

DISTRICT OF COLUMBIA CONTRACT APPEALS BOARD

PROTEST OF:

CORINTHIAN CONTRACTORS, INC.)	
)	CAB No. P-0812
Under IFB No. DCKA-2009-B-0090)	

For the Protester: Timothy J. McEvoy, Esq., Cameron McEvoy PLLC. For the District of Columbia Government: Alton E. Woods, Esq., Assistant Attorney General. For the Intervenor: Christopher M. Kerns, Esq., Fort Myer Construction Corp.

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

OPINION

Filing ID 26493845

Corinthian Contractors, Inc., the apparent low bidder under a solicitation for certain reconstruction work on Pennsylvania Avenue, SE, has protested the contracting officer's decision to reduce its bid amount for mobilization to the maximum amount permitted by section 612.02 of the Standard Specifications for Highways and Structures which was incorporated into the solicitation. We conclude that the contracting officer was required by the terms of the solicitation to reduce Corinthian's bid amount for mobilization to the maximum permitted by section 612.02 of the Standard Specifications. If Corinthian believed that the solicitation contained an unreasonably low mobilization maximum, it should have brought that issue to the attention of the contracting officer prior to bid opening. Accordingly, we deny the protest.

BACKGROUND

On May 4, 2009, the District's Department of Transportation ("DDOT") Invitation for Bids ("IFB") No. DCKA-2009-B-0090 was advertised in the Washington Times and posted on the Office of Contracting and Procurement ("OCP") website. (Agency Report ("AR") Ex. 1). The IFB was for the reconstruction of Pennsylvania Avenue, SE, from 200 Feet West of 27th Street, SE, to Southern Avenue, SE. (*Id.*). From May 6, 2009, to June 10, 2009, five amendments were issued to the IFB, none having any bearing on this protest. On June 12, 2009, bids were received and opened from six bidders with the evaluated bids with Certified Business Enterprise preferences adjusted as follows:

<u>Name:</u>		<u>Total Bid:</u>
1. Corinthian Contractors, Inc.	-	\$23,464,629.65
2. Fort Myer Construction Corp.	-	\$25,182,540.26
3. Civil Construction, LLC.	-	\$25,582,048.70
4. Capitol Paving of DC, Inc.	-	\$27,332,237.90
5. Rustler Construction, Inc.	-	\$29,676,271.49
6. Tompkins Builders, Inc.	-	\$29,968,820.96

On June 15, 2009, the contracting officer certified and signed a tabulation of the bids. (AR Ex. 2). On June 16, 2009, the contracting officer sent a letter (AR Ex 3) to Corinthian indicating that the contracting officer had discovered a mathematical error in Corinthian's bid regarding mobilization and that the bid amount of \$2,653,310.00 for mobilization had been adjusted to the allowed maximum amount of \$1,203,231.48 as required by section 612.02 of the Measure and Payment portion of DDOT's Standard Specifications for Highways and Structures 2005 (Revised 2007), which is incorporated into the IFB (Appendices Index, at ii (AR Ex. 1, Part 4)). Section 612.02 provides in relevant part:

Payment for Mobilization will be made at the contract lump sum price, subject to allowable limits under this section, which payment will include all operations and expense needed to mobilize, remobilize and demobilize. Lump sum price for Mobilization shall not exceed applicable amounts determined as follows:

Original Contract Total Including Mobilization More Than To and Incl.		Maximum Lump Sum for Mobilization
\$ 0	\$200,000	10% of Contract Total
\$200,000	1,000,000	\$20,000 plus 7.5% (of Contract Total minus \$200,000)
\$1,000,000		\$80,000 plus 5% (of Contract Total minus \$1,000,000)

If the lump sum shown in the Pay Item Schedule for any bid for Mobilization exceeds the allowable amount shown in the table above, the District reserves the right to adjust the amount and total bid accordingly when checking bids. Said adjustment will in no way invalidate bids. . . .

(AR Ex. 7). The contracting officer informed Corinthian that the total price of its bid had been adjusted from \$23,464,629.65 down to \$22,014,551.13. The letter requested that Corinthian acknowledge the changes by signing the letter and returning a signed copy to the contracting officer. (AR Ex. 3). Corinthian did not sign the letter acknowledging the adjustment, and by letter of the same date, took exception to the revised price for mobilization and to the adjustment to the total contract price. (AR Ex. 4). Corinthian argued that since the project was being funded by the American Recovery and Reinvestment Act, federal requirements supersede the cited District requirements. On June 17, the contracting officer sent a letter to Corinthian requesting responsibility data. (AR Ex. 5). On June 18, 2009, the contracting officer received a second letter from Corinthian, arguing that the price adjustment was unfair and that it could not perform the contract for the adjusted price. (AR Ex. 4(a)). On June 23, 2009, Corinthian provided the responsibility data to the contracting officer. (AR Ex. 6). On June 25, 2009, Corinthian filed this protest with the Board challenging the mobilization price reduction and the overall contract price reduction. Corinthian requests that the District be required either to accept the original bid price or permit Corinthian to adjust the bid by reducing the mobilization amount and commensurately increasing other line items in its bid. Fort Myer intervened on June 30, 2009. On July 15, 2009, the District filed its Agency Report, and filed a determination and

finding to proceed with contract performance on July 24, 2009. Corinthian thereafter filed comments on the Agency Report.

DISCUSSION

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

The sole issue presented is Corinthian's contention that the District had discretion not to reduce the mobilization price and that the contracting officer's decision to reduce Corinthian's bid price was arbitrary and capricious. Corinthian contends that the following standard specification provision provides the contracting officer with discretion in deciding whether to reduce the contract price due to an excessive mobilization bid:

If the lump sum shown in the Pay Item Schedule for any bid for Mobilization exceeds the allowable amount shown in the table above, *the District reserves the right to adjust the amount and total bid accordingly when checking bids.* Said adjustment will in no way invalidate bids.

(AR Ex 7). (emphasis added). Citing D.C. Code § 2-301.01, Corinthian states that the Procurement Practices Act requires that the procurement law should "be liberally construed to promote its underlying purposes and policies" and that penalizing the low bidder by reducing the bid amount is contrary to public policy. Corinthian argues that the contracting officer should have considered whether the bid presented an "undue risk" to the government.

We disagree with Corinthian. The standard specification mobilization price limitation states:

Payment for Mobilization will be made at the contract lump sum price, subject to allowable limits under this section, which payment will include all operations and expense needed to mobilize, remobilize and demobilize. *Lump sum price for Mobilization shall not exceed applicable amounts determined as follows*

(AR Ex. 3). (emphasis added). This standard, using "shall" and not "may", provides the contracting officer no discretion to accept a higher mobilization price. The portion of section 612.02 cited by Corinthian merely gives the contracting officer the right to adjust the mobilization bid item after bid opening in connection with award. Corinthian has not demonstrated that any federal provision expressly supersedes or contradicts the provisions found in section 612.02. Accordingly, Corinthian's reliance on the American Recovery and Reinvestment Act is misplaced.

The adjustment requested by Corinthian, adding the excess mobilization amount to other line items after bid opening has been specifically considered and rejected by the Board in *Corman Construction, Inc.*, P-0217, 39 D.C. Reg. 4235 (1991). In that matter, Corman made an arithmetical error in calculating the appropriate amount of mobilization, pursuant to the then-governing section 104.07(C) of the District of Columbia Department of Highways and Traffic Standard Specifications for Highways and Structures (1974). The language of section 104.07(C)

essentially mirrors that of the current section 612.02 of the DDOT Standard Specifications for Highways and Structures. Corman contended that the error should be corrected by maintaining the total bid amount and increasing other items to make up for the reduction of the excess amount from the mobilization item. The Board held that the interpretation used by the District was correct, that “the mistake may be corrected by decreasing the total bid by the excess amount in the Mobilization item”, denied the protest, and permitted Corman to withdraw its bid.

CONCLUSION

The solicitation clearly limited the mobilization amount and provided the contracting officer the right to adjust the mobilization bid item to the maximum allowable amount. The contracting officer’s action was consistent with the solicitation and the law. Accordingly, we deny the protest.

SO ORDERED.

DATED: August 7, 2009

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

CONCURRING:

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