

GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD
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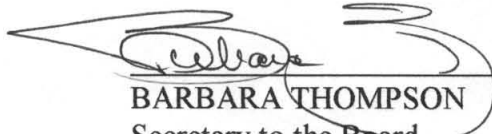
October 14, 1998

TO: Mr. Bryan Chaison, Project Manager
HR General Maintenance Corporation
2021 Shannon Place, S.E.
Washington, DC 20020

H. Christopher Malone, Esquire
Warren J. Nash, Esquire
Howard S. Schwartz, Esquire
Assistants Corporation Counsel
Office of the Corporation Counsel
441 4th Street, N.W., 10th Floor
Washington, DC 20001

SUBJECT: CAB No. P-545, HR General Maintenance Corporation

Attached is a copy of the Board's Opinion denying protest.


BARBARA THOMPSON
Secretary to the Board

GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

PROTEST OF:

HR GENERAL MAINTENANCE CORPORATION)	
)	CAB No. P-545
Under IFB No. 98-0066-AA-2-0-CC)	

For the Protester: Mr. Bryan Chaisone, Project Manager. For the Government: Howard S. Schwartz, Warren J. Nash, and H. Christopher Malone, Assistants Corporation Counsel.

Opinion by Administrative Judge Claudia Booker, with Chief Administrative Judge Lorilyn E. Simkins and Administrative Judge Phyllis W. Jackson, concurring.

OPINION

Bryan Chaisone, Project Manager for HR General Maintenance Corporation ("HR" or "Protester"), protests the Department of Public Works' ("DPW") consideration of contract award to any of the three bidders listed that submitted bids in response to the solicitation, IFB No. 98-0066-AA-2-0-CC. The three bidders were: NAPA Development Corporation ("NAPA"), SJC Company ("SJC"), and AEO Construction Company ("AEO"). The Protester contends that at bid opening on April 30, 1998, the three bids should have been excluded from consideration for contract award because of various irregularities in the bid documents and because NAPA's bid price was unreasonably low. The District later rejected two of the bids and as a result the only remaining issue is the challenge to SJC's bid.

On the same day as bid opening the Protester filed a letter with Mr. Kevin Green, Contracting Officer, DPW, protesting DPW's consideration for contract award to any of the three bidders. On June 12, 1998, HR filed this protest with the Board.

BACKGROUND

On April 6, 1998, DPW issued IFB No. 98-0066-AA-2-0-CC, for the replacement of the roof of DPW's Traffic Services Division located at 137 G Street, N.W. Bid opening occurred on April 30, 1998, and five bids were received. At the time of bid opening the bids were ranked as follows:

1. NAPA	\$80,204
2. SJC	\$119,083
3. AEO	\$139,950
4. HR	\$147,440
5. Selective	\$185,000

Following bid opening HR was awarded 12 bid preference points for its status as a local small business located in an enterprise zone under the Equal Opportunity for Local, Small, Disadvantaged Business Enterprise Temporary Act of 1998, D.C. Act 12-278, Jan. 27, 1998, thereby reducing its bid price by 12% (for bid evaluation purposes only). HR became the third lowest bidder with a weighted bid of \$129,747.20. On May 19, 1998, DPW found all five bids to be responsive.

On the same day as bid opening, HR submitted to the DPW Contracting Officer a letter which contained a header entitled "Subject: Service of Protest". The letter protested DPW's consideration of contract award to NAPA Development Corp., SJC Co., and AEO Construction Co. for the same reasons set out in the protest filed with this Board. The DPW Contracting Officer did not forward the protest letter to the Board. On June 10, 1998, the DPW Chief of the Office of Contract Administration sent HR a letter notifying it that DPW was in receipt of HR's protest and that its protest should be filed with the Board. Further, the letter informed HR to "Please redirect your correspondence accordingly."

On June 12, 1998, the Protester filed this protest with the Board asserting that three of the bids should have been excluded from consideration for contract award for the following reasons. The Protester began by asserting that NAPA Development Corporation's price was well below market price and, as such, the work cannot be performed properly to specifications and scope for the amount quoted. Next, according to the Protester, SJC Company's bid bond was not attested, AEO Construction Company's bid bond was not attested by the secretary and did not acknowledge Addendum No. 1, and NAPA Development Corporation's bid package did not include payments to subcontractors and suppliers.

On July 6, 1998, the District filed an Agency Report arguing that the various protest grounds should be denied or dismissed. The District asserted that HR filed its protest late with the Board. Next, it argued that the issue raised with regard to NAPA's bid is not ripe for review, and DPW was in the process of investigating whether NAPA can perform the work for its bid price which is less than DPW's estimate. Lastly, the District contended that the issue raised with regard to SJC's bid is without merit; and the issue raised with regard to AEO's bid is moot.

In mid-August DPW requested that each of the remaining four bidders execute a bid extension form. NAPA failed to submit the extension form and, as a result, its bid was rejected from further consideration for contract award. DPW had not resolved the issue of NAPA's ability to perform the work for the bid price prior to requesting the bid extension.

On September 10, 1998, in response to a Board request for a report from DPW on the current status of the review of NAPA's bid price, the current ranking of the remaining bidders, and the status of contract award the District submitted a status report. The District notified the Board that NAPA's bid was rejected for failure to submit a bid extension form, AEO's bid was rejected for nonresponsiveness, and SJC was determined to be the apparent low bidder. As a

result, DPW has determined HR to be the second lowest bidder. Next, DPW expressed its intention to award the contract to SJC if and when the Board decides this protest in favor of the District. The District did not comment on the status of Selective's bid.

The Board finds that it has jurisdiction to hear and decide this protest and denies the protest on its merits.

DECISION

I. Jurisdiction

The District argues that the protest is untimely and, therefore, the Board lacks jurisdiction to hear and decide this case on the merits.

Board Rule 302.2, 45 D.C. Reg. 1415 (March 13, 1998) provides:

(a) 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 with the Board prior to bid opening or the time set for receipt of initial proposals. In procurements where proposals are requested, alleged improprieties which do not exist in the initial solicitation, but which are subsequently incorporated into this solicitation, must be protested not later than the next closing time for receipt of proposals following the incorporation.

(b) Protests other than those covered in paragraph (a) shall be filed with the Board not later than ten (10) business days after the basis of the protest is known or should have been known, whichever is earlier.

In accordance with Board Rule 302.2(b), the Protester would have had 10 business days from May 1, the day after bid opening, until May 14 in which to file a protest with the Board. However, the effect of the Protester having submitted a protest letter with the DPW Contracting Officer on April 30, 1998, (bid opening day), although misdirected, is the functional equivalent of filing the protest with the Board, for the purpose of timeliness. As stated in *Fort Myer Construction Corp.*, CAB No. P-452, July 23, 1997, 44 D.C. Reg. 6476, 6481:

Based on the circumstances presented in the record, we conclude that Fort Myer's filing of its protest with the contracting officer was functionally equivalent to filing the protest with this Board and that we should not dismiss the protest as untimely. . . . When Fort Myer delivered its protest to the contracting officer, it certainly provided fair notice to the appellee, the District of Columbia, and to the agency through the person of the contracting officer. 44 D.C. Reg. at 6481

When the DPW Contracting Officer received HR's misdirected protest he was required to immediately forward it to the Board. Instead, DPW took no action with regard to the protest for approximately six weeks, until June 10, when it informed HR to file its protest with the Board. On June 12, 1998, HR filed a protest with the Board.

The Board finds that this protest was timely filed as of April 30, 1998, and, therefore, the Board has jurisdiction to hear and decide this protest on its merits.

II. Merits

With regard to the merits of the protest, the Protester has challenged the eligibility for contract award of the bids submitted by the three other bidders (NAPA, SJC and AEO) and argues that the bids should have been excluded from consideration for contract award. However, after the filing of this protest DPW rejected AEO's bid as nonresponsive and NAPA's bid for failure to submit a bid extension form. Therefore, the only remaining bidder whose eligibility for contract award was challenged in the protest is SJC, the current apparent low bidder.

The Protester argues that SJC's bid is ineligible for contract award because its bid bond was not attested. However, the District has correctly pointed out that, in keeping with the Board's decision in *Fort Myer*, 6482, the bid bond is nevertheless valid upon the corporation and the surety.

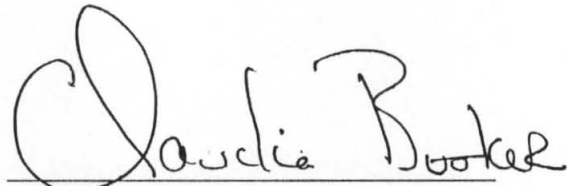
A bid bond is a form of guarantee designed to protect the government's interest in the event of default. If a bidder fails to honor its bid in any respect, the bid bond secures a surety's liability for all procurement costs. When required by a solicitation a bid bond is a material part of the bid which must be furnished at the time of bid submission. If a bidder submits a defective bid bond, the bid itself is rendered defective and must be rejected as nonresponsive. The determinative question as to the acceptability of a bid bond is whether the bond documents establish that the bond is enforceable against the surety should the bidder fail to meet its obligations. See *Fort Myer*, at 6482, citing *Norair Engineering Corp.*, CAB No. P-302, Oct. 21, 1992, D.C. Reg. 4636; and *Southern Maryland Restoration, Inc.*, CAB No. P-241, Aug. 7, 1991, D.C. Reg. 4268.

SJC's bid contains a bid bond signed by SJC's vice president, properly identifying the IFB to which it was applicable in the appropriate penal amount. The bond was signed by the attorney-in-fact of the surety with the attestation signature. The bond included a power of attorney from the surety for the individual who signed as attorney-in-fact and contained the surety's corporate seal (A.R., Exh. 3). The fact that the bidder's corporate secretary failed to attest to the certificate as that of the SJC corporation would not defeat the District's right to coverage under the bond should SJC default on its bid. Accordingly, the failure to include the attestation is a minor irregularity which the contracting officer in his discretions is free to waive. See 27 DCMR 1535.

Therefore, the Board finds that the failure of SJC to attest its bid bond does not, as a matter of law, disqualify its bid from consideration for contract award and the protester's challenge cannot be sustained. Accordingly, this protest is denied.

SO ORDERED.

Date: October 9, 1998



CLAUDIA BOOKER
Administrative Judge

CONCURRING:



LORILYN E. SIMKINS
Chief Administrative Judge



PHYLLIS W. JACKSON
Administrative Judge