

DISTRICT OF COLUMBIA CONTRACT APPEALS BOARD

PROTEST OF:

AAA TERMITE & PEST CONTROL)	
)	CAB No. P-0828
Solicitation No: DCAM-2009-B-0055)	

For the Protester: Mr. Michael Wanamaker, *pro se*, AAA Termite & Pest Control. For the District of Columbia Government: Alton E. Woods, Esq., Assistant Attorney General, Office of the Attorney General.

Opinion by Chief Administrative Judge Jonathan D. Zischkau, with Administrative Judge Warren J. Nash, concurring.

OPINION

Filing ID 28406256

AAA Termite & Pest Control has protested the determination that its bid was nonresponsive for failing to acknowledge two solicitation amendments. AAA Termite had downloaded the solicitation from the Office of Contracting and Procurement (“OCP”) website but failed to check the website prior to submitting its bid for any amendments. The contracting officer states that bidders who picked up a printed copy of the solicitation from OCP were mailed the amendments but firms that downloaded the solicitation were not known to OCP. Thus, OCP could not mail amendments to firms which had downloaded the solicitation from the website and were not on the bidders list. We conclude that the contracting officer did not violate law, regulation, or the terms of the solicitation by determining AAA Termite’s bid to be nonresponsive. Having chosen to obtain the solicitation from the OCP website, it was AAA Termite’s responsibility to check the same OCP website for any amendments to the solicitation. Accordingly, we deny the protest.

BACKGROUND

On August 28, 2009, the District’s Department of Real Estate Services (“DRES”) issued Invitation for Bids (“IFB”) No. DCAM-2009-B-0055 for pest control services for various District Government properties. (Agency Report (“AR”), at 2; AR Ex. 2). This IFB was posted on OCP’s website on August 28, 2009. The IFB could either be picked up from DRES’s bid room or downloaded from OCP’s website. AAA Termite most likely downloaded an electronic copy of the solicitation from the OCP website between August 28, 2009, and September 21, 2009, that is, at some point before the first amendment was posted at the website on September 22, 2009. Bidders that picked up a printed copy of the solicitation from the DRES bid room were added to the bidders list. Firms that downloaded the solicitation from the OCP website were not added to the bidders list though presumably a firm could have asked to be added to the bidders list so that it could receive amendments by mail from the contracting agency.

The solicitation provides *inter alia* in section L.2 (entitled “Pre-Bid Conference”):

All oral questions must be submitted in writing following the close of the pre-bid conference but no later than five working days after the pre-bid conference in order to generate an official answer. Official answers will be provided in writing to all prospective bidders who are listed on the official bidder's list as having received a copy of the solicitation. Answers will also be posted on the OCP website at www.ocp.dc.gov.

(AR Ex. 2). Section L.12 provides that any responses to bidders' questions would be provided in an amendment. Bidders were notified of the need to acknowledge IFB amendments in IFB section L.16 (entitled "Acknowledgment of Amendments"):

The Bidder shall acknowledge receipt of any amendment to this solicitation by (a) signing and returning the amendment; (b) by identifying the amendment number and date in the space provided for this purpose in item 20 of page 1 (Solicitation, Offer, Award Form) of the solicitation; or (c) by letter or telegram, including mailgrams. The District must receive the acknowledgment by the date and time specified for receipt of bids. Bidder's failure to acknowledge an amendment may result in rejection of the bid.

(AR Ex. 2) (emphasis in original). AAA Termite attended the pre-bid conference on September 8, 2009 (*see* District's Determination to Proceed with Contract Performance, filed Nov. 10, 2009), but never had itself added to the bidders list. Amendment No. 1, posted on OCP's website on September 22, 2009, addressed questions posed by the bidders, added buildings to each of the two groups of facilities, and revised the pricing schedule. (AR Ex. 4). Amendment No. 2, posted on OCP's website on September 24, 2009, answered additional questions and again revised the pricing schedule. (AR Ex. 5). In addition to posting the amendments on the OCP website, the two amendments were mailed by OCP's staff to the vendors listed on the official bidders list. Because AAA Termite had downloaded the IFB from the OCP website, it did not appear on the bidders list. AAA Termite failed to check the OCP website during the period leading up to the bid opening date of September 30, 2009, and thus it states that it was not aware of the two amendments. On September 30, 2009, five bids were publicly opened with AAA Termite the apparent low bidder. (AR Ex. 1). Because AAA Termite failed to acknowledge the two amendments as set forth in IFB section L.16, and in 27 DCMR § 1517.1 (*see* AR Ex. 8), the contracting officer determined its bid to be nonresponsive in a letter dated October 1, 2009:

It is the responsibility of the bidders to check the OCP website through the duration of the advertised period and to be aware of amendments made to the solicitation. As your bid did not acknowledge the above mentioned amendments to the subject solicitation, the District finds the bid submitted by AAA Termite and Pest Control non-responsive to the District requirements; and therefore, will not be considered for a contract award.

(AR Ex. 3). On October 1, 2009, the contracting officer issued letters of intent to award contracts to the next two low bidders, Configuration, Inc., and Dixon Termite & Pest Management, Inc. (AR Ex. 9). On October 6, 2009, DRES's deputy director received a call from a representative of AAA Termite asserting that its bid was responsive and that it had not

been notified of the two amendments. (*Id.*). The contracting officer issued a notice the same day cancelling the solicitation. (AR Ex. 6). After a review of the matter and consultation with the Office of the Attorney General, the contracting officer determined that she could proceed with award to bidders other than AAA Termite on the basis that AAA Termite was responsible for checking the OCP website for amendments. (AR at 3; AR Ex. 9). On October 14, 2009, the contracting officer notified all bidders that she was rescinding the October 6 cancellation and that the contract award would proceed. (AR Ex. 7). On October 15, 2009, AAA Termite filed its protest.

DISCUSSION

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

AAA Termite argues that the contracting officer's determination finding it nonresponsive was legally erroneous because the solicitation failed to notify bidders that they should check the OCP website for postings of IFB amendments. AAA Termite also argues that the procurement was flawed in that some bidders were mailed the amendments while others (including AAA Termite) were not. The District responds that it was AAA Termite's responsibility to check the OCP website for possible amendments to the IFB because it had downloaded the IFB from the same OCP website. Because the contracting officer only had a bidders list of firms that had obtained a printed copy of the IFB from the DRES bid room, the District points out that the contracting officer could not know the bidders who had downloaded the IFB from the OCP website.

The Procurement Practices Act requires effective competition and fair and equitable treatment of all persons involved in District procurements. D.C. Code § 2-301.01. In order to further these goals, a contracting agency has an affirmative obligation to use reasonable methods for the dissemination of solicitation documents, including amendments, to prospective contractors. *Southern Maryland Restoration, Inc.*, CAB No. P-0459, Sept. 20, 1996, 44 D.C. Reg. 6503, 6506; *U.S. Pollution Control, Inc.*, B-248910, Oct. 8, 1992, 92-2 CPD ¶ 231; *Electromagnetix Corp.*, B-249623, Oct. 29, 1992, 92-2 CPD ¶ 295. Prospective bidders have a duty to avail themselves of every reasonable opportunity to obtain solicitation documents. *Southern Maryland Restoration, Inc.*, 44 D.C. Reg. at 6506; *Optelec U.S., Inc.*, B-400349, Oct. 16, 2008, 2008 U.S. Comp. Gen. LEXIS 178 (GAO held that Optelec "alone was responsible for monitoring the website for the posting of the solicitation"); *Republic Floors, Inc.*, 70 Comp. Gen. 567, 91-1 CPD ¶ 579. Normally, a prospective contractor bears the risk of not receiving a solicitation amendment, unless it is shown that the contracting agency made a deliberate effort to prevent the firm from competing, or even if not deliberate, there is evidence that the agency failed to provide the amendment after the firm availed itself of every reasonable opportunity to obtain it. *Crown Management Services, Inc.*, B-232431.4, Apr. 20, 1989, 89-1 CPD ¶ 393. A prospective bidder's nonreceipt of a solicitation amendment, and subsequent elimination from the competition, will not justify disrupting a procurement, unless evidence exists that the agency failed to comply with the applicable regulations governing the distribution of amendments. *Irwin-Jurkewicz Corp.*, B-249037, Oct. 20, 1992, 92-2 CPD ¶ 257.

In the present protest, AAA Termite does not argue that it was unreasonable for DRES to post the original IFB at OCP's website for prospective contractors to download. Nor does AAA Termite deny that the OCP website warns prospective contractors to check the OCP website daily for any amendments to the posted solicitations. Having opted to download the IFB from the website, and knowing that the downloading function is structured so that the downloading entity remains anonymous to the contracting agency, AAA Termite should have realized that the only way for the contracting agency to communicate an amendment to it would be by posting the amendments at the same OCP website containing the original IFB. Alternatively, if AAA Termite wanted to assure itself of receiving a written notice specifically directed to it, then it should have contacted DRES and had its name added to the official bidders list. The record demonstrates that AAA Termite did not take this measure. Although it would have been reasonable for DRES contracting officials to add to the official bidders list both AAA Termite and the other firm which attended the September 8 pre-bid conference, that was not done. Nevertheless, the agency did not violate procurement law by failing to add these contractors to the bidders list. It was AAA Termite's responsibility to have itself added to the bidders list if it wanted amendments to be mailed to it. In sum, by failing to check the OCP website for IFB amendments and by failing to have its name added to the bidders list, AAA Termite did not avail itself of every reasonable opportunity to obtain the amendments.

AAA Termite failed to respond to the agency report so we deem it to concede that the amendments made material changes to the scope of work and price schedule. The amendments added additional buildings to the statement of work requirements and revised the price schedule. These were material changes such that the failure of AAA Termite to acknowledge the amendments could not be considered a minor informality which could be waived by the contracting officer. By not acknowledging the two amendments, AAA Termite was not legally bound to the IFB requirements as amended, thus rendering its bid nonresponsive. *Northern Sealcoating & Paving, Inc.*, B-299393, Mar. 30, 2007, 2007 CPD ¶ 67.

CONCLUSION

For the reasons discussed above, we deny the protest of AAA Termite of the contracting officer's determination that its bid was nonresponsive for failing to acknowledge the IFB amendments.

SO ORDERED.

DATED: December 8, 2009

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

CONCURRING:

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