

GOVERNMENT OF THE DISTRICT OF COLUMBIA  
CONTRACT APPEALS BOARD

PROTEST OF:

HOOD'S INSTITUTIONAL FOODS, INC.	)	
	)	CAB No. P-0658
Under Solicitation No. POHA-2002-B-0629	)	

For the Protester, Hood's Institutional Foods, Inc.: Philip L. Kellogg, Esq., Kellogg, Williams & Lyons. For the Government: Howard Schwartz, Esq., Assistant Corporation Counsel.

Opinion by Administrative Judge Jonathan D. Zischkau, with Administrative Judge Matthew S. Watson, concurring.

**OPINION**

*CourtLink Filing ID 878031*

Hood's Institutional Foods, Inc., protests the award of a summer food service contract to Preferred Meal Systems, Inc., and the contracting officer's determination that Hood's bid was nonresponsive for Hood's failure to submit a performance bond. Hood alleges that it never received the proper notice for the performance bond as required by the solicitation. We conclude that Hood received adequate notice but failed to submit the performance bond. Accordingly, we deny the protest.

**BACKGROUND**

On June 16, 2002, the Office of Contracting and Procurement ("OCP") issued an emergency solicitation, RFQ No. POHA-2002-B-0629, on behalf of the Department of Parks and Recreation, for a food service management company to prepare and deliver boxed breakfast and lunch meals to 49 Parks and Recreation Centers and Boys and Girls Clubs from June 24, 2002, through August 30, 2002. (Agency Report, *CourtLink Filing ID 805642* ("AR") at 3; Determination and Findings, *CourtLink Filing ID 775021* ("D&F"), filed June 28, 2002, Ex. B). The summer food service program is funded by the United States Department of Agriculture ("USDA"). The following prospective bidders received the RFQ: Hood's Institutional Foods, J&K Distributors of Washington, D.C., Food Resource Management, Martin's Inc., THL Associates, Preferred Meal Systems, Inc., and Georgia Food Service Inc. The RFQ required the successful contractor to prepare and deliver 4,275 breakfast meals and 5,225 lunch meals each weekday of the performance period. Section C.1.1 of the statement of work makes applicable to the contract the USDA Summer Food Service Program regulations found at 7 CFR Part 225. Section C.3.7 provides:

The successful Contractor shall provide to [the Department of Parks and Recreation] a performance bond and payment bond within 24 hours following notification that the Contractor is the lowest responsive and responsible bidder. The performance bond shall be 100% of the bid price and the payment bond shall be 50% of the bid price.

On June 11, 2002, OCP issued Amendment No. 1 to the RFQ, which extended the bid opening from June 16 to June 17 and provided the following bidder question and OCP answer:

Question: Is a bid bond required?

Answer: A bid bond is not required. Only a performance bond and payment bond is required as indicated in paragraph C.3.7 on page 3 of the Scope of Work.

(D&F Ex. C).

On June 17, 2002, OCP opened three bids: Hood's in the amount of \$709,887, Preferred Meal Systems in the amount of \$757,601, and Georgia Food Service in the amount of \$765,514. (AR Exs. 4, 6; D&F Ex. D). Because Hood had the apparent low bid, OCP's contract specialist contacted Mr. Hood by telephone shortly after bid opening and advised him that Hood was the apparent low bidder and that a letter would be faxed to him within an hour which would request that Hood submit responsibility data, including the performance bond, by noon on June 19, 2002. (D&F at 1-2; D&F Ex. E). The contracting officer did fax a letter to Hood that day, which stated that a "prospective contractor must affirmatively demonstrate responsibility" and that the contracting officer "must make a determination of nonresponsibility if the information obtained does not indicate clearly that the prospective contractor is responsible." (D&F Ex. E, at 1). In the letter, the contracting officer additionally states:

In order for the contracting officer to make a decision, in accordance with the above [responsibility] regulation [27 DCMR § 2200], please respond to the following checked requests:

....

8. Please provide a performance bond of 100% of the bid price and a payment bond of 50% of the bid price.

Please complete and return the information by 12:00 Noon, Wednesday, June 19, 2002.

(D&F Ex. E).

In a telephone call to the contracting officer at some point during the morning of June 19, 2002, Mr. Hood requested that Hood be given an extension of time to submit the responsibility data. The contracting officer extended the deadline from noon to 1 p.m. on June 19. Hood's response was delivered at 1:15 p.m. (D&F at 2; D&F Ex. F). Hood's responsibility data submission was incomplete. Hood failed to produce a list of current contracts relating to the RFQ, a list of qualified personnel, a copy of the truck leases, and the performance and payment bonds. In addition, Hood stated that it intended "to accomplish the mission and meet the requirements in accordance with the contract by relying on [Georgia] Food Services to provide most of the supplies for the contract." (D&F Ex. F). In its June 19 submission, Hood also furnished a letter of the same date from Inner Harbour Insurance Inc., addressed to Hood, advising Hood that Inner Harbour was in the process of evaluating Hood's request for a performance bond, and requesting certain additional information from Hood. (D&F Ex. F).

At 9 a.m. on Thursday, June 20, the contracting officer called Mr. Hood, advising him that he would receive a letter, by fax and email immediately after their conversation, requiring Hood to furnish the missing responsibility data, by no later than 12 noon that day. Hood requested that the contracting officer waive the performance bond requirement. The contracting officer replied that the USDA mandated the bonding requirement and that OCP had to have the performance bond prior to awarding the contract, and the deadline was important because contract performance was to begin Monday, June 24, at 8 a.m. Mr. Hood told the contracting officer that he would have no problem acquiring the performance bond and that OCP would receive it when Hood submitted its response to the missing data by 12 noon that day. (D&F at 3). After the telephone conversation, the contracting officer issued Amendment No. 2 to the RFQ reducing the amount of the performance bond from 100 to 25 percent of the bid price. (D&F Ex. H). Hood confirmed receipt of this amendment. (D&F at 3). The contracting officer issued the written request for the missing responsibility data with the deadline changed from 12 to 4 p.m. that day. (AR Ex. 1).

Later the same day, the contracting officer made a request to the USDA for waiver of the performance bond requirement but that request was denied by the USDA in the afternoon. (D&F Ex. I). Hood submitted the missing responsibility data to OCP later in the afternoon of June 20, but its submission did not contain the required performance bond. In his cover letter, Mr. Hood stated: "Bonding Company is currently processing the application." (AR Ex. 2).

During the morning of Friday, June 21, the contracting officer requested for a third time that Hood provide the required performance bond, with a deadline of 12 noon, and if the bond was not timely received, OCP would award the contract to the next low bidder. Hood failed to provide a performance bond. (D&F at 3).

The contracting officer determined Hood to be nonresponsible for failing to provide the performance bond. (D&F at 3). Preferred Meal Services provided the required performance bond and was awarded the contract in the afternoon of June 21. (AR Exs. 4-6). It began performance on Monday, June 24, at 8 a.m. (D&F at 3).

By letter dated June 24, 2002, the contracting officer advised Hood that the USDA had denied the request for waiver of the performance bond, that Hood's bid was deemed "nonresponsive" (the contracting officer probably intended to say that Hood was determined to be "nonresponsible") due to Hood's failure to provide a performance bond within 24 hours of notification that Hood was the apparent low bidder, and that OCP had awarded to Preferred Meal Services the contract for summer food service. (AR Ex. 3).

On June 25, 2002, Hood filed its protest with the Board, contending that the District improperly found Hood nonresponsible.

## **DISCUSSION**

We exercise protest jurisdiction pursuant to D.C. Code § 2-309.03(a)(1) (2001).

Hood argues that the District failed to give proper notice for the performance bond. Section C.3.7 of the solicitation states that the contractor shall provide the performance bond within 24 hours

“following notification that the Contractor is the lowest responsive and responsible bidder.” Although there is no dispute that the contracting officer notified Hood on June 17 to submit the performance bond by June 19, Hood contends that the June 17 notice was merely notice that it was the apparent low bidder, not that it was the low responsive and responsible bidder as section C.3.7 requires.

The District responds that the contracting officer constructively amended the RFQ by requiring submission of the performance and payment bonds prior to contract award and thus making the bond submission requirement a part of the responsibility evaluation.

We agree with the District under the facts present here that the contracting officer clearly communicated that the performance bond was required as part of the responsibility evaluation, and that Hood understood the requirement and agreed to fulfill it. The contracting officer twice extended the deadline under this emergency procurement to accommodate Hood. The contracting officer also sought a USDA waiver of the performance bond requirement although the USDA denied the request. Hood's failure to submit the performance bond under the circumstances was unreasonable. Accordingly, we sustain the contracting officer's determination that Hood was not responsible for its failure to furnish the bond.

The District also argues that Hood's bid was nonresponsive because Hood intended to have a subcontractor who was responsible for production of the meals. *See* 7 C.F.R. § 225.6(b)(2)(iii). The record is not adequate to support finding Hood's bid nonresponsive on that basis.

### **CONCLUSION**

Having sustained the contracting officer's determination that Hood was nonresponsive for failing to submit a performance bond, we deny Hood's protest.

**SO ORDERED.**

DATED: August 23, 2002

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

CONCURRING:

/s/ Matthew S. Watson  
MATTHEW S. WATSON  
Administrative Judge