

DISTRICT OF COLUMBIA CONTRACT APPEALS BOARD

PROTEST OF:

CONFIGURATION INCORPORATED)	
)	CAB No. P-0819
Solicitation No: DCPO-2009-B-0020)	

For the Protester: J. Michael Hannon, Esq., The Hannon Law Group, LLP. For the District of Columbia Government: Talia Cohen, Esq., Assistant Attorney General, Office of the Attorney General. For the Intervener Maryland Office Interiors, Inc.: Peter Garvin, Esq., Jones Day. For the Intervener Standard Business Furniture: Mr. Milton D. Morris, *pro se*.

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

OPINION

Filing ID 27962129

Configuration has protested the contracting officer's determination that its bid was nonresponsive and the award made to Maryland Office Interiors, Inc. We conclude that Configuration's bid was not responsive as it failed to meet the solicitation's salient characteristics. Accordingly, we deny the protest challenge of the nonresponsiveness determination and dismiss the remaining grounds for lack of standing.

BACKGROUND

On June 5, 2009, the Office of Contracting and Procurement ("OCP"), on behalf of the Office of Property Management, renamed the Department of Real Estate Services, issued IFB No. DCPO-2009-B-0020 for a requirements contract, which included a fixed price component consisting of an order for furniture for the Waterfront project. (Agency Report ("AR") Ex. 1). The IFB sought a contractor to furnish and deliver to District agencies various systems furniture and case goods ordered from a manufacturer's price list (Part I) and to furnish and install systems and case goods at the Waterfront located at 1100 and 1101 4th Street SW (Part II) based in part on the prices in Part I. IFB Exhibit F set forth a table containing the salient characteristics of the furniture. (AR Ex. 1).

By Amendments 0001 through 0004, OCP changed the pre-bid conference date from June 26, 2009, to June 19, 2009, clarified the closing date, responded to written questions, and revised IFB Section J.1.1 (Part I) and J.1.2 (Part II). Amendment 0004 also required bidders to submit unit prices for standardized case goods (Attachment J.1.2 Part I, Case goods and Systems Furniture Pricing for 48 items). By Amendment 0005, dated June 26, 2009, the District, among other things, inserted Section J.1.13, Exhibit A, requiring bidders to submit a fixed price for the Waterfront Project. In addition, Amendment 0005 stated "Evaluation of proposed furniture and fixtures shall be a comparison of the item bid and its match to the salient characteristics as specified in Exhibit F." By Amendments 0006 through 0008, the District responded to questions and revised Exhibit A, responded to a written question, and extended the closing date to July 27,

2009. By Amendment 0009, dated July 8, 2009, the District revised the closing date to July 15, 2009. (AR at 3-4; AR Ex. 1).

On July 15, 2009, the following eight bidders submitted timely bids: American Office, Configuration, F.A. O'Toole Office Systems, Inc., Dynamic Business Interiors ("DBI"), Maryland Office Interiors ("MOI"), Capital Services and Supplies, Inc, Motir Services, and Standard Business Furniture. (AR Ex. 7). The bid opening officials (a program specialist and contract specialist) noted on the original "Goods and Services Bid Abstract Form" dated July 16, 2009, that the prices for American Office, MOI, F.A. O'Toole, and Motir Services were "not in compliance." (Protest, Attachment 2). There is no precise indication in the record regarding why the bid opening officials believed MOI's bid prices to be "not in compliance." However, after the contracting officer reviewed all eight bids, the contracting officer determined that MOI's prices were in compliance with the solicitation requirements. Configuration fails to identify any aspect of MOI's bid that fails to meet the IFB's requirements. In accordance with the IFB as amended, the contracting officer evaluated the bids based on the fixed price component in Part II and the ability of each bidder to meet the technical requirements. The contracting officer prepared a Bid Tabulation Sheet based on the prices submitted for the Waterfront Project Part II. (AR Ex. 8 and 9).

By a Determination and Findings for Award to other than the Lowest Bidder dated July 28, 2009, the contracting officer determined that bids of American Office and Configuration were not responsive. Configuration had submitted with its bid a six-page list entitled "DC Waterfront Furniture Deviation List" describing how the Configuration proposed furniture items deviated from the salient characteristics required by the IFB. (District Response to Comments on the Agency Report, Ex. A). Specifically, the contracting officer determined that 20 items of furniture in Configuration's price schedule failed to meet the salient characteristics set forth in the Attachment F of the IFB. (AR Ex. 10). We find that the following furniture items proposed by Configuration materially deviated from the solicitation's salient characteristics:

<u>Item (Description)</u>	<u>Salient Characteristics</u>	<u>Deviation</u>
32 Training Table	frosted opaque modesty panel	fabric modesty panel
34 Café Table	36" square	29" x 36" rectangular
36 Training Table	frosted opaque modesty panel	fabric modesty panel
37 Conference Table	boat shape, wood legs	rectangular shape, drum base
39 Training Table	frosted opaque modesty panel	fabric modesty panel
42 Conference Table	48" diameter	36" diameter
43 Conference Table	54" diameter	36" diameter
47 Conference Table	boat shape, wood legs	rectangular shape, drum base

Based on his July 28 determination of nonresponsiveness of the two low bidders (American Office and Configuration), the contracting officer determined that the award must go to MOI, the next lowest responsive and responsible bidder. On August 10, 2009, the contract to MOI was deemed approved by the Council. (District Response to Comments on the Agency Report, Ex. B).

On August 28, 2009, Configuration filed with the Board its bid protest which was docketed as CAB No. P-0819. On September 11, 2009, DBI filed with the Board another protest which was docketed as CAB No. P-0823. Subsequent to the filing of the protests, the contracting officer prepared a revised bid tabulation sheet, dated September 21, 2009, which confirmed the following order of bidding and the award to MOI:

BIDDERS	Price Quote for Waterfront Project PART II A	Total of 48 Unit Prices PART I B	Total A + B	CBE Preference	Evaluated Price
1. American Office	\$2,617,434.34	\$25,077.10	\$2,642,511.44	0	\$2,642,511.52
2. Configuration	\$5,321,448.76	\$18,334.30	\$5,339,783.06	9%	\$4,859,202.58
3. MOI	\$6,790,307.97	\$35,195.35	\$6,825,503.32	0	\$6,825,503.32
4. Motir Services	\$7,681,525.75	\$39,567.19	\$7,721,092.94	9%	\$7,026,194.58
5. DBI	\$7,083,867.59	\$22,359.25	\$7,093,518.37	0	\$7,093,518.37
6. F.A. O'Toole	\$7,433,881.31	\$27,926.57	\$7,461,807.88	0	\$7,461,807.88
7. Standard Business Furniture	\$37,454,085.00	\$77,954.59	\$7,532,039.59	0	\$7,532,039.59
8. Capital Services and Supplies	\$8,975,000.00	\$36,745.09	\$9,011,745.09	12%	\$7,930,335.68

(AR Ex. 14). On September 23, 2009, the District filed its motion to dismiss and agency report. By letter dated October 1, 2009, the District terminated for convenience Part I (Case Goods and Systems Furniture) of MOI's Contract No. DCPO-2009-C-0020, as part of a settlement of DBI's protest in CAB No. P-0823, and DBI thereafter withdrew its protest. On October 2, 2009, Standard Business Furniture intervened in CAB No. P-0819. On October 6, 2009, Configuration filed its comments on the agency report. In its response, Configuration protested the District's termination of Part I of the MOI contract which would lead the District to rebid the citywide requirements requested in the solicitation. Configuration also protested the failure of the District to timely notify it of the July 28 nonresponsiveness determination and provide Configuration an opportunity to "address the alleged failures of its bid." Configuration also contends that "[t]hough the IFB solicited 'brand name [Kimball] or equal', the IFB was written in such a manner, and the award granted in such an irregular manner, that Kimball dealers were unduly favored for no legitimate reason." On October 15, 2009, the District responded to the new protest grounds raised by Configuration.

DISCUSSION

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

Configuration raises four principal grounds for protest: (1) whether the District properly determined Configuration nonresponsive and therefore not in line for award; (2) whether the District's award to MOI conformed to law; (3) whether the District conducted a proper public bid opening; and (4) whether the Council approved the proposed contract to MOI.

If the District properly determined that Configuration's bid was nonresponsive, then it is not in line for award and therefore lacks standing to raise the other challenges with respect to the award to MOI. *C.P.F. Corp.*, CAB No. P-0521, Jan. 12, 1998, 45 D.C. Reg. 8697, 8699 (the Board will not consider protests by bidders who are not next in line for award if the protest is sustained). To be responsive to a brand name or equal solicitation requirement, a bid offering an equal product must conform to the salient characteristics of the brand name product listed in the solicitation. *Advance Medical Systems, Inc.*, CAB No. P-0202, April 1, 1992, 39 D.C. Reg. 4516, 4518; *Trail Equipment Co.*, B-241004, Feb. 1, 1991, 91-1 CPD ¶ 102. A bidder must submit with its bid sufficient descriptive literature to permit the contracting officer to assess whether the proposed equal product meets all of the salient characteristics specified in the solicitation. *Id.* A bid which materially deviates – that is, one which affects in more than a trivial way, the price, quality, or quantity of goods or services offered – from the salient characteristics must be rejected as nonresponsive. *Id.*; *Parsons Precision Products, Inc.*, B-249940, Dec. 22, 1992, 92-2 CPD ¶ 431.

Based on our review of the record, it is clear that the District properly determined that Configuration's bid was nonresponsive because the bid expressly and materially deviated from a number of salient characteristics specified in Exhibit F of the solicitation. Configuration's "DC Waterfront Furniture Deviations List" submitted with its bid consists of a spreadsheet listing furniture items being proposed by Configuration and how those items deviate from the furniture items listed in the bid at Attachments A and F. In determining Configuration's bid nonresponsive, the contracting officer focused on a subset of the deviating products by comparing how Configuration's proposed items deviated from the Attachment F salient characteristics of the bid items. Configuration's bid for furniture items 32, 34, 36, 37, 39, 42, 43, 47, and 57 clearly deviate from the salient characteristics and Configuration admits as much in its October 6 comments on the agency report. In some cases, Configuration states in its October 6 pleading that it "will provide" a conforming item "at no additional cost to the District" and in other cases it states that it will provide the precise item specified in Attachment A. But Configuration's post-bid opening attempts to cure the deviations in its bid are ineffective precisely because these attempts come after bid opening. In *Advance Medical Systems, Inc.*, CAB No. P-0202, April 1, 1992, 39 D.C. Reg. 4516, 4518, we quoted the following from *Trail Equipment Co.*, B-241004, Feb. 1, 1991, 91-1 CPD ¶ 102: "Responsiveness must be determined at the time of bid opening, and, in general, solely from the face of the bid and the material submitted with the bid. To allow a bidder to make its nonresponsive bid responsive after bid opening is tantamount to allowing the bidder to submit a new bid." *Parsons Precision Products, Inc.*, 92-2 CPD ¶ 431 ("A bid which is nonresponsive on its face may not be converted into a responsive bid by post opening bid clarifications or corrections.").

Accordingly, Configuration's bid was properly determined nonresponsive and it lacks standing to raise its other challenges to the award. Even if we were to address the merits of Configuration's challenges to the award to MOI, we would not sustain the protest grounds. Configuration failed to demonstrate that the award to MOI violated law, regulation, or the terms of the solicitation. The record adequately demonstrates that all bids were publically opened, that MOI's bid was responsive, and that the Council approved the proposed award to MOI. To the extent that Configuration challenges the solicitation as being overly restrictive in designating Kimball furniture, that challenge is untimely.

CONCLUSION

For the reasons discussed above, we deny Configuration's challenge of the contracting officer's determination that its bid was nonresponsive, and we dismiss its other challenges to the award for lack of standing.

SO ORDERED.

DATED: November 9, 2009

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

CONCURRING:

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