

GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

PROTESTS OF:

TITO CONTRACTORS, INC.)
) CAB Nos. P-363 and P-366
) (Consolidated)
Under IFB No. 93-0030-AA-4-N-CC)

For the Protestor: Joseph V. McGrail, Esquire. For the Government: Robert J. Harlan, Jr., Assistant Corporation Counsel.

Opinion by Administrative Judge Zoe Bush, with Administrative Judges Terry Hart Lee and Benjamin B. Turner concurring.

OPINION AND ORDER

These consolidated protests challenge the solicitation and award of the above-captioned Invitation for Bids (IFB) for the renovation of portions of the South Potomac Building at 613 G Street, N.W., Washington, DC^{1/}. Protestor, Tito Contractors, Inc. (Tito), asserts that the actions of the Department of Public Works (DPW) in cancelling the solicitation after meeting with all the bidders is without precedent and impugns the integrity of the sealed bid system. Tito also asserts:

- a. Contract award was made despite the pending protest CAB P-363 acknowledged by the Board on February 2, 1993.
- b. The Government of the District of Columbia violated its own rules by making this award namely: Violated of 1619.3(a). The solicitation that was issued subsequent to the cancellation of IFB 93-0030-AA-4-N-CC did not notify potential offerors that an award would be made without discussion. The Contracting Agency did not conduct any discussions before award.^{2/}

^{1/}These protests were consolidated by Board Order dated March 10, 1993.

^{2/}The cited regulation provides:

1619.3 If discussions are not held pursuant to § 1619.1(b), the following requirements shall be met:

- (a) All offerors must have been notified of the possibility that an award might be made without discussion.

c. The Contracting Agency issued a Notice to Proceed to the Contractor Diamond Construction, Inc. without receiving payment and performance bonds from Diamond Construction, Inc. in violation of 2611.1 of Title 27 of the District of Columbia Municipal Regulations, and 2703.9 of Title 27.^{3/}

d. That the Contracting Agency acted in an arbitrary and capricious manner and possibly illegal manner by allowing Diamond Construction, Inc. a "second bite of the apple".

Tito requests that the IFB be reinstated and that it be awarded the contract as the lowest responsive and responsible bidder, or, in the alternative, that it be awarded its bid preparation costs and costs for payment and performance bonds.

In its agency report concerning the consolidated protests, the District argues that in

^{3/}The cited regulations provide:

2611.1 Each notice of intent to award shall include the following:

- (a) The identity of the IFB;
- (b) The prospective contractor's bid;
- (c) The award price;
- (d) A statement notifying the prospective contractor that all required performance and payment bonds must be properly executed by the prospective contractor and sureties and returned to the contracting officer by the prospective contractor within the time period specified in the IFB, or, if no time period is specified in the IFB, within ten (10) days after the bond forms are presented by the District to the prospective contractor for signature;
- (e) A statement notifying the prospective contractor that the required contract form must be properly executed by the prospective contractor and returned to the contracting officer by the prospective contractor within the time period specified in the IFB, or, if no time period is specified in the IFB, within ten (10) days after the District government contract form is presented by the District to the prospective contractor for signature; and
- (f) A statement that a notice to proceed will be issued, contingent upon the contracting officer's receipt of executed performance and payment bonds and executed contract form that is in compliance with the requirements of the IFB and this title.

* * *

2703.9 In construction contracts, the contractor shall furnish all performance and payment bonds (or other securities) by the deadline for submitting bonds (or other securities) as stated in the solicitation. The bonds (or other securities) must be submitted before a notice to proceed is issued.

P-363, the cancellation of the invitation and subsequent negotiation were proper according to the regulations. With regard to P-366, the District responds that: (a) there is no requirement that the District delay awarding a contract because a bid protest is filed; (b) the District did not violate 27 DCMR § 1619.3(a); (c) the District did not violate 27 DCMR § 2611.1; and in view of the solicitation provisions, the question of whether the contractor submitted performance and payment bonds is a performance issue not within the Board's jurisdiction; and (d) protestor's final allegation does not comply with Board rules, in that it is not a clear and concise statement of the factual and legal basis of a ground for protest.

The Protestor filed comments in opposition to the agency report. The Protestor argues in its supplemental comments that the District acted in bad faith in cancelling the IFB because the bids were in a competitive range of one another and in the competitive range of the government's estimate.

FINDINGS OF FACT

F.F.1. On November 19, 1992, the Contracting Officer for DPW made and certified findings in a Determination and Findings (D&F) for Emergency Procurement to renovate part of the 8th and 9th, 10th and 11th floors of 613 G Street, N.W., pursuant to D.C. Code § 1-1183.12(a)(1) and 27 DCMR § 1710. (Exhibit 1 to Agency Report).

F.F.2. Bid opening was scheduled for December 18, 1992. (Exhibit 3 to Agency Report).

F.F.3. Included in the bid packages was a single sheet entitled "Important Notes", consisting of five notes including No. 1. which stated:

"Bidder must submit 5% bid bond. Upon award of contract to the low responsive and responsible bidder, he must submit 100% performance and 50% payment bonds." (Exhibit 4 to Agency Report).

F.F.4. By Addendum No. 1, bid opening was postponed, "until further notice." (Exhibit 5 to Agency Report).

F.F.5. By Addendum No. 2, bid opening was re-scheduled for January 12, 1993. (Exhibit 6 to Agency Report).

F.F.6. Timely bids were received from four contractors, Tito Contractors, Inc. (Exhibit 8 to Agency Report), Diamond Construction, Inc. (Diamond) (Exhibit 9 to Agency Report), Associated Builders, Inc. (Associated) (Exhibit 10 to Agency Report), and MTI Construction Co., Inc. (MTI) (Exhibit 11 to Agency Report).

F.F.7. The government's estimate for the work was \$850,000.00. (Exhibit 16 to Agency Report).

F.F.8. Bids were opened on January 12, 1993, and were as follows:

Tito	\$1,100,815.00
MTI	\$1,164,000.00
Associated	\$1,190,000.00
Diamond	\$1,113,321.00

(Exhibit 13 to Agency Report).

F.F.9. By memorandum dated January 22, 1993, the Director of the Department of Administrative Services (DAS) stated as follows (in pertinent part):

I have determined that the bids received are at unreasonable prices and should be cancelled pursuant to Section 1530, 27 DCMR. Further, since the services are urgently needed, I am requesting that you negotiate with each responsible bidder as per Section 1601, 27 DCMR.

In order to expedite the procurement of these urgently needed services, I am suggesting the following schedule:

- o Negotiations with Bidders January 26
- o Contract Award January 29
- o Completion of Renovation March 12

(Exhibit 14 to Agency Report).

F.F.10. Both Protestor and the District agree that prior to cancellation of the IFB, DPW met with each bidder on January 26, 1993. Each bidder was advised that its bid was too high and was asked to reveal its cost breakdown. (Protest in CAB No. P-363, p. 2; Agency Report, p. 4).

F.F.11. Thereafter on January 27, 1993, DPW issued a Determination and Findings for the Cancellation of an Invitation for Bids After Opening (D&F). The D&F stated in pertinent part:

* * *

An evaluation of the bid prices and their comparison with the revised government cost estimate of \$850,000.00 has revealed that the bid prices are unreasonable.

The Department of Administrative Services, the requesting agency for the subject project, in its letter of January 22, 1993, has also indicated that the bid prices are excessively high and has requested that the invitation be canceled and that the contract be negotiated with the bidders. (see Attachment No. 2).

In order to obtain a more competitive price, it is recommended that this invitation be canceled, and in accordance with 27 DCMR, Section 1601, the contract be negotiated with each responsible bidder that submitted a bid.

(Exhibit 15 to Agency Report).

* * *

F.F.12. On January 28, 1993, DPW notified Tito, Diamond, Associated, and MTI that the IFB had been canceled, and requested best and final offers (BAFO's) by February 3, 1993. (Exhibit 17 to Agency Report).

F.F.13. The BAFOs were as follows:

Tito	\$ 998,000.00
MTI	\$1,012,000.00
Associated	\$1,016,685.00
Diamond	\$ 943,265.00

(Exhibit 19 to Agency Report).

F.F.14. On February 3, 1992, the Real Property Administration, DAS, recommended that Diamond, the lowest bidder, be awarded the contract. (Exhibit 20 to Agency Report).

F.F.15. On February 5, 1993, DPW entered into a letter contract with Diamond. (Exhibit 21 to Agency Report).

F.F.16. On February 26, 1993, the contracting officer determined that Diamond was a responsible contractor. (Exhibit 22 to Agency Report).

F.F.17. On February 26, 1993, Diamond was given its notice to proceed with work, effective February 8, 1993. (Exhibit 23 to Agency Report).

F.F.18. The performance and payment bonds of Diamond do not reflect the dates on which they were presented. (Exhibits 25 and 26 to Agency Report).

F.F.19. Work was scheduled to be completed by March 22, 1993. (Exhibit 23 to Agency Report).

DECISION

The first issue to be addressed is whether the IFB was properly canceled. Protestor asserts that the District must show that there was a "compelling reason" to cancel the solicitation after bid opening and cites as support 40 Comp. Gen. 671 (1961). However, Protestor references a standard which does not apply to the solicitation at issue or to solicitations of the District of Columbia generally. In the decision cited by Protestor, the Comptroller General is relying on the Federal Acquisition Regulations (FAR) at Part

14.404-1, Cancellation of invitation after opening. The FAR does indeed state that preservation of the integrity of the competitive bid system dictates that after bids have been opened, there must be a compelling reason to cancel the invitation. However, the FAR is not controlling here.

The District correctly points out that the proper standard here is whether the cancellation is in the "best interest" of the District government. In this regard, the Procurement Practices Act of 1985 (PPA) provides as follows:

An invitation for bids, a request for proposals, or other solicitations may be cancelled, or all bids or proposals may be rejected, only if it is determined in writing by the Director that the action is taken in the best interest of the District government. This information must be forwarded to the Inspector General for review within 72 hours of the action.

(Emphasis added) D.C. Code § 1-1183.7.

The District of Columbia Municipal Regulations for Contracts and procurements set forth some of the reasons which could justify cancellation of procurements after bid opening:

An IFB may be canceled and all bids rejected before award but after opening when the Director determines in writing that cancellation is in the best interests of the District for any reason, including the following:

- (a) Inadequate or ambiguous specifications were cited in the IFB;
- (b) Specifications have been revised;
- (c) The supplies or services being contracted for are no longer required;
- (d) The IFB did not provide for consideration of all factors of cost to the District;
- (e) Bids received indicate that the needs of the District can be satisfied by a less expensive article differing from that for which the bids were invited;
- (f) All otherwise acceptable bids received are at unreasonable prices, or only one (1) bid is received and the contracting officer cannot determine the reasonableness of the bid price, or no responsive bid has been received from a responsible bidder; or
- (g) The bids were not independently arrived at in open competition, were collusive, or were submitted in bad faith.

(Emphasis added) 27 DCMR § 1530.4.

Finally, this Board has consistently held that where the District has demonstrated that cancellation was in the best interest of the District, and where the procedural requirements are adhered to, the cancellation was proper. Systrol, CAB No. 316, 5 P.D. 3058 (November 17, 1992); General Oil Corporation, CAB No. P-155, 38 DCR 2982 (October 17, 1992); Battery Place, CAB No. P-98, 38 DCR 2796 (June 15, 1989). Having determined the proper standard for our review, we now consider whether that standard has been met here.

The reason for cancellation cited by the District is that all bids received were at unreasonable prices. (F.F. 9 and F.F.11.) This justification is certainly contemplated as sufficient by the District's procurement regulations, 27 DCMR § 1530.4(f), supra, and recognized in case law. Omega Container, Inc., B-206858.2, 82-2 CPD ¶ 475 (1982) (determination of price unreasonableness based upon a comparison of bid prices with, inter alia, government's estimate); Building Maintenance Specialist, Inc., B-186441, 76-2 CPD ¶ 233 (1976) (cancellation proper where low responsive bid was only 7.2% greater than government estimate).

The Protestor takes issue with the government's estimate of \$850,000.00, and argues that it is unreasonably low. However, we recognize that contracting officers have broad discretion to determine whether cancellation of an IFB after bid opening is justified, and our review of that decision is limited to ensuring that the determination was reasonable. Total Protech Inc., B-233264, Feb. 28, 1989, 89-1 CPD ¶ 211. Further, the government's determination as to unreasonableness of price must be sustained unless there is a showing of bad faith or fraud. Penn Landscape & Cement Work, B-196352, 80-1 CPD ¶ 126 (1980). In its comments on the agency report, the Protestor asserts that the District has shown bad faith because the government estimate of \$850,000.00 was erroneous in that it reflected no cost for 14 items from rough carpentry through electrical. (Exhibit 12 to Agency Report). Protestor further argues that the proper estimate was \$1,098,790.00.

The Board notes that in its Determination and Findings for Cancellation, the Director of DPW states that the government's estimate for this project was \$850,000.00. (F.F.7) (Exhibit 16 to Agency Report). However, Exhibit 12 to the Agency Report, which is the estimate of work prepared by Hunter Miller Associates, does not reflect an estimate of \$850,000.00. A telephone conference was held with the parties on Tuesday, May 25, 1993, at 2:00 p.m. so that an explanation of the information contained in Exhibit 12 could be provided to the Board. See Board Rule 310, 36 DCR 2714-2715. During the course of that conference, the District explained that the estimate relied on was a "Contractor Estimate" which was based on estimates received from contractors who did not bid on the project but would perform the work for that amount. The amount of that estimate was \$859,000.00. This explanation is consistent with the information in footnote 3 to Exhibit 12. The "Contractor Estimate" does include costs for the 14 items referenced by the Protestor. With this explanation, the Board finds the District's determination that the original bids were unreasonably high to be a reasonable determination.

We turn now the question as to whether the government complied with the proper procedural requirements for the cancellation of the IFB. Clearly it did not. Based on the District's procurement regulations at 27 DCMR § 1601, Negotiation after Cancellation, and

the written instructions of the Director of Administrative Services, negotiation with the bidders was to be held after cancellation of the bid. (F.F.9.) However, the procurement regulations and the Director's memorandum of January 22, 1993, were clearly ignored. It is uncontested that DPW negotiated with bidders prior to cancellation of IFB. (F.F.10.) The procurement regulations were further violated in that negotiations were not held after BAFO's were received, and potential offerors were not notified pursuant to 27 DCMR § 1619.3(a) that award would be made without discussion. (See F.F.13 and F.F.14.)

It is further clear that contract award was improper. The letter contract with Diamond was entered into on February 5, 1993, and Diamond was not found to be responsible until 21 days later on February 26, 1993. (F.F. 15 and F.F. 16). Clearly this was improper in that the PPA provides that contracts shall be awarded to responsive and responsible bidders. D.C. Code § 1183.3(e); 27 DCMR § 1541.1. The District's procurement regulations further require that award is not to be made until all required approvals have been obtained. 27 DCMR § 1541.3. Thus the District failed to comply with the PPA and its own regulations in cancelling the IFB and awarding the contract. Having found that the District failed to follow proper procedures as well as the instructions of the Director of DAS, the Board finds that the District acted in an arbitrary and capricious manner; and therefore the first ground of the protest has merit and is **GRANTED**.

The other grounds of the protest are not compelling. Contract award is not suspended by the filing of a protest with the Board, D.C. Code § 1-1189-8(e)(1); and so that ground of the protest must fail. See Group Insurance Administration, Inc., CAB No. P-309, 39 DCR 4491, 1992). It is not clear from the record whether or not the District issued a notice to proceed before it received a payment and performance bond. (F.F.17 and F.F.18.) However, the District's compliance or non-compliance with 27 DCMR 2703.9, supra, is a matter of contract administration and cannot serve as proper grounds of a protest. Markhurd Aerial Surveys, B-210108, Jan. 17, 1983, 83-1 CPD ¶ 51; See Shane Meat Company, CAB Nos. P-339, P-347, P-349, 5 P.D. 4018, 4031.^{4/} With regard to Tito's assertion that Diamond was improperly given a "second bite at the apple," the Board finds that argument without merit. Anytime that an IFB is canceled after bid opening the bid prices have become public. However, competition the second time around puts all bidders on equal footing with regard to the knowledge of the prior bid prices; and all bidders are given an opportunity to bid at reasonable prices. See Stewart Thomas Industries, Inc., B-196295, 80-1 CPD ¶ 175. Thus, these latter grounds of the protest are **DENIED**.

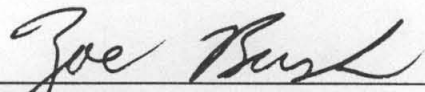
^{4/}Failure of a successful bidder to properly execute a payment or performance bond after contract award is matter of default. Allgood Elec. Co., B-235171, July 18, 1989, 89-2 CPD ¶ 58, Fn 2. In this regard the Federal Acquisition Regulation provide at Part 52.228-1(c):

If the successful bidder, upon acceptance of its bid by the government within the period specified for acceptance fails to execute all contractual documents or give a bond(s) as required by the solicitation within the time specified, the Contracting Officer may terminate the contract for default.

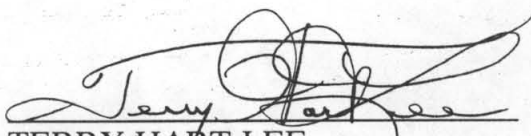
WHEREFORE, as set forth above, the protest is **GRANTED** in part, and **DENIED** in part. Tito has requested to be awarded its bid preparation costs and costs for payment and performance bonds. This Board is authorized pursuant to the PPA to award reasonable bid preparation costs when requested and when the Board finds that the District's actions toward the Protestor were arbitrary and capricious. D.C. Code § 1-1189.8(e)(2). However, that is no statutory authority or precedent for this Board to order reimbursement of a Protestor's payment or performance bonds. As explained above, we find that the District acted in an arbitrary and capricious manner in cancelling the IFB. Therefore, Tito shall be awarded its reasonable bid preparation costs. D.C. Code § 1-1189.8(e)(2). Koba Associates, Inc., CAB Nos. P-344 and P-359, 5 P.D. 5036, 5050. March 3, 1993; Agmilu and Company, Inc., 36 DCR 3993, November 29, 1988; Pinnacle Corporation, 36 DCR 3695, November 18, 1988. Therefore, pursuant to Board Rules 314.5, 314.7, 36 DCR 2717, Tito shall submit documentation supporting its costs within 20 days of receipt of the Board's decision, and the District may respond within 10 days.

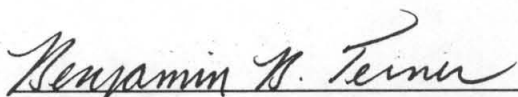
So **ORDERED**.

DATE: May 27, 1993


ZOE BUSH
Chief Administrative Judge

CONCUR:


TERRY HART LEE
Administrative Judge


BENJAMIN B. TURNER
Administrative Judge