GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

PROTEST OF:

PINNACLE CORPORATION)
)
Under IFB No. 86-0062-AA-2-0-CC)

For the protester: Jack Rephan, Esquire. For the Government: Frank E. Barber, Assistant Corporation Counsel, D.C.

Opinion by Administrative Judge Davis with Administrative Judges Booker and Sharpe[1] concurring.

SUMMARY OF OPINION

STANDARD OF REVIEW--NONRESPONSIBILITY DETERMINATION. The D.C. Procurement Practices Act of 1985 ("PPA"), D.C. Code, secs. 1-1189.3(1) and 1-1189.8 (c) (1987 Replacement) confers on this Board jurisdiction to hear and decide all protests (including those challenging a nonresponsibility determination) on a de novo basis. Thus, given this standard of review and the PPA's mandate in sec. 1-1189.8(c) that "the Board shall promptly decide whether the solicitation or award was in accordance with the applicable law, regulations, and terms and conditions of the solicitation," all that is required for the protester to prevail on the issue of responsibility is a showing (by a preponderance of the evidence) that the District materially violated an applicable law, regulation or term or condition of the IFB in making the nonresponsibility determination in question.

RESPONSIBILITY--SPECIAL RESPONSIBILITY CRITERION. Where the District failed to clearly state in the IFB the legitimate policy decision it made that the roofing contractor "itself" must have five years of relevant roofing experience, the District could not properly exclude from its consideration the relevant roofing experience of the protester's officers and employees when evaluating whether the protester met the five years roofing experience requirement. Thus, the mere fact that the protester had not been previously in existence for five years as a corporate entity should not have been dispositive of the question of whether it met the five years roofing experience requirement.

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[1]Judge Sharpe's participation in this case is pursuant to the authority contained in the D.C. Procurement Practices Act of 1985, D.C. Code, sec. 1-1189.2(c)(2) (1987 Replacement).

RELIEF--BID PREPARATION COSTS. Where there is nothing in the record which supports the District's reading of the IFB's special responsibility criterion, the District's misinterpretation of the criterion and application of the misinterpretation to the protester is unreasonable and therefore arbitrary and capricious within the meaning of sec. 1-1189.8(e)(2). Thus, in the circumstance where the record reflects that the contract at issue has in all likelihood been completed by another contractor, the protester's request for reasonable bid preparation costs is granted.

OPINION

This protest[2] by the Pinnacle Corporation ("Pinnacle") presents a classic case of a study in contradictions. At the outset, we have no reservation whatsoever in stating that we find little to admire in the manner in which the responsibility evaluation involved in this protest was conducted.

Pinnacle protests the award of a contract under Invitation for Bids No. 86-0062-AA-2-0-CC ("IFB") to anyone other than itself. In this connection, Pinnacle alleges that it is the lowest, responsive and responsible bidder under the IFB, but that the District of Columbia ("District") incorrectly determined that the corporation was nonresponsible and therefore ineligible to receive the contract award.

The Department of Public Works ("DPW") on December 18, 1986, issued the IFB for roofing work construction at the Harrison

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[2]This case originated during a period of time when the District of Columbia Contract Appeals Board was functioning pursuant to Commissioner's Organization Order No. 9, D.C. Code, Supplement V (1978), as amended by Mayor's Order No. 82-224, 30 DCR 497 (January 28, 1983) and Mayor's Order 86-65, 33 DCR 3006 (May 16, 1986). Pursuant to sec. 1-1189.1, a new independent agency denominated as the Contract Appeals Board was created. This new Board became operational on August 1, 1988, and succeeded to jurisdiction of all protest cases pending before the previously established Board.

Elementary School. Six bids were timely received in response to the IFB. Although Pinnacle submitted the apparent low bid, it did not receive the contract. Instead, the contract award was made to H&R General Maintenance Corporation ("H&R"), the fourth low bidder.

Notification to Pinnacle of its unsuccessful bid was first communicated by a letter dated June 29, 1987, from DPW. That letter merely returned Pinnacle's bid package, indicated that it was not the successful low bidder and thanked it for the submission. The letter did not contain any reasons as to why Pinnacle was not the successful bidder. Pinnacle states that sometime between the date of the receipt of the June 29 letter (which was July 8, 1987, according to Pinnacle) and July 16, 1987 (the date of the filing of this protest), it was informed that an award had been made to H&R on May 27, 1987. Pinnacle further states it orally received word that the rejection of its bid was based on the corporation's failure to meet the five years experience requirement set forth in article 10 under the Special Conditions of the IFB. That article reads in pertinent part as follows:

> "10. CONTRACTOR'S QUALIFICATION:
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> "A. The Contractor shall have had a minimum of five (5) years experience in this type and size of project."

It is this special condition (hereinafter referred to as "Special Condition No. 10") and its interpretation that is at the hub of this protest.

Pinnacle contends that the District's determination of nonresponsibility was arbitrary and irrational because the experience evaluation of the corporation under Special Condition No. 10 was restricted to the fact that it had not been previously incorporated for five years. The evaluation, contends Pinnacle, should have included the experience of the officials and key employees of the corporation. In this regard, Pinnacle points out that its president and vice president had roofing experience far in excess of five years and with other projects of the type and size as the project here, and it planned to utilize five experienced individuals to perform the actual field work.

The District does not dispute the basis of the nonresponsibility determination as alleged by Pinnacle but contends that the determination to restrict the five years experience requirement solely to Pinnacle as a corporate entity rather than consider the experience of Pinnacle's officers and employees was made because that is what Special Condition No. 10 specifically required. This interpretation, it says, was the result of an in-house policy determination geared towards improving the quality of the work obtained and guarding against a contractor going out of business before the project was completed or the work warranty having expired. Having made this determination, the District asserts that since it was within the discretion of the DPW to make it, this Board should not disturb the determination unless there is a showing that there was no rational and reasonable basis for the decision or that the contracting officer acted in bad faith.

In support of this position, the District relies on a host of U.S. Comptroller General's opinions.

A prospective contractor's ability or capacity to satisfactorily perform all the requirements of a contract relates to its responsibility, and an affirmative demonstration of this ability or capacity is a precondition for the award of a contract. See D.C. Procurement Practices Act of 1985, D.C. Code secs. 1-1181.7(40) and 1-1183.3(e) (1987 Replacement). The Comptroller General has for a number of years consistently taken the position that he will not disturb a nonresponsibility determination absent a showing of possible fraud or bad faith or lack of a reasonable basis thereof on the part of a contracting officer. See, e.g., Satellite Services Inc., B-219679, Aug. 23, 1985, 85-2 CPD par. 224; Martin Electronics, Inc., B-221298, Mar. 13, 1986, 86-1 CPD par. 252; and Shelf Stable Foods, Inc., B-226112, April 10, 1987, 87-1 CPD par. 400. The District of Columbia would urge that we adopt this standard of review. Our adoption of the standard would most certainly impose a very heavy burden upon one who chooses to protest a nonresponsibility determination and would require a deference be given to the findings of contracting officers.

We emphatically reject an adoption of the Comptroller General's standard of review because it flies squarely in the face of our statutory mandate. Unlike the legislative underpinnings of the Comptroller General's protest review authority, the PPA, sec. 1-1189.3(1), confers on this Board jurisdiction to "review and determine de novo any protest" which has been addressed to us.

This mandate of authority is repeated in sec. 1-1189.8 ("Protest of solicitations or awards to the Board") under subsection (c), which provides in pertinent as follows:

> "On any direct protest . . . the Board shall promptly decide whether the solicitation or award was in accordance with the applicable law, regulations and terms and conditions of the solicitation. The proceedings shall be de novo. Any prior determination by administrative officials shall not be final or conclusive."

In view of these statutory provisions, all that we require of Pinnacle to prevail on the issue of responsibility is that it demonstrate by a preponderance of the evidence a material violation by the District of an applicable law, regulation or term or condition of the IFB in making the nonresponsibility determination in question.

That stated, we turn now to the merits of this protest and address first the District's position that a business and policy decision underlie the interpretation it placed on Special Condition No. 10.[3] We note here that we do not question the authority of the District to set special responsibility criterion

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[3]The District of Columbia has supplied the Board with what we will loosely term the "administrative history" of Special Condition No. 10. This history is in the form of affidavits from two employees of the Design, Engineering and Construction Administration of the DPW who allegedly were responsible along with an unnamed outside architectural engineering firm and other unnamed staff members in developing Special Condition No. 10. This history concludes that it was the intention of all of those who worked on the development of Special Condition No. 10 that the experience requirement had to be satisfied by the track record of the bidding firm rather than through the individual experience of its employees. The justification for this conclusion was the staff's belief that a firm in business for at least five years would be more qualified to complete the project in a satisfactory manner and would more likely be available to meet the warranty requirements. See Agency Report, Exhibits D and E.

in this procurement. That it had that right is indisputable. See, generally Materiel Management Manual ("MMM"), sec. 2620.18. This therefore is not the issue. The relevant issue here concerns a matter which goes to the very heart of the District's procurement system and that is basic fairness in the treatment of those who seek to do business with it. Did the District clearly and unequivocally articulate in Special Condition No. 10 its bona fide business and policy decision that a roofing firm itself must have had at least five years of roofing experience similar to what was desired on the Harrison Elementary School project in order to be a responsible bidder? We think not. As indicated by the discussion that follows, we find the language in Special Condition No. 10 to be vague and imprecise; we further find an egregious failure to communicate to the marketplace DPW's "new" policy and a contradictory application of the condition.

The District's primary argument is essentially an attempt to bootstrap its interpretation of "contractor" as used in Special Condition No. 10 to the definition given the word in sec. 1-1181.7(16) of the PPA ("any business which enters into a contract agreement with the District"). Whatever linguistic force this argument may initially have had, it rapidly deteriorated in the face of the record. We carefully scrutinized the Agency Report in search of a reference for some positive indication either in the procurement regulations or the IFB which would compel the definitional leap the District urges and found our search wanting. The absence of any such reference seems to imply that whenever the

word "contractor" is used in a procurement document, it carries the meaning specified in sec. 1-1181.7(16). For reasons that should be all too obvious, an argument along these lines is one-dimensional at best.

In our quest to ascertain the true meaning of the word "contractor," we note that it is being used in the context of a bidder's responsibility. Within the marketplace, we think it is well-understood that in responsibility terms a determination regarding a contractor's experience generally may, and indeed should, include the experience of its officers and employees. This is so because a main concern of the procuring officials is whether the contractor has available to it the necessary persons to perform the contract satisfactorily. See MMM, sec. 2620.18.B.2.

We glean from the deliberations that assertedly went into DPW's policy change (although it is not expressly stated in the record) that it was likely the practice of the District to take into account the experience of a roofing firm's personnel in determining the firm's experience until sometime in 1986 or 1987. This observation raises several questions for which there appears to be no answers in the record. When did the District adopt the policy change it says underlies Special Condition No. 10? In this connection, we note that the District calls attention to a memorandum of the Director of the DPW dated April 21, 1987 (approximately four months after the issuance of the IFB at issue here), discussing the reasons for the change in policy but nowhere stating when the change was actually made effective. While we

know that Special Condition No. 10 appeared in the IFB (which, as we mentioned earlier, was issued on December 16, 1986), the record is silent as to when Special Condition No. 10 was first employed in DPW's roofing contracts. Did the same text of Special Condition No. 10 appear in DPW's roofing contracts prior to the adoption of the new policy? If not, how did the experience requirement, if one was stated in the invitations, read?

Irrespective of the answers to these questions, given the general understanding of the meaning of "contractor" in the context of a bidder's responsibility, it was incumbent upon the District, if it wished to convey a different and more restrictive meaning, to draft a special responsibility provision which clearly eliminated any belief by the prospective bidders that they could meet the experience requirement through their officers and employees.[4] This could have readily been done by the District. That they did not do so is suspect and made more so by the District's conduct during the time the instant procurement was pending for contract award.

On April 14, 1987, the DPW's Administrator made a nonresponsibility determination with respect to Pinnacle's bid in the instant case because it failed to meet the five years roofing experience requirement set forth in Special Condition No. 10. See Agency Report, Exhibit B. Less than a month earlier, March 18, 1987, Pinnacle, having bid on another solicitation put out by the

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[4]The importance of this is that prospective bidders can determine at the outset whether it would be worth their time and expense to submit a bid and the likely scope of competition.

District for the provision of roofing work at the D.C. Police Training Center, received notification from the District that the "proposal for the roofing work at the D.C. Police Training Center, in strict accordance with the terms of said proposal . . . was accepted." See Protest, Exhibit 10. This solicitation included the identical Special Condition No. 10 as contained in the instant protest and provided for similar roofing work. See Protest, Exhibits 12 and 13. On May 6, 1987, a contract with Pinnacle for the Police Training Center work was executed by the District. Exhibit 11, Protest.

Thus, within a span of one month, the District placed itself in a posture where it made two diametrically opposed responsibility determinations concerning Pinnacle's compliance with the five years experience requirement of Special Condition No. 10. If Pinnacle did not meet the five years experience requirement at the time of the instant procurement, it is inconceivable that it met the requirement in the Police Training Center procurement. The contradiction presented by these two determinations provides further reason for us to eschew the interpretation of the term "contractor" that the District urges upon us.

Based upon the foregoing, we conclude that Special Condition No. 10 did not limit the evaluation of a contractor's roofing experience to the contractor itself, but rather permitted, and indeed required, the District to include the relevant experience of the contractor's officers and employees in determining the contractor's roofing experience. In reaching this conclusion, it

is emphasized that we are not saying that the District's asserted new policy exceeds permissible boundaries of discretion. What we do say is that the District failed to adequately state the new policy in Special Condition No. 10. Hence, the mere fact that Pinnacle had not been previously in existence for five years as a corporate entity should not have been dispositive of the question of whether it met the five years roofing experience requirement.

Laying aside the inconsistency in its application of Special Condition No. 10, we find that the District's statement in Special Condition No. 10 of its new policy is so lacking in expression as to make its reading of the condition and the application of its reading to Pinnacle unreasonable and therefore arbitrary and capricious within the meaning of sec. 1-1189.8(e)(2). This conduct resulted in Pinnacle not receiving the contract award when it might have received the award had the District (as it should have) considered the relevant roofing experience of Pinnacle's officers and employees when it was evaluating Pinnacle's responsibility under Special Condition No. 10.

THE PROTEST IS SUSTAINED. In considering the matter of relief, we note that Pinnacle has requested numerous forms, including (1) an order directing the District to terminate the contract awarded to H&R and recompete the procurement and (2) an order granting it reasonable bid preparation costs. Termination of the contract award is an option not available as a form of relief because the contract was 75 percent complete a month after the filing of this protest, a year and three months ago. We,

therefore, grant Pinnacle's request for reasonable bid preparation costs.

Pinnacle may file with the Board, with a copy to be served on the District, a bill of its bid preparation costs, not including legal fees, within twenty (20) working days after its receipt of this decision. The bill of costs shall be accompanied by sufficient documentation supporting the costs being claimed. The District may, within twenty (20) working days after its receipt of the bill of costs, file a written response thereto.

DATE: November 18, 1988

William L. Davis
WILLIAM L. DAVIS
Chief Administrative Judge

CONCUR:

Claudia Booker
CLAUDIA D. BOOKER
Administrative Judge

Samuel S. Sharpe
SAMUEL S. SHARPE
Administrative Judge