

(AR Ex. 2). Section M.1.9 of the solicitation includes the following language regarding the subcontracting plan:

Any prime contractor responding to this solicitation shall submit with its bid, a notarized statement detailing its subcontracting plan. Bids responding to this IFB shall be deemed nonresponsive and shall be rejected if the bidder fails to submit a subcontracting plan that is required by the solicitation....

(AR Ex. 1). Subsections of M.1.9 identify the specific information that must be included in each subcontracting plan:

M.1.9.1 A description of the goods and services to be provided by the SBEs...;

M.1.9.2 A statement of the dollar value of the bid that pertains to the subcontract to be performed by SBEs...;

M.1.9.3 The names and addresses of all proposed subcontractors who are SBE's...;

M.1.9.4 The name of the individual employed by the prime contractor who will administer the subcontracting plan...;

M.1.9.5 A description of efforts that the prime contractor will make to ensure that SBEs, or, if insufficient SBEs are available, that certified business enterprises will have an equitable opportunity to compete for subcontracts;

M.1.9.6 In all subcontracts that offer further subcontracting opportunities, assurances that the prime contractor will include a statement, approved by the contracting officer, that the subcontractor will adopt a subcontracting plan similar to the subcontracting plan required by the contract;

M.1.9.7 Assurances that the prime contractor will cooperate in any studies or surveys that may be required by the contracting officer...;

M.1.9.7 A list of the type of records the prime contractor will maintain to demonstrate procedures adopted to comply with the requirements set forth in the subcontracting plan, and assurances that the prime contractor will such records available for review upon the District's request; and

M.1.9.9 A description of the prime contractor's recent effort to locate SBEs or, if insufficient SBEs are available, certified business enterprises and to award subcontracts to them.

(AR Ex. 1).

Twenty-one bidders responded to the solicitation at the bid opening of September 16, 2009. Keystone's bid was the fourth lowest actual bid price, and the third lowest price after evaluation of

bidder preferences. (AR at 3; AR Ex. 5). Keystone acknowledged receipt of all five amendments. All bidders with prices lower than Keystone's were found to be ineligible. In a determination and findings dated December 10, 2009, the contracting officer found Keystone's bid to be nonresponsive since Keystone failed to submit a valid subcontracting plan as required by section M.1.9. (AR Ex. 5). Keystone's subcontracting plan, signed by its President, Carlos Perdomo, included only the company's contact information and tax identification number. Keystone's plan failed to include any subcontracting information. Thus, the substantive part of the subcontracting plan was left entirely blank. (AR Ex. 3). Keystone filed this protest on November 25, 2009, challenging the contracting officer's decision to reject its bid as nonresponsive. Keystone asserts that section L.9.1 of the original solicitation (prior to Amendment 2) is applicable and that the contracting officer had never requested Keystone to submit its subcontracting plan.

DISCUSSION

We exercise jurisdiction pursuant to D.C. Code § 2-309.03(a)(1). The main issue presented in this protest is whether the contracting officer properly determined that Keystone's incomplete subcontracting plan furnished with its bid rendered Keystone's bid nonresponsive.

D.C. Code §§ 2-218.46(d) and (e) provide:

(d) Bids or proposals responding to a solicitation, including an open market solicitation, shall be deemed nonresponsive and shall be rejected if the solicitation requires submission of a certified business enterprise subcontracting plan and the prime contractor fails to submit a subcontracting plan as part of its bid or proposal. A certified business enterprise subcontracting plan shall specify the following:

- (1) The name and address of the subcontractor;
- (2) Whether the subcontractor is currently certified as a certified business enterprise;
- (3) The scope of work to be performed by the subcontractor; and
- (4) The price to be paid by the contractor to the subcontractor.

(e) No prime contractor shall be allowed to amend the subcontracting plan filed as part of its bid or proposal except with the consent of the contracting officer and the Director. Any reduction in the dollar volume of the subcontracted portion resulting from such amendment of the plan shall insure [sic] to the benefit of the District.

Our decision in this case is controlled by our recent decision in *Keystone Plus Construction Corp.*, CAB Nos. 822, 830, 832, Feb. 19, 2010. There is no dispute that subsection 2-218.46(d) applies to this procurement and the procuring agency. As the facts amply demonstrate, the solicitation was a set-aside solicitation requiring submission of a certified business enterprise subcontracting plan. Section M of the solicitation tracks much of the language of D.C. Code § 2-218.46, including subsection 2-218.46(d). Thus, each bidder was required to submit a complete subcontracting plan including the name and address, current CBE certification status, scope of work, and price to be paid, for each subcontractor.

Keystone argues that the contracting officer improperly found Keystone's bid to be nonresponsive, even though the contracting officer had not requested from Keystone a subcontracting plan after bid opening, as required by the original Section L.9.1 of the solicitation. Keystone's argument ignores the fact that Section L.9.1 was removed from the solicitation by Amendment 2. Additionally, prior to enactment of D.C. Code § 2-218.46 in 2005, District procurement law addressed subcontracting plans in bids as a matter of bidder responsibility, not responsiveness. However, section 2-218.46, in regulating performance and subcontracting requirements, including SBE participation, mandates that CBE subcontracting plans, under certain defined circumstances which are applicable here, be a matter of bid responsiveness. Section M, particularly M.1.9, of the solicitation provides more than adequate clarity that the subcontracting plan here was a matter of responsiveness. Each bidder in this procurement was required to submit a CBE subcontracting plan with its bid.

On the facts presented in the record, Keystone's subcontracting plan was materially incomplete so as to render its bid nonresponsive. In its subcontracting plan, Keystone failed to provide any of the required information in its subcontracting plan. Because Keystone failed to submit a valid CBE subcontracting plan, Keystone's bid was rendered nonresponsive pursuant to D.C. Code § 2-218.46(d). Accordingly, the contracting officer did not err in determining Keystone's bid to be nonresponsive.

CONCLUSION

For the reasons discussed above, we conclude that the contracting officer did not err in determining Keystone's bid to be nonresponsive based on a failure to submit a valid subcontracting plan with its bid. Accordingly, we deny the protest.

SO ORDERED.

DATED: February 24, 2010

/s/ Warren J. Nash

WARREN J. NASH

Administrative Judge

CONCURRING:

/s/ Jonathan D. Zischkau

JONATHAN D. ZISCHKAU

Chief Administrative Judge