

PROTEST OF:

The District's Office of Contracting and Procurement, on behalf of the Department of Transportation, issued Solicitation No. DCKA-2008-B-0097 in May 2008, for the demolition and removal of the existing ramp bridges for Ramps SE and ES at the interchange of 11th Street and the Southeast Freeway. (Agency Report ("AR") at 2). The ramps provide access to the Robert F. Kennedy Memorial Stadium from the freeway. Eight bids were submitted on July 24, 2008. Horton was the apparent low bidder with a price of \$504,619.50. The next low bid was Milani Construction, LLC, with a price of \$1,871,180. The remaining bids ranged from \$2,599,199 to \$4,957,263.50. (AR Ex. 5). The District's initial estimate for the job was \$5,764,730 but that estimate was later revised to \$1,904,990 when the statement of work was amended to remove the requirement that certain materials removed from the bridges under the contract be salvaged and delivered to the District. (AR at 3). Horton's bid guaranty included a bid bond underwritten by Infinity Surety of Saginaw, Texas. The asset pledged by Infinity Surety to support the bond was a parcel of land identified as "Lot 20, Block 7, Woodmont addition, an addition to the City of Fort Worth, Texas." (AR at 5, AR Ex. 2).

Horton did not provide any other documentation or details about the pledged parcel of land with its bid. By letter dated July 25, 2008, the contracting officer requested that Horton confirm its bid price. (AR at 3). The contracting officer did not request that Horton provide cost data supporting the pricing of the various line items found in its bid. On July 29, 2008, Horton confirmed its bid price. (AR Ex. 4). Horton did not provide any cost data supporting the pricing of the solicitation's line items. On August 6, a bid opening transmittal letter was forwarded to Barton Clark, who is the program manager for the District's Anacostia Waterfront Initiative, requesting a recommendation for award and a justification for the disparity between the bid prices and the government's estimate. (AR at 3-4). On August 7, the contracting officer received from the program management office a recommendation to award to the second low bidder, Milani Construction. (AR at 4).

On October 24, 2008, the contracting officer approved a Determination and Findings (D&F) to reject the Horton's bid for an unreasonably low price. (AR Ex. 3). One major portion of the work consisted of bridge demolition over an active railroad facility, M Street and the SE/SW Expressway. The contracting agency notes that the demolition and removal of the bridges' superstructures/substructures is both labor and equipment intensive. The contracting officer concluded that Horton could not perform this complex portion of the work for its unit price of \$250,000. The next low bidder had a price of \$1,090,000 for this same work. For mobilization, Horton bid \$30,000, while the average price of the eight bidders is \$106,937.50 and the government estimate is \$100,000. For the construction lane closing line item, Horton bid \$10,000 while the average price for this bid item was \$107,312.50 and the government estimate is \$50,000. For the protection shield line item needed to protect public and CSX property during demolition, Horton bid \$20,000 while the next low bidder's price was \$185,000, a difference of \$165,000. According to the contracting agency, improper or ill prepared plans can result in project delays and/or a danger to public safety. (AR at 7-8; AR Exs. 2, 3, and 7).

Also on October 24, 2008, the District's Chief Procurement Officer approved the D&F to award the contract to Milani Construction. (AR Ex. 5). By letter dated October 29, 2008, the contracting officer informed Horton that it had been determined to be nonresponsive due to an unreasonably low bid price. (AR Ex. 6). On November 9, 2008, Horton filed this protest. On December 1, 2008, the District filed its Agency Report arguing that (1) Horton's bid was nonresponsive because the bid bond was defective, and (2) Horton was properly determined to be nonresponsive because its bid price was unreasonably low pursuant to 27 DCMR §§ 1531.6 and 2200.5. On December 19, 2008, Horton filed its comments on the Agency Report and included an affidavit from Horton's CEO, Herman W. Barber, III. Horton argues that the contracting officer acted in bad faith in making his nonresponsibility determination without requesting Horton to provide support for its pricing and to otherwise obtain the required types of responsibility information set forth in 27 DCMR § 2204.1 – 2204.5. Mr. Barber states in his affidavit that he "received price commitments from buyers of steel, concrete and other salvage materials identified in the 'Summary of Quantities' list provided in the solicitation. For example . . . a per ton price of \$365.00 for steel." (Barber Affidavit ¶ 6). He adds: "I used all of the price quotes received and salvage value research I obtained to help determine my solicitation bid price." (Barber Affidavit ¶ 7). After bid opening, Barber states that he confirmed his bid price but that the contracting officer "never

requested that I verify, justify or explain my bid price” and “did not respond to any of my additional attempts to inquire about the need to extend my bid bond or provide any additional information.” (Barber Affidavit ¶¶ 9-11).

The District awarded the contract to Milani Construction on March 5, 2009. (Contract No. DCKA-2008-C-0097, filed March 26, 2009). The contract price matches Milani’s bid price of \$1,871,180 and Milani executed performance and payments bonds as part of the contract.

DISCUSSION

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

The District argues that Horton submitted an inadequate bid bond, and thus its bid is nonresponsive. Horton argues that the contracting officer failed to identify the alleged bid bond defect and that the District is estopped from raising it for the first time in its Agency Report. We conclude that the District was not estopped from raising the bid bond issue in the Agency Report and that the bond was defective, rendering Horton’s bid nonresponsive. The IFB required bidders to provide a bid guaranty for 90 calendar days after bid opening. (AR Ex. 1). Horton submitted a bid bond that contained a pledge of real estate described as “Lot 20, Block 7, Woodmont addition, an addition to the City of Fort Worth, Texas.” (AR at 5, AR Ex. 2). Horton provided no other information about the real estate with its bid.

The sufficiency of a bid bond depends on whether the surety is clearly bound by the bond and whether the government will receive the full and complete protection contemplated by the government if the bidder fails to execute the required contract documents. *Fort Myer Constr. Corp.*, CAB No. P-0452, July 23, 1996, 44 D.C. Reg. 6476, 6481; *Communications by Johnson, Inc.*, B-255478, Mar. 2, 1994, 94-1 CPD ¶ 163; *Gulf & Texas Trading Co.*, B-253991, Jan. 24, 1994, 94-1 CPD ¶ 31. If the surety’s liability is not clear from the face of the bond, the bond is defective and must be rejected as nonresponsive. *See Gulf & Texas Trading Co.*, B-253991, Jan. 24, 1994, 94-1 CPD ¶ 31; *H.R. General Maintenance Corp.*, CAB No. P-0557, Feb. 2, 1999, 44 D.C. Reg. 8556, 8560. Horton’s bond did not include an appraisal of the property. Therefore, the contracting officer could not determine the value of the secured property, and he could not determine whether the property had the value needed to support the value of Horton’s bid. Accordingly, the bid bond was defective. *Communications by Johnson, Inc.*, B-255478, Mar. 2, 1994, 94-1 CPD ¶ 163; *Gulf & Texas Trading Co.*, B-253991, Jan. 24, 1994, 94-1 CPD ¶ 31.

Horton cites no authority, and we can find none, for concluding that the contracting agency should be estopped from rendering such a determination four months after bid opening and three months before award to the second low bidder. *Computer Terminal Sales*, B-200366, Jan. 22, 1981, 81-1 CPD ¶ 37 (even if the agency erroneously rejected the protester’s bid on one ground, GAO found protester could not have been prejudiced because its bid should have been rejected on another basis). Even if Horton had been notified of the defect shortly after bid opening, Horton could not have cured that defect after bid opening. *Spotless Janitorial Services, Inc.*, B-257341, Sept. 15, 1994, 94-2 CPD ¶ 102; *H.R. General*

Maintenance Corp., 44 D.C. Reg. at 8560. Horton was thus not prejudiced by the delayed notification of the defective bid bond.

Horton also argues that the District should be barred from awarding the contract to Milani Construction because the District failed to act within 90 calendar days after bid opening and presumably Milani's bid expired. The record is not clear on whether the contracting officer requested that the other bidders extend their bids in October 2008 beyond the initial 90 days. Nevertheless, the contracting officer and Milani executed a contract on March 5, 2009, and there is a notification on the same date to extend its bid. There is no argument that Milani's bid, at the time of bid opening, was nonresponsive or that the bid bond was defective. The issue raised by Horton is whether Milani's bid, if it expired after the initial 90 day period, could be revived and an award made based on the revived bid. We believe that Milani could have elected not to extend its bid but the record shows that it elected to extend its bid and there was no legal error on the part of the contracting officer in entering into a contract with Milani under its revived bid. *See General Oil Corp.*, CAB No. P-0355, Apr. 16, 1993, 40 D.C. Reg. 5097, 5102-03; *Holk Development, Inc.*, B-230830.2, Dec. 1, 1988, 88-2 CPD ¶ 543.

The contracting officer determined in a D&F dated October 24, 2008, and in a letter to Horton dated October 24, 2008, that Horton's bid was unreasonably low and that Horton was therefore nonresponsive. The contracting officer asked Horton to confirm its bid price, which Horton did, but the contracting officer did not ask Horton to further justify its bid prices for the various line items. Horton maintains that it should have been given a further opportunity to explain its pricing to the District, and that the "contracting officer acted in bad faith by prematurely determining the protestor non-responsive without fully appraising himself of the Protester's capabilities."

We see no evidence for concluding that the contracting officer acted in bad faith in determining Horton's bid price to be unreasonably low. Although the contracting officer should have asked for additional information from Horton on the particular line items that he found were unreasonably low, under the circumstances here we conclude that the nonresponsibility determination is sustainable because Horton has not introduced sufficient evidence rebutting the contracting officer's findings on the pricing. Horton only presented some evidence of salvage value per ton of steel but without identifying its total costs to perform the solicited work, and evidence of its costs to perform the challenged line items, there is no basis for us to conclude that the matter should be remanded to the contracting office for further review. Horton should have introduced evidence of its costs and salvage revenue in its original protest filing but failed to do so and even after the Agency Report identified the various line items as being significantly below estimates and other bidders' prices, Horton still failed to introduce adequate evidence of the reasonableness of its pricing.

CONCLUSION

For the reasons discussed above, we deny Horton's protest.

SO ORDERED.

DATED: April 3, 2009

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

CONCURRING:

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