

GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

PROTEST OF:

THL ASSOCIATES)	
)	CAB No. P-643
Under IFB No. POHA-2001-B-005)	

For THL Associates: Raymond Fioravanti, Esq., Daniel B. Abrahams, Esq., Epstein, Becker & Green, P.C. For the Government: Howard Schwartz, Esq., Warren J. Nash, Esq., Assistants Corporation Counsel.

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

OPINION

THL Associates (“THL”) protests the award of a contract to J&K Distributors, Inc. of Washington, D.C. (“J&K”) for the preparation and delivery of hot and cold meals to institutional child care centers. THL alleges that the solicitation failed to provide quantity and quality criteria for certain adult meals which were added through solicitation amendments. We conclude that the solicitation as amended made all meals, both those for children and adults, subject to the USDA meal criteria set forth in 7 C.F.R. § 226.20. If THL was not clear on the meal requirements for adult meals, it should have brought the matter to the attention of the contracting officer prior to bid opening, and if not satisfied with the response, protested prior to bid opening. Because THL filed its protest long after bid opening, we dismiss the protest as untimely.

BACKGROUND

On February 20, 2001, the Office of Contracting and Procurement (“OCP”) issued IFB No. POHA-2001-B-005 in the small business set-aside market for the preparation and delivery of hot and cold meals to institutional child care centers owned and operated by the Department of Parks and Recreation. (Agency Report (“AR”) Ex. 1, Section C.2). The solicitation states that it is necessary to have food catered to the child care centers because the facilities are not equipped to meet health and safety standards for on-site food preparation. (AR, Ex. 1, Section C.2). Section C.1.1, entitled “Applicable Documents,” specifies the regulation at 7 C.F.R. Part 226 for the “Child Care Food Program and USDA, Required Meals Pattern.” Section C.3 provides in pertinent part:

The contractor shall provide all labor, supplies, and equipment necessary to prepare and deliver and estimated 1,261 hot or cold meals and snacks daily to the Department of Parks and Recreation daycare and after care sites. The contractor shall perform the following general tasks to satisfy the requirements above:

- C.3.1 The contractor shall plan and develop menus and menu cycles approved by the District for children between the ages of 2 through 18 years old in accordance with the Child Care Food Program and the USDA, Required Meals Patterns, 7 CFR Part 226.
- C.3.2 The menus shall be planned per the USDA approved cycle and developed in the format which incorporates the meal type, food components, meal portions and meal patterns and variety for children ages 2 through 18 years old according to the sample meal menu herein (see Attachment J.9). The menu must change every eleven (11) calendar days.

....

The Department of Agriculture, in 7 C.F.R. § 226.20 (c), lists meal patterns consisting of food components for children through age 12 and adult participants, covering breakfast, lunch, supper, and snack. (AR, Ex. 2).

The contracting officer issued three amendments to the solicitation. Amendment Nos. 2 and 3 are relevant. On March 21, 2001, the contracting officer issued Amendment No. 2 which added to the Section C.3 preamble the following: "An additional 100 adult size hot meals shall be delivered to the daycare sites." The amendment also added to the definition of "Luncheon" in Section C.1.2.7, the following: "To include additional meal portions for adults according to the USDA serving size." (AR, Ex. 1). Amendment No. 3, issued on March 22, 2001, replaced the solicitation's pricing schedules so that they included contract line items for the adult meals.

Three bidders, THL Associates, J&K Distributor, Inc., and Hood Institutional Foods, Inc., submitted bids by the due date of April 2, 2001. (AR at 3; Ex. 3). J&K was the low bidder with a total price for the base year and four option years of \$6,434,481.72. THL's total bid price was \$6,670,723.88. (AR, Exs. 3 and 4). The pricing summaries shows that THL's price for adult meals (ranging from \$5.50 to \$6.16 each) was more than twice that of J&K's (ranging from \$2.30 to \$2.54 each), which in the aggregate made THL's adult meal price more than \$400,000 greater than J&K's. (AR, Ex. 3). J&K's adult meal prices were generally only about five cents greater than the prices it bid for the children's menu whereas THL's adult meal prices were about twice that of its children's menu.

On June 11, 2001, the contracting agency advised THL of its intent to award the contract to J&K. On June 25, 2001, THL filed its protest, arguing that there was not a level playing field in that the adult meal offered by J&K was of considerably lower quantity and quality than that which was offered by THL. Alternatively, THL contends that the solicitation contained a latent ambiguity concerning the requirements for the adult meal. On July 10, 2001, the District's CPO issued a notice to proceed with contract award to J&K notwithstanding pendency of the protest. The Board sustained that determination over a challenge from THL.

On July 16, 2001, the District filed its response to the protest, contending that the protest should

be either dismissed as untimely because the protest raises solicitation improprieties or denied on the merits because the solicitation clearly defined the requirements for adult meals. In its comments on the District's Motion to Dismiss/Agency Report, THL argues that the adult meals bid by THL were consistent with the meals it had been providing to the District under the predecessor contract. THL concedes that J&K's adult meals meet the minimum meal requirements set forth in 7 C.F.R. § 226.20. Nevertheless, THL argues that the solicitation as amended did not incorporate the requirements of 7 C.F.R. § 226.20 for adult meals.

DISCUSSION

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

Sections C.1.1 and C.3 of the original solicitation clearly incorporated the meal requirements set forth in 7 C.F.R. § 226.20 for the meals that were being solicited. The additions to Sections C.1.2.7 and C.3 cannot reasonably be read with the remaining portions of the original solicitation as excluding adult meals from the only specified criteria for meals found in the solicitation, namely, 7 C.F.R. § 226.20. If THL was not certain of the requirements for adult meals, it had an obligation to raise the issue before the bid opening time. We see no latent ambiguity in the requirements for adult meals. *See Grumman Data Systems Corp. v. Dalton*, 88 F.3d 990, 997-98 (Fed. Cir. 1996).

THL's protest is untimely because solicitation improprieties which are apparent prior to bid opening must be protested prior to bid opening. D.C. Code § 1-1189.8(b)(1).

SO ORDERED.

DATED: August 3, 2001

/s/
JONATHAN D. ZISCHKAU
Administrative Judge

CONCURRING:

/s/
LORILYN E. SIMKINS
Chief Administrative Judge

/s/
MATTHEW S. WATSON
Administrative Judge