

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD**

PROTEST OF:

CARTER FUEL OIL COMPANY)	
)	CAB No. P-208
Under RFP No. 9121-AA-NS-0-9-KC)	

For the Protestor: George A. Carter, President. For the Government: Nancy Hapeman, Assistant Corporation Counsel, and Anne Cauman, Assistant Corporation Counsel.

Opinion by Administrative Judge William L. Davis, with Administrative Judges Zoe Bush and David H. Marlin concurring.

OPINION

In this protest Carter Fuel Oil Co. (Carter) alleges that as the lowest responsive and responsible bidder, it should have been awarded the contract which resulted from Request for Proposal No. 9121-AA-NS-0-9-KC (RFP); and that the action of the District in awarding the contract to Tri-Continental Industries, Inc. (Tri-Con), whose offered price was the highest, was improper. The District contends that there does not exist any basis for Carter's protest because Carter has imposed an invalid standard for award of a procurement conducted by means of competitive sealed proposals--that of lowest bid price. We agree with the District and for the reasons hereinafter discussed, we deny the protest.

On January 20, 1989, the Department of Administrative Services (DAS) issued an RFP in the sheltered market for the supply and delivery of gasoline and heating oil products. The RFP set February 22, 1989 as the closing date for submission of proposals. Subsequently, four addenda and an amendment to the RFP finally extended the closing date to June 7, 1989.

DAS received six responses to the RFP;^{1/} however, Green Fuel Oil Company (Green), General Oil Corporation (General Oil),^{2/} Tri-Con, and Carter were the only companies evaluated as technically acceptable and found to be within the competitive range. The four proposals were reviewed by a panel of five evaluators.

^{1/}Proposals were received from Tri-Continental Industries, Inc., Green Fuel Oil Company, General Oil Corporation, and Carter Fuel Oil Company, Inc. A fifth offeror, District Line Fuel Company, Inc., submitted a sub-contractor offer only; and the sixth offeror, Collins Electronics, submitted a no-bid.

^{2/}On May 8, 1989 General Oil Corporation filed a protest with the Board alleging that the RFP contained two unduly restricted requirements. See, General Oil Corporation, P-155 (D.C. CAB April 20, 1990), 38 DCR 3059 (1991).

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Section E of the RFP contains the following seven evaluation criteria with assigned numerical weights which were to be used in rating the proposals:

(1) Cost	0 - 25 point.
(2) Subcontract Plan	0 - 19 points
(3) Location of Terminal and Rack Facilities	0 - 6 points
(4) Demonstrated Satisfactory Performance	0 - 12 points
(5) Location of Bank or Saving & Loan Association	0 - 5 points
(6) General Operating Capability	0 - 18 points
(7) Source of Supply	0 - 26 points

The maximum points obtainable from each evaluator was 100. (Exh. 1 to Agency Report.)

After receipt of the first round of best and final offers, the District evaluated the offers and assigned various point scores. Tri-Con received the highest evaluation, followed by Green, General Oil, and Carter. Tri-Con's price was also the highest, while Carter's was the lowest. (Exh. 8.) The District then conducted discussions with each of the four offerors and upon completion of the discussions set June 23, 1989, as the date for submission of the second round of best and final offers. Each of the four offerors submitted a second best and final offer, which resulted in the following points scores:

<u>Contractor</u>	<u>Technical Evaluation Points (Max 375)</u>	<u>Cost Evaluation Points (Max 125)</u>	<u>Total Evaluation Points (Max 500)</u>	<u>Total Cost</u>
Tri-Con	227	105.50	382.55	\$14,228,229.21
Green	263	111.55	374.55	\$13,461,171.37
General Oil	172	111.70	283.70	\$13,437,141.57
Carter	194	125	319.00	\$12,015,235.46

Based upon the above point scores, the District awarded the contract to Tri-Con as the highest-rated offeror. Tri-Con's price remained the highest.

It is readily apparent from Carter's protest letter, and its reliance on a "low bid" price theory, that it has confused the competitive sealed "bidding" process with that of the competitive sealed "proposal" process.^{3/} Award in a procurement conducted by means of competitive sealed proposals is made on the basis of evaluation factors stated in the RFP and not on the basis of the "low bidder". Since the procurement involved in this case was by means of competitive sealed proposals, which included evaluation criteria, it

^{3/}D.C. Code § 1-1181.1 et seq. (1987), requires that the District conduct procurement by means of either competitive sealed bidding or competitive sealed proposals, unless there is only one source available.

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is not determinative of award that the price submitted by Carter was lower than the price submitted by Tri-Con.^{4/}

In a procurement by means of competitive sealed bidding, the District solicits bids through the issuance of an Invitation for Bids (IFB), and the award is made to the responsive and responsible bidder with the lowest price. See, D.C. Code § 1-1183.3(b) and (e). Price is the determinative factor for award in any such procurement pursuant to an IFB. Competitive sealed proposals is defined in § 1-1181.7(11) of the D.C. Code as: "[a] process which includes the submission of sealed written technical and price proposals from 2 or more sources and a written evaluation of each proposal in accordance with evaluation criteria which consider price, quality of the items, performance and other relevant factor."^{5/}

Under the evaluation factors stated in the instant RFP, price was an important factor, but it was not the determining factor for award. Out of a total 100 maximum possible points to be assigned to proposals upon evaluation, the District allowed a maximum of 25 points for price. As a result, price accounted only for 25% of the possible 100 points an offeror could achieve; while the remaining factors accounted for 75% of the possible 100 points. Section 1-1183.4(c) requires that each request for

^{4/}D.C. Code § 1-1183.2(b) provides that:

In selecting 1 of the methods authorized by this section for the awarding of contracts, it is the policy of the District government that competitive sealed bidding shall be the preferred method for awarding contracts.

Section 1-1183.3. Competitive sealed bidding, provides:

(a) Contracts exceeding the amount provided by § 1-1183.6 shall be awarded by competitive sealed bidding unless the Director determines in writing that:

- (1) Specifications cannot be prepared that permit an award on the basis of either the lowest bid price or lowest evaluated bid price;
- (2) There is only 1 available source;
- (3) There is an unanticipated emergency which leaves insufficient time to use this method; or
- (4) There is some other reason in the best interest of the District government which is so compelling as to use 1 of the other authorized methods.

...

The record reveals that the District complied with the requirements of § 1-1183.3(a) in utilizing competitive sealed proposals instead of competitive sealed bidding. See, Exhs. 5, 6, 7, 8 attached to District's Reply to Carter's Response to Agency Report.

^{5/}If the RFP contains no evaluation factors § 1614.1 of 27 DCMR allows the District to select a contractor through the use of an RFP that sets forth price competition as a criterion for award so long as the offeror is responsible and its offer meets the minimum needs of the District.

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proposals indicate the relative importance of each evaluation factor. This was done in this case through the assignment of a numerical weight to each factor.

The District conducted its evaluation of each of the four offerors' proposals in accordance with the evaluation factors stated in the RFP. (Exh. 8 to Agency Report.) After completion of discussions with the offerors, and receipt of two rounds of best and final offers, the District concluded that Tri-Con was the highest-rated offeror. Based on Tri-Con's higher score (which indicated that its offer represented the greatest value to the District in terms of technical merit) its prices, and an affirmative finding of responsibility, the District awarded the contract to Tri-Con on October 5, 1989. See, Exhs. 1, 10 to Agency Report; D.C. Code § 1-1183.4 (b). This action was in accord with the requirements of the solicitation and the D.C. Code.

Section B.16 of the RFP pertaining to contract award provides as follows:

- A. The Government will award a contract resulting from this solicitation to the responsible offeror whose offer conforming to the solicitation will be the most advantageous to the Government, cost or price and other factors, specified elsewhere in this solicitation, considered.

Section 1-1183.4(f) of the D.C. Code mandates that:

[a]ward of the contract shall be made to the responsible offeror whose proposal is determined to be the most advantageous to the District government, considering price and the evaluation factors set forth in the request for proposals. (Emphasis supplied.)

In its response to the agency report Carter raises for the first time the propriety of the District using the competitive sealed bidding method of procurement. The District contends that Carter's belated challenge is untimely and improper because it raises issues not raised in its initial protest letter of October 19, 1989. The District requests that we strike the response. Since we have determined from the record that the District did in fact comply with the requirements of § 1-1183.3(a) in using the competitive sealed proposal process, we need not address the District's request.

Carter also raises in its response the need for a conference and discovery. Section 310 of our rules provides that a conference may be held at the discretion of the Board upon its own motion or upon the request of the protestor. Our rules also provide for discovery if no agency report is filed in order to provide a sufficient factual basis for the fair and just resolution of the protest.

In its attempt to justify the need for a conference, Carter raises the specter that there may have been procurement deficiencies, ergo, a conference is needed to determine what occurred. The alleged procurement deficiencies are in the form of statements by Carter of questions it believes existed regarding the procurement. Questions about areas of concern in the procurement do not rise to the level of clear and concise statements of

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protest grounds. A conference is not the place to look into issues that are not stated grounds of the protest. The Board acts as a quasi-judicial body, not as an investigating arm of the government. Our role is the development of the record in the context of affirmative protest grounds clearly spelled out in the protest.

We note also that the District filed a voluminous agency report with numerous exhibits attached thereto. Carter failed to demonstrate in its response that the report does not provide a sufficient factual basis upon which to decide the stated grounds of its protest, nor did Carter set forth any facts which contradict the District's exhibits. The purpose of discovery is to aid the Board in a just resolution of the protest, not to enable a protestor to conduct a fishing expedition so as to develop the grounds of its protest. Therefore, we find a conference and discovery would be inappropriate in this case.

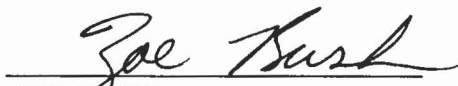
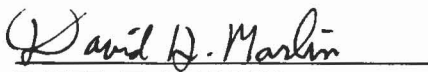
Accordingly, the record having revealed that (1) Carter's offer received a fair evaluation according to the requirements set forth in the solicitation, (2) the District's use of the competitive sealed proposals process was appropriate, and (3) the award to Tri-Con was proper, the protest is hereby DENIED.

DATE: July 12, 1991



WILLIAM L. DAVIS
Chief Administrative Judge

CONCUR:


ZOE BUSH
Administrative Judge
DAVID H. MARLIN
Administrative Judge