

DISTRICT OF COLUMBIA CONTRACT APPEALS BOARD

PROTEST OF:

HORTON & BARBER CONSTRUCTION SERVICES, LLC)
)
Solicitation No.: DCKA-2012-B-0037) CAB No. P-0907
)

For the Protester: Herman W. Barber, *pro se*. For the District of Columbia Government: Alton E. Woods, Esq., Assistant Attorney General.

Opinion by Administrative Judge Maxine E. McBean with Chief Administrative Judge Marc D. Loud, Sr., concurring.

OPINION

Filing ID 45740397

Horton & Barber Construction Services, LLC (“H&B” or “protester”) filed a protest on March 8, 2012, challenging the requirements set forth in the Invitation for Bids Solicitation No. DCKA-2012-B-0037 (“IFB” or “Solicitation”). The Office of Contracting and Procurement (“OCP”) for the District’s Department of Transportation (“DDOT”) issued the IFB for “construction services to replace and repair sidewalk pathways throughout the District in all eight Wards.” (District’s Mot. to Dismiss 2.) H&B alleges that it is unreasonable and contrary to the District’s procurement practices to include the requirement for a bid bond in the Solicitation. (Protest 1.) The District contends that the protest is untimely because – although it alleges improprieties in the Solicitation which were apparent prior to bid opening – the protest was filed after the time set for receipt of bids on March 2, 2012. (District’s Mot. to Dismiss 4.) The Board finds that the protest was in fact untimely filed and, for this reason, we dismiss the protest.

BACKGROUND

On February 9, 2012, OCP issued an IFB for “a contractor to provide emergency sidewalk repair/replacement.” (District’s Mot. to Dismiss Ex. 1, § B.1.) The Solicitation was advertised on OCP’s website and in the Washington Examiner. (District’s Mot. to Dismiss Ex. 9.) The advertisement in the Washington Examiner included notice that a 5% bid guarantee would be required with each bid. (Id.) The IFB was revised twice prior to the deadline for receipt of bids: (i) on February 15, 2012, the District extended the bid submission date from February 29, 2012, to March 2, 2012, (District’s Mot. to Dismiss Ex. 1(a)) and (ii) on February 16, 2012, the IFB was amended to include the unit amounts for certain quantities (District’s Mot. to Dismiss Ex. 1(b)).

In sections C.1.1 and I.2, the IFB incorporated DDOT’s “Standard Specifications for Highways and Structures” (“SSHS”). (District’s Mot. to Dismiss Ex. 1, §§ C.1.1, I.2.) Article 12 (A) of the SSHS states, “[o]n all bids of \$100,000 or more, security is required to insure the execution of the contract. No bid will be considered unless it is so guaranteed.” (District’s Mot. to Dismiss Ex. 2.)

On February 15, 2012, the Contracting Officer (“CO”) held a pre-bid conference wherein he discussed the requirement for a bid guarantee. (District’s Mot. to Dismiss Ex. 8.) Herman Barber, CEO of H&B, attended the pre-bid conference. (District’s Mot. to Dismiss Ex. 10.) On March 2, 2012, ten bidders, including protester, responded to the IFB. (District’s Mot. to Dismiss Ex. 4.) Protester and six other bidders failed to include a bid guarantee in their bid submission. (District’s Mot. to Dismiss Exs. 4, 8.)

On March 5, 2012, H&B sent an email to Bernetha Armwood, an employee of the Department of Public Works (“DPW”), to protest the Solicitation’s requirement that each offeror’s bid include a bid guarantee. (District’s Mot. to Dismiss Ex. 5.) In its email, H&B argued that a bid guarantee should not be required because the proposed contract was a requirements contract with no specified amounts. (Id.) The CO forwarded H&B’s email to the Contract Appeals Board (“CAB”) where the protest was acknowledged and docketed on March 8, 2012. (District’s Mot. to Dismiss Exs. 6, 7.) On April 4, 2012, the District filed a “Determination and Findings to Proceed with Contract Award while a Protest is Pending” (“D&F”). Protester challenged the D&F in a motion filed April 9, 2012.¹ (See H&B Mot. to Dismiss D.C. Request to Proceed [hereinafter “H&B Mot. to Dismiss”].)

DISCUSSION

We exercise jurisdiction over this protest and its underlying allegations pursuant to D.C. Code § 2-360.03(a)(1)(2011).

One of the threshold issues for this Board to examine prior to considering the merits of a protest is whether the protest has been filed timely in accordance with the statutory requirements and Board Rules. The statutory requirements pertaining to timeliness are codified in D.C. Code § 2-360.08(b)(1) and (2) and are similar to those contained in the Board Rules as set forth in D.C. Mun. Regs. tit. 27, §§ 302.2(a), 302.2(b) (2002). The statute provides:

- (b)(1) A protest based upon alleged improprieties in a solicitation which are apparent prior to bid opening or the time set for receipt of initial proposals shall be filed prior to bid opening or the time set for receipt of initial proposals.
- (2) In cases other than those covered in paragraph (1) of this subsection, protests shall be filed not later than 10 business days after the basis of the protest is known or should have been known, whichever is earlier.

D.C. Code § 2-360.08.

In its protest, H&B alleges that the IFB’s bid bond requirement was improper because “it is a requirements contract, and the actual total of work to be provided has not yet been determined.” (Protest 1.) However, the District claims that the protest is untimely because, from the onset, H&B was aware of any alleged irregularities contained in the Solicitation. (District’s Mot. to Dismiss) First, the Solicitation included a bid guarantee requirement in Article 12(A) of the SSHS which states that “no bid will be considered unless it is so guaranteed.” (District’s Mot. to Dismiss Ex. 2.) Second, the advertisement in the Washington Examiner included notice that a 5% bid guarantee would be required with each bid. (District’s Mot. to Dismiss Ex. 9.) Third, the CO discussed the requirement for a bid guarantee during the pre-bid conference, (District’s Mot. to Dismiss Ex. 8) which was attended by H&B’s CEO (District’s

¹ The present Order renders moot the April 4, 2012, D&F and protester’s challenge of April 9, 2012.

Mot. to Dismiss Ex. 10). Therefore, prior to the March 2, 2012, deadline for submission of bids, it was clearly apparent to the protester that the Solicitation included a requirement for a bid guarantee. That being the case, H&B needed to file its protest prior to bid opening on March 2, 2012. Instead, on March 5th, H&B emailed a protest to DPW which was docketed by CAB on March 8th. As a result, protester failed to meet the referenced statutory requirement concerning timeliness as set forth in D.C. Code § 2-360.08(b)(1).

In *NetSystems Corp.*, CAB No. P-0841, 2010 WL 3947582 (Apr. 28, 2010), the Board held that where the protest was based upon the solicitation's alleged contradictions to the D.C. Code, the District properly rejected the bid as untimely because protester did not file the protest until after bid opening. "NetSystems' protest relates specifically to the terms of the solicitation, and should have been filed prior to bid opening." *Id.* Similarly, in *Nation Capital Builders, LLC*, CAB No. P-0761, 57 D.C. Reg. 000741, 000743 (Nov. 20, 2007), the Board held that, "[t]he protester should have sought clarification of this alleged impropriety in the IFB by filing a protest before bid opening" (in response to protester's question concerning whether sealed bids for construction IDIQ type contracts require bid bonds at bid opening). More recently, this Board held that, "protests challenging the propriety of a solicitation term that is apparent prior to bid opening must be filed prior to bid opening." *Elite People Protective Services, Inc.*, CAB No. P-0898, 2012 WL 554445 (Jan. 9, 2012).

In its challenge to the D&F, protester asserts that it does not object to any of the terms issued in the Solicitation. (H&B Mot. to Dismiss.) Protester claims instead that the "protest is based on the Districts use of DCMR 27-2416 and its incorrect determination of the evaluated bid price being utilized as the actual bid price." (*Id.*) However, the protest is very clearly based on the Solicitation's bid requirement. As such, "protester's failure to protest this matter prior to the deadline for submission of proposals renders the present protest untimely." *Enterprise Info. Solutions, Inc.*, CAB No. P-0901, 2012 WL 554446 (Feb. 9, 2012). Finding that the protest allegations are untimely filed, the Board will not determine the merits of this protest.

CONCLUSION

For the reasons discussed above, we dismiss the present protest as untimely.

SO ORDERED.

DATED: August 6, 2012

/s/ Maxine E. McBean
MAXINE E. MCBEAN
Administrative Judge

CONCURRING:

/s/ Marc D. Loud, Sr.
MARC D. LOUD, SR.
Chief Administrative Judge

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