propriety of the emergency contract's award are moot.

Accordingly, we deny the protest, in part, and dismiss the protest as moot, in part.

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[1] The H&B protest might well be considered as two separate protests, since the emergency contract protested was not based on the initial solicitation which resulted in the award to LRS. Nevertheless, since the emergency contract was issued as a replacement for a portion of the initial solicitation which was not awarded, we have considered both issues in a single protest.

BACKGROUND

On March 3, 2000, the Contracting officer for the Office of Contracting and Procurement (OCP) acting on behalf of the Department of Parks and Recreation (DOPR) issued the IFB for a contractor to provide lawn mowing, mulching and pruning services at 89 recreation facilities and 418 parks operated by DOPR in all 8 city wards. (AR, Ex. 1). The procurement was set aside for local businesses, disadvantaged businesses or businesses operated in an enterprise zone. (*Id.* at §M.1). A total price evaluation preference of up to 12% was offered for qualification for the set aside categories. (*Id.* at §M.1.1.2). Unit prices per acre per cutting were requested for mowing service at the various sites grouped by ward and further grouped within wards by "small parks and [large recreation] facilities." (*Id.* at B.4). In addition, separate unit prices per service for mulching and pruning were requested for individual, specifically-identified sites within each ward. (*Id.* at 9-15).

The IFB provided that the District reserved the right to award the single bidder or multiple bidders whose bids are most advantageous to the District. (*Id.* at §§B.2 and C.1). Although separate unit prices were required for mowing large and small sites within each ward, all mowing requirements within a ward would be awarded to a single contractor. (*Id.* at §B.4). The IFB provided that the District reserved the right to accept or reject any and all bids or any part of bids. (*Id.* at §§B.3 and C.1). Although the primary intent of the solicitation was to procure grass cutting services, the IFB requested separate line item prices for mulching and for pruning stating that "[i]n addition to the grass cutting, the agency may need mulching and pruning services for some specific sites. . . ."[2] (*Id.* at §C.2).

On March 21, 2000, the Contracting officer issued Amendment No. 1, adding properties of the Department of Human Services (DHS). (AR, Ex. 2).

On April 3, 2000, OCP received bids from 5 contractors. (AR, Ex. 3).

The Maintenance Section of DOPR informed OCP that it only had sufficient personnel to manage two contractors at the same time for the same service. (AR Ex. 7 at ¶12). DOPR further determined that it had sufficient funds only for the grass cutting service. (*Id.*).

The bid received from the Protester did not follow the bidding instructions. Rather than stating separate prices for grass cutting, mulching and pruning, the bid stated a unit price per acre per cutting for each grass cutting line item, but showed "0" for each mulching and pruning line item with a handwritten note written adjacent to the first mulching and pruning items stating that these items were "included in mowing service."[3] (AR, Ex. 5 at 9 & 12).

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[2] The invitation is silent as to whether, if an award were made for mulching and pruning in a ward, the contract would necessarily be awarded to the same contractor awarded the mowing services in that ward.

[3] Not only did this combination of prices fail to follow the bidding instructions, its application is not clear. First, since this was an indefinite quantity requirements contract, if the need for mowing increased, the cost to the District of unrelated pruning and mulching would also go up whether or not additional pruning and mulching were needed.

The lowest bid for a single contractor for mowing services for the entire city was $1,149,373. It appeared, however, that by awarding the services to more than one contractor, savings could be achieved. Since DOPR could only manage two contractors, OCP divided the groups into two sections. Section 1 consisted of Wards 1, 2, 6 and 7. Section 2 consisted of Wards 3, 4, 5 and 8. (AR, Ex 7, ¶M). The lowest bids for sections 1 and 2 were $491,302 and $623,985, respectively, or a total of $1,115,287. Even though the Protester received more preference points than the other bidders, 12 as opposed to 10, its evaluated bid ranked third overall and third in each of the sections.

Protester, H&B, ranked third for every grass cutting line item. Contrary to the bid instructions, Horton and Barber chose to include the cost of pruning and mulching in the grass cutting price and offer the additional services at no extra cost. The Contracting officer determined that there were not sufficient funds to contract for pruning and mulching services. Notwithstanding that H&B's price for each grass cutting line item included pruning and mulching, the prices entered on H&Bs bid for grass cutting were used to evaluate the H&B bid since the combined price is the only price H&B chose to bid.[4]

The lowest evaluated bid for grass cutting for Section 1 was Olds and Olds Lawn Service, Inc. ("Olds"). (AR, Ex. 4). The lowest evaluated bidder for grass cutting for Section 2 was LRS. (*Id.*).

On May 31, 2000, the Contracting officer awarded a contract to LRS for grass cutting services for Section 2. (AR, Ex. 8). The Contracting officer did not make an award to Olds for Section 1 because Olds was not current on its District taxes.[5] (AR, Ex. 7 at ¶18). It does not appear from the record that Olds was ever notified of this finding. The Contracting officer did not make award to the second low bidder on section 1, LRS, because LRS's performance on the Section 2 contract was not satisfactory. (AR, Ex. 9 at ¶ 3). The Contracting officer did not make award to the third low bidder, H&B, because "the Director, DOPR was not in favor of an award to a small contractor, since the media was very critical of the grass cutting performed at parks and recreation facilities" (*id.* at ¶ 5) and "[i]n addition, the price bid under the IFB by Horton and Barber for the

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[4] Even if the bids of the other bidders had been evaluated by adding their bids for mulching and pruning, H&B would still not have been the low evaluated bidder overall, or for either of the two sections. By Protester's own admission, when pruning and mulching are taken into account, it is the apparent low evaluated bidder only for Ward 4. (AR, Ex. 6).

[5] The record is unclear as to whether or not Olds and Olds actually was current on its District taxes. The document from the Department of Tax and Revenue ("DTR") which the Contracting officer claims verifies noncompliance, (AR, Ex. 7, Att. 7), cannot be construed as indicating noncompliance. The DTR response is not on the DTR standard Tax Verification Advice, which has a box to indicate noncompliance. Rather, the response was a hand-written note stating that the Business Tax Number ("BTN") given to DTR as Olds and Olds' BTN was the tax number for another concern and stated nothing about whether Olds and Olds, or the firm identified by the BTN, had fully complied with District tax laws. (*Id.*). It does not appear from the record that any attempt was made to advise Olds and Olds' of its disqualification or to verify the correct BTN.

base year for grass cutting for [Section 1] was $66,346 higher than the price bid by Olds. . . ." (*Id.* at ¶ 6).[6]

On June 23, 2000, the contracting officer determined that an emergency existed as to grass cutting in Section 1. (AR, Ex 10). Quotations were sought from three large business suppliers.[7] (*Id.* at ¶ 11). Only one company responded, (*Id.* at ¶ 14), and on June 26, 2000, a purchase order was issued to TruGreen LandCare. (AR, Ex. 9, Att. 5) The subject purchase order covered mowing for park and recreation facilities in Wards 1, 2 and 6 during the year 2000 growing season and was completed October 24, 2000. (*Id.*). The unit price per acre per cutting was $270.70 and $70.15 for small and large parks, respectively. (AR, Ex. 9, Att. 4). This compares to $150 and $45, respectively, bid by LRS. (AR, Ex. 8).

Notwithstanding the fact that the contract pursuant to the solicitation was awarded May 31, 2000, and the emergency purchase order issued June 26, 2000, unsuccessful bidders who responded to the IFB were not advised of the awards for over 5 months until November 28, 2000. (AR, Ex. 7 at ¶ 24). The letter giving notice also requested that the bidders extend their bid acceptance periods.

DISCUSSION

We exercise protest jurisdiction pursuant to D.C. Code § 1-1189.3(a)(1).

LRS Contract

There is no merit to the Protester's allegation that its bid was evaluated contrary to the terms of the IFB in the award of the contract for Section 2 to LRS. The solicitation reserved the right of the District to award only grass cutting services and to award those services for individual wards or groups of wards most advantageous to the District. (AR, Ex. 1 at §B.2). Award under the IFB is made to "the most advantageous [bid] to the District, considering only price and the price-related factors specified in the solicitation." (*Id.* at § M.3.1).

The Contracting officer divided the services into two sections based on the ability of DOPR to supervise contract performance and further determined to procure only grass cutting services due to limitations on funds. It has been consistently held that the determination of government needs and the method of accomplishing such needs is primarily the responsibility of the procuring agency and absent convincing evidence of abuse of administrative discretion we have no basis for inquiry. *Unitron Incorporated*, B-191273, July 5, 1978, 78-2 CPD ¶ 7. We find no abuse of this discretion.

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[6] The latter justification is disingenuous since the per unit contract price of the emergency contract ultimately awarded covering 3 of the 4 wards included in Section 1 was 17% higher than the H&B price, which, in addition to grass cutting, included pruning and mulching not included in the emergency contract.

[7] To the extent that the emergency purchase "remove[d] a solicitation placed in the SBE set-aside program," the action should not have been taken without the written approval of the Local Business Opportunity Commission. 27 D.C.M.R. § 804.4, 39 D.C. Reg. 9058 (Dec. 4, 1992).

Section 2 was awarded to the lowest evaluated bidder pursuant to the terms of the IFB. Based on H&B's bids on the grass cutting line items within Section 2, H&B ranked third. Contrary to the IFB instructions, H&B included within its grass cutting bid the cost of pruning and mulching services. H&B cannot, by its own choice, combine items within its bid so as to require the District to purchase more services than it chooses. *See, CNC Company*, B-175689, Aug. 28, 1972. Since H&B chose not to separate its bids for grass cutting, pruning and mulching and put the total amount in the space for each grass cutting line item, the Contracting officer had no choice but to evaluate the bid based on the price shown. Protester was not the low bidder and not entitled to award. The protest against award to LRS under the IFB is denied.

Emergency contract

Protester also protests against award of the emergency contract. The emergency contract was awarded on June 26, 2000, to cut grass during the year 2000 growing season for a period not to exceed 120 days. Protester had no knowledge of the award of the emergency contract until it received a letter from the Contracting officer dated November 28, 2000. The protest was filed December 11, 2000. Although the protest is timely, the issues in the protest are moot. The contract was to cut grass during the year 2000 growing season. Clearly the need for such grass cutting is past. The Board will not consider issues regarding award of a contract for which there is no longer a need for the services. Absent the possibility of a new award, the protest is merely academic and presents no live controversy for the Board's consideration. *Consolidated Waste Industries*, CAB No. P-300, Oct. 8, 1992, 40 D.C. Reg. 4570. The protest against award of the emergency contract is denied as moot.

SO ORDERED

DATED: February 21, 2001

MATTHEW S. WATSON
Administrative Judge

CONCURRING:

JONATHAN D. ZISCHKAU
Administrative Judge

PHYLLIS W. JACKSON
Administrative Judge

NOTE[8]

The protester in this matter was not awarded a contract because it was not the low bidder and the issues raised concerning the emergency procurement are moot, nevertheless, a number of practices exhibited in this procurement were unfair, particularly to small, disadvantaged businesses.

First, we believe that the emergency procurement authority was abused. Emergency procurements are permitted in accordance with regulations adopted pursuant to D.C. Code §1-1183.12. Those regulations limit the use of emergency authority to situations "which cannot be met through normal procurement methods." 27 DCMR §1710.2. That standard was clearly and demonstrably not met in this case. The emergency procurement duplicated portions of the originally issued IFB. By the time the finding was made supporting the emergency procurement, June 23, 2000, bids on the IFB had been received and evaluated. Bids had been opened April 3, 2000, and evaluation completed by May 31, 2000, indicated by the award of Section 1 of the properties included in the IFB. The only action necessary to make an award for the remainder of the work "through normal procurement methods" would have been to sign a contract. The Contracting officer asserts, however, that he did not make an award to LRS "because at this juncture an operational decision was made to issue an emergency procurement," (AR, Ex 7 at ¶ 19), and that he did not make an award to H&B "because a conscious decision was made to suspend further awards under the IFB until the emergency contract expired." (*Id.* at ¶ 20). This logic is circular. An emergency procurement cannot be justified by the fact that normal procurement procedures have been suspended by the decision to undertake the emergency procurement being justified.

Second, we believe that it is patently unfair to induce small, disadvantaged firms, which the District is pledged to assist, to use their resources to bid on set-aside contracts and then determine not to award the contracts to any bidder on the basis that the department, as the result of critical media reports, is "not in favor of an award to a small contractor." District agencies should be certain that a small firm may theoretically be capable of meeting the contractual requirements before setting aside an IFB. Wasting the resources of small, local, disadvantaged firms on preparing bids which the government summarily rejects on the basis that they are small businesses is not to the advantage of either the contracting community or the government. The District certainly should test the responsibility, in terms of capacity to perform the work, of any bidder, whether large or small, but to intentionally exclude all small businesses, regardless of qualification, from having their bids considered is both against established policy and detrimental to the integrity of the system. In determining not to make an award to H&B, the contracting officer made no individual determination as to H&B's qualifications, but rejected its bid solely because it was a small business. When the District then determined to seek quotations on an emergency basis, it limited the RFQ to "larger vendors." (AR, Ex. 9 at ¶ 12). The emergency request sent to only 3 large firms produced

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[8] The Contract Appeals Board has a unique opportunity to review procurements arising from the entire range of District of Columbia Government activity. Where we see problem areas in procurement practices which might be considered by other agencies we will report on these practices as Notes appended to protest and appeal decisions. These Notes are for information only and are not binding on agencies or to be considered precedent of any sort.

effectively no competition, since only one response was received. The price ultimately paid for the services procured under the emergency contract was almost twice the low bid for the same services under the IFB.

Lastly, this procurement showed a breakdown in communication between the agency and the bidders. A bidder is entitled to have its bid fairly considered and to be timely advised as to the conclusion of that consideration. Although a delayed notice to an unsuccessful bidder will not affect the validity of a properly awarded contract, *Andromedica Transcultural H.M.H.C.*, CAB No. P-386, June 17, 1994, 41 D.C. Reg. 3880, 3884; prompt notice is a procedural requirement, 27 DCMR §1544.4, which is expected to be observed. *John E. Kelly & Sons Electrical Construction, Inc.*, CAB No. P-214, May 24, 1990, 38 D.C. Reg. 3065. Delays due to administrative error in giving notice of award to unsuccessful bidders are becoming common. *See, e.g., Trifax Corporation*, CAB No. P-624, Jan. 8, 2001, 12 P.D. 8086. The delays create uncertainty as to when a protester received knowledge of an award and consequently introduce unnecessary issues before the Board as to the timeliness of protests. More importantly, the delays deprive an unsuccessful bidder of the benefits of D.C. Code §1-1189.8(2) to stop performance and maintain the status quo.

In this matter, the delays in giving notice of award were not through inadvertent error, but were intentional. On May 31, 2000, when the Section 2 awarded was made, the Contracting officer determined not to advise other bidders of the award until "all of the awards were made." (AR, Ex. 7 at ¶ 21) Subsequently, it was decided to suspend awards for Section 1 until "the emergency contract expired." (*Id.* at ¶ 20). At the same time the Contracting officer decided to suspend further awards, he determined not to notify other bidders of his decision "because this Office was awaiting the outcomes of the emergency procurement." (*Id.* at ¶ 22). As a result of these decisions, no notice was given to unsuccessful contractors until November 28, 2000, six months after the Section 2 contract was awarded and 5 months after the Contracting officer effectively rejected all bids for Section 1 for the year 2000 growing season. Olds and Olds was denied an award of Section 1 because it allegedly was not in compliance its District tax obligations, however, it does not ever appear to have been advised of this rejection. The long delays in giving notice of contract decisions will render moot most issues upon which a dissatisfied contractor may wish to protest, as was the case in this matter. In addition, responsible bidders may be induced to hold resources available and refrain from taking other work while awaiting award decisions, even though, unbeknownst to them an award has actually been made or the solicitation canceled or suspended. Particularly for small, disadvantaged businesses for which this solicitation was set aside, such resource drain may hamper their ability to succeed in business.

If the District procurement system is to be considered trustworthy, decisions not to award to any bidder, whether because the contract is awarded to another bidder, because of deficiencies in the responsibility of the bidder or responsiveness of the bid, or because the solicitation has been canceled or suspended should be immediately communicated to the bidders. To do otherwise defeats the openness required by a fair procurement system and may give the impression, whether rightfully or wrongfully, that information is delayed to defeat bidders' rights to protest.