

GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

PROTEST OF:

Infrastructure Corporation of America)	
)	CAB No. P-0731
Under RFP No. POKA-2005-R-0034-CB)	

For the Protester Infrastructure Corporation of America: Tenley A. Carp, Esq., Cohen Mohr, LLP. For the District of Columbia Government: Jon N. Kulish, Esq., and Jennifer L. Longmeyer-Wood, Esq., Assistant Attorneys General. For the Intervenor VMS, Inc.: Mark F. Evens, Esq., and Michael J. Askew, Esq., Thelen, Reid, & Priest, LLP.¹

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

OPINION

(Lexis-Nexis Filing ID 11825911)

Infrastructure Corporation of America (ICA) protests the District's action of issuing Amendment No. 5 to the Request for Proposals (RFP). ICA asserts that Amendment No. 5 revised the RFP's performance requirements in a significant manner but did not provide reasonable additional time to submit proposals, thereby unfairly eliminating competition. The District responds that it properly amended the solicitation and that the Board should dismiss the protest. Because the protester failed to factually support the allegations, we deny the protest.

BACKGROUND

On December 1, 2005, the District of Columbia Office of Contracting and Procurement, ("OCP"), through the District Department of Transportation ("DDOT"), issued RFP No. POKA-2005-R-0034-CB, NHS Asset Preservation DC Streets II. The RFP requested offerors to submit proposals that could provide to the District asset management services to rehabilitate and maintain designated roadway and roadside assets for a base period of two years and potentially for three additional option years. Prospective contractors were to submit offers for Contract Line Item Numbers ("CLINS") for basic roadway and roadside rehabilitation and maintenance. The RFP also requested proposals for additive alternate CLINs for snow removal and tree and debris removal which could be added to the contract if funds were available. (Agency Report ("AR") Ex. 1).

¹ By letter dated May 22, 2006, VMS, Inc., submitted a second motion to intervene in the protest. The Board hereby grants the VMS request to file its Comments to the Agency Report and Response to ICA's Comments on the Agency Report.

Thirteen companies picked up copies of the RFP. Five of those companies appeared to be able to meet the RFP bonding requirements. (AR Ex. 1 and 10). The District conducted a pre-proposal conference on December 21, 2005, attended by representatives of all thirteen potential offerors. (AR Ex. 10). Amendment No. 2, issued December 30, 2005, requested proposals from offerors on January 31, 2006. (AR Ex. 1 and 10).

Prospective offerors at the pre-proposal conference submitted 42 questions. ICA submitted two additional questions by e-mail dated December 22, 2005. (AR Ex. 10). OCP and DDOT provided written responses to these questions in Amendment No. 3, dated January 6, 2006. In the response, OCP declined ICA's request to extend the proposal deadline for an additional 45 days beyond January 10, 2006, as well as ICA's request to extend the mobilization period for an additional 30 days. (AR Ex. 4). OCP and DDOT issued Amendment No. 4 on January 20, 2006. Amendment No. 4 answered three additional questions submitted by potential offerors. (AR Ex. 4). On January 31, 2006, VMS, Inc. submitted the only timely proposal. (AR Ex. 10).

DDOT's evaluators met on February 8, 2006, to consider the VMS proposal. (AR Ex. 10). DDOT held negotiation sessions with VMS on February 17 and March 17, 2006. (AR Ex. 10). After the second session DDOT decided to revise the RFP. In the amendment, DDOT deleted a number of locations that had already been paved under other contracts. (AR Ex. 10). The effect of the amendment was to reduce the scope of work and thus the cost of the job. DDOT hoped the amendment would encourage the other prospective contractors to submit proposals.

DDOT issued Amendment No. 5 to the RFP, dated March 29, 2006, to all potential offerors on the bidders list, except the District initially failed to send Amendment No. 5 to VMS. (AR Ex. 5). The District later sent Amendment No. 5 to VMS by facsimile on April 14, 2006. (AR Ex. 10). Amendment No. 5 removed several items of work from the RFP. (AR Ex. 6). Amendment No. 5 adjusted the method of testing for the International Roughness Index ("IRI"), by excluding from the index utility cuts. (The IRI prescribes tests for pavement smoothness). Amendment No. 5 also allowed the contractor additional time to meet the IRI compliance date by extending the IRI compliance date from six months after award to a full year after award. (AR Ex. 10). Amendment No. 5 erroneously stated that the January 31, 2006, due date for proposals was not extended. However, the amendment required offerors to acknowledge receipt of the amendment by April 14, 2006. (AR Ex. 10).

There is no indication that ICA contacted DDOT about Amendment No. 5 from March 29 through April 9, 2006. On April 10, 2006, David Rader from ICA contacted DDOT by telephone and spoke with OCP Supervisory Contract Specialist Kathy Hatcher regarding Amendment No. 5. (AR Ex. 9). In that conversation, Ms. Hatcher confirmed that the District was in negotiations with VMS, but stated that the District had modified several terms and conditions that could affect prices and change the quality of services and delivery schedule. Ms. Hatcher told Mr. Rader that the District had decided to send the addendum to all firms that had received a copy of the RFP to give those firms an opportunity to respond by submitting proposals. Ms. Hatcher told Mr. Rader that, if asked, the District would grant an extension of

time of two weeks beyond the (presumed) closing date of April 14, 2006, in which to respond to the revised RFP. According to Ms. Hatcher, Mr. Rader informed her that two weeks was not enough time, and that ICA needed from 60 to 90 days to submit a proposal. (AR Ex. 9). ICA filed its protest on April 13, 2006.

By Amendment No. 6 dated April 14, 2006, the District extended the date for submission of offers to April 28, 2006. (AR Ex. 7). By Amendment No. 7, dated April 28, 2006, but actually signed and faxed to all prospective offerors on April 24, 2006, the District extended the date for submission of offers to May 8, 2006. (AR Ex. 8 and 10). The May 8 deadline passed without any new submissions from prospective offerors or even a revised offer from VMS. DDOT states that VMS's original proposal is still under consideration.

DISCUSSION

ICA asserts that Amendment No.5 was a substantial change to the solicitation, and that the District should have allowed prospective offerors more time to respond to the new requirements of the solicitation. The District responds that OCP complied with all regulations when it issued Amendment No. 5 and that ICA has not shown the District any reason to extend the proposal due date.

We begin by observing that ICA has not demonstrated – with evidence of record – why it could not prepare a proposal from March 29 through May 8, a total of 40 calendar days. On that basis, we must deny its protest in view of the affidavit from DDOT indicating that the response time was reasonable. Nevertheless, the District clearly must appreciate that during this period – intended to spur additional competition – not a single new offer was submitted nor did VMS submit a revised proposal. Moreover, the issuance of the last three solicitation amendments were accompanied by glaring errors and sloppy work by the contracting agency. There is no indication in the record that the contracting officer has completed negotiations with VMS, much less made an award. Thus, nearly seven weeks after the revised closing date, we are left wondering if perhaps the contracting officer should not have given prospective offerors more time to offerors to respond. Apart from ICA, none of the other eleven prospective offerors seems interested in the procurement. We hope that DDOT has made inquiry to see why that is, and, with the contracting officer, is working on a plan to inject some meaningful competition into a project that clearly should have ample competition.

CONCLUSION

For the reasons discussed above, we deny the protest.

DATE: July 18, 2006

/s/ Warren J. Nash

WARREN J. NASH
Administrative Judge

CONCURRING:

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

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