

DISTRICT OF COLUMBIA CONTRACT APPEALS BOARD

PROTEST OF:

LORENZ LAWN & LANDSCAPE, INC.)	
)	CAB No. P-0869
Under Solicitation No. DCKA-2010-B-0219)	

For the Protester, Lorenz Lawn & Landscape, Inc.: Randy Alan Weiss, Esq. For the District of Columbia Government: Alton E. Woods, Esq., Assistant Attorney General, Office of the Attorney General for the District of Columbia.

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

OPINION

Filing ID 40105790

The protester Lorenz Lawn & Landscape, Inc. (“Lorenz”) challenges the award made to C&D Tree Services, Inc. (“C&D”) by the District of Columbia (“District”) Department of Transportation (“DDOT”) for tree planting and other related landscaping services under IFB No. DCKA-2010-B-0219 (“IFB”). Lorenz alleges that the award decision was improper because the awardee did not meet the IFB qualification requirements and was not the lowest responsible bidder.

Having reviewed the record, we find no evidence that the District violated procurement law or regulation, or the terms of the IFB, in making the subject award. Accordingly, we deny Lorenz’s protest challenge to the District’s source selection decision in this matter.

BACKGROUND

The IFB, issued on August 3, 2010, contemplated the award of a firm fixed-priced contract to a company having proven experience in completing municipal tree planting contracts to provide transportation, equipment, tools, materials, supplies, facilities, labor and supervision required to plant trees and perform incidental tree parts removal services. (Agency Report (“AR”) Ex. 1). The District Office of Contracting and Procurement issued the IFB on behalf of the Urban Forestry Administration (“UFA”) division within DDOT which is responsible for establishing and maintaining a full population of healthy trees within the District. (AR Ex. 1).

The IFB Provisions

The services being solicited by the IFB were categorized into four different “Aggregate Award Groups” (Groups 1, 2, 3, and 4) which each included the base year contract period, and four

additional one year option periods. (AR Ex. 1). More specifically, each of the Aggregate Award Groups in the IFB detailed, by respective contract line items (“CLINs”) 0001 - 0012, the particular tree planting related services that the successful bidder would be required to provide within certain divisions of the District also known as “Wards” in the District. (AR Ex. 1).¹

Accordingly, in response to the IFB, offerors were directed to submit proposed bid prices to perform all of the CLINs in each of the four Aggregate Award Groups for the base year contract period as well as for each of the four one year option periods. (AR Ex. 1). The IFB advised that, in turn, the resulting award would be made to the successful bidder by Aggregate Award Group for the contract base year period and the four one year option periods. (AR Ex. 1).

Section L.18 of the IFB also included “General Standards of Responsibility” that were to be applied to all of the bidders in this procurement. (AR Ex. 1). These standards required that offerors demonstrate to the satisfaction of the District their capability to fully perform the contract requirements by providing, within 5 days of request by the District, evidence of adequate financial resources, credit or ability to obtain such resources as required during the performance of the contract. (AR Ex. 1).

Additionally, the IFB set forth corporate licensing, registration and certification requirements for each bidder in at least two instances. Section H.21 of the IFB stated very generally that the successful bidder would be required to obtain the required licenses, permits, and registrations immediately after contract award although this provision did not establish an exact completion deadline for this requirement after the award:

Immediately following award, the Contractor shall obtain at its expense any licenses, permits [sic] registrations necessary for the performance of this contract.

(AR Ex. 1).

In a second instance, Section L.15 of the IFB further specified the same requirements as follows:

Each bidder must provide the following information:

... A copy of each District of Columbia license, registration or certification that the bidder is required by law to obtain. This mandate also requires the bidder to provide a copy of the executed “Clean Hands Certification” that is referenced in D.C. Official Code §47-2862, if the bidder is required by law

¹ Aggregate Award Group 1 related to services to be provided by the awardee in Wards 1 and 3; Aggregate Award Group 2 related to services to be provided by the awardee in Wards 4 and 5; Aggregate Award Group 3 related to services to be provided by the awardee in Wards 2 and 6; and Aggregate Award Group 4 related to services to be performed by the awardee in Wards 7 and 8.

to make such certification. If the bidder is a corporation or partnership and does not provide a copy of its license, registration or certification to transact business in the District of Columbia, the bid shall certify its intent to obtain the necessary license, registration or certification prior to contract award or its exemption from such requirements...”

(AR Ex. 1).

Further, because of the dollar value of the subject procurement, the IFB incorporated a provision, Section B.5, mandating that the successful bidder subcontract a certain percentage of the contract work:

A bidder responding to this solicitation must submit with its bid, a notarized statement detailing any subcontracting plan required by law. Proposals responding to this IFB shall be deemed nonresponsive and shall be rejected if the bidder fails to submit a subcontracting plan that is required by law. For contracts in excess of \$250,000, at least 35% of the dollar volume of the contract shall be subcontracted ...

(AR Ex. 1).

The Award Decision

Bids were opened on September 10, 2010, and only two timely bids were received from C&D and the protester, Lorenz. (AR Ex. 6) C&D submitted a total bid price of \$3,955,192.00 for the performance of the contract, which included a bid price of \$988,798 for the base and four one year option periods for all four of the Aggregate Award Groups. (AR Exs. 2, 4(b)). Lorenz’s total bid, on the other hand, amounted to \$4,127,760 for the four Aggregate Award Groups including a proposed price of \$1,031,940.00 for the base and four one year options periods for all four of the Aggregate Award Groups. (AR Exs. 3, 4(a)). Thus, C&D’s overall proposed price for performing the four Aggregate Award Groups over the base and option years of the contract was lower than Lorenz’s bid.

Subsequently, as part of the District’s evaluation of the two bids that it received from C&D and Lorenz, the UFA conducted a site visit with C&D at the work site of Denison Landscaping & Nursery, Inc. (“Denison”). (AR Ex. 7). At this site visit on September 24, 2010, C&D provided the District with a subcontracting plan which identified Denison as one of the two proposed subcontractors that C&D contemplated using to perform the contract. (AR Ex. 7).² During the site visit, UFA observed Denison’s equipment, staff, inventory, and knowledge of tree planting as it related to its ability to perform the requirements in the IFB. (AR Ex. 7).³

² C&D, however, indicated a preference to use Denison as its subcontractor for this contract. (AR Ex. 7).

³ The District also noted that Denison maintained a 900 acre nursery from which the District could get locally grown nursery stock for use on the contract. (AR Ex. 7).

Consistent with the General Standards of Responsibility criteria in the IFB described earlier, on October 7, 2010, the contracting officer also issued email correspondence to C&D requesting that the company provide a Responsibility Determination Data (“RDD”) response to the contracting officer. (AR Exs. 9(a), 9(b)). This included a request by the District for information related to C&D’s financial data, past performance, and corporate operational procedures. (AR Exs. 9(a), 9(b)). C&D responded with the requested RDD by letter dated October 18, 2010. (AR Exs. 10(a), 10(b), 10(c)).⁴

In order to also confirm compliance with the IFB certification requirements, on October 28, 2010, DDOT’s contract specialist undertook the process of attempting to obtain a Clean Hands Certification for C&D to confirm that it had filed all required tax returns with the District and that it did not owe any significant outstanding monies to the District. (AR Ex. 6).⁵ A company that does not meet these tax requirements is prohibited from receiving an award of a District contract. (AR Ex. 6). The Clean Hands Certification is issued by the District’s Office of Tax and Revenue (“OTR”) and Department of Employment Services (“DOES”). (AR Ex. 6).

The initial Clean Hands report generated by the OTR and DOES database on October 28, 2010, indicated that C&D could not be awarded a District contract, and be issued a Clean Hands Certification, due to its failure to comply with the District’s tax payment laws. (AR Exs. 6, 11). In response to this report of C&D’s non-compliant tax status, the contracting officer sent an email to C&D on October 28, 2010 informing it that it had failed to receive the required Clean Hands Certification approval from OTR and DOES. (AR Ex. 11). The District also later contacted OTR for further clarification regarding this report of tax non-compliance. (AR Ex. 6).

In response to the foregoing inquiry from the District, on October 29, 2010, OTR advised the contracting officer that the information in the Clean Hands database was not accurate due to a backlog in entering current information into the database during the relevant time period. (AR Ex. 6). To correct this administrative error, OTR ultimately provided the District with a manually completed tax compliance status report for C&D which effectively acted as a Clean Hands Certification for this company. (AR Ex. 6).

Based upon a resulting determination that C&D was the lowest responsible, responsive bidder, on November 8, 2010, the contracting officer awarded the contract to C&D. (AR Ex. 5). On November 18, 2010, Lorenz filed this protest with the Board challenging the District’s award. (AR Ex. 6).⁶ As it relates to the protest allegations, C&D provided its Foreign Corporate

⁴ C&D’s RDD response also included a second subcontracting plan which identified Denison as a subcontractor, and in which C&D provided more information concerning Denison’s equipment, personnel, years of experience, letters of commitment, and other resources that would be available for the tree planting contract. (AR Ex. 10).

⁵ The District’s current Clean Hands Compliance Status database was implemented during February or March 2010, and replaced the manual system of having each contracting officer send a separate request to the Office of Tax and Revenue (OTR) and the Tax Division of the Department of Employment Services (“DOES”) to acquire Clean Hands Certification for a proposed contractor. (AR Ex. 6).

⁶ On January 4, 2011, the District subsequently filed a Determination and Findings to Proceed with Award after Receipt of a Protest, and did subsequently proceed with performance. (January 4, 2011 Notice of Determination and Finding to Proceed with Performance).

Registration (“FCR”) and Basic Business License (“BBL”) to the District on December 8, 2010, after they were requested by the contracting officer. (AR Exs. 6, 14).

DISCUSSION

We exercise jurisdiction over this protest and its underlying allegations pursuant to District of Columbia Code §2-360.03(a)(1).⁷

Awardee’s Qualifications

Lorenz initially challenges the qualifications of C&D to perform the scope of services required by the IFB.⁸ In particular, Lorenz primarily contends that the awardee is not competent to successfully perform the tree planting requirements set forth in the IFB because C&D’s primary line of business has not involved tree planting services. The protester also alleges that the District improperly allowed C&D to rely upon its subcontractor Denison’s tree planting experience to meet the IFB requirement that the successful contractor have a significant background in performing tree planting contracts. Our standard of review for proposal evaluations and the selection decision is whether they were reasonable and in accord with the evaluation and selection criteria listed in the solicitation and whether there were material violations of procurement laws or regulations. *Trifax Corp.*, CAB No. P-539, Sept. 25, 1998, 45 D.C. Reg. 8842, 8847.

Here, the record reflects that C&D has largely provided tree removal and pruning services to the District over the past twenty-five years under different contracts. (AR Ex. 5). While the District expressly recognized during the evaluation that C&D did not have prior tree planting experience of the same magnitude as the subject contract, UFA’s site visit and review of C&D’s subcontracting plan led it to reasonably conclude that C&D’s strong subcontracting arrangement with Denison would allow it to successfully provide the services required under the subject tree planting contract. (AR Ex. 5).

Specifically, as described earlier, during this site visit at Denison’s work space, UFA officials were able to see Denison’s facility, inspect its equipment, meet its personnel, discuss its knowledge and understanding of tree planting, and tour some of the over 900 acre nursery that it maintains. (AR Ex. 7). Thus, UFA officials reasonably determined that, as a landscaping team, C&D and Denison had the capacity, resources, and past experience to perform the tree planting contract for the District based upon this site visit and C&D’s written subcontracting plan that it submitted to the contracting officer describing its overall project performance approach. (AR

⁷ Effective April 8, 2011, the Procurement Practices Reform Act (“PPRA”), District of Columbia Code §2-360.03(a)(1) is the controlling statute with respect to the Board’s jurisdiction. At the time that the instant protest was filed on November 18, 2010, the Board’s jurisdiction was governed by former District of Columbia Code §2.309.03. The current §2-360.03(a)(1) is identical to the former §2-309.03(a)(1).

⁸ This decision responds to Lorenz’s protest allegations in the same order in which they were presented as Legal Argument in its November 18, 2010 protest.

Ex. 5). C&D also identified crew leaders/foreman, and supporting personnel, for each Aggregate Award Group as required by the IFB. (AR Ex. 10(a)).

Further, the fact that C&D proposed a subcontracting arrangement to largely support the tree planting work required under the contract was not improper as the IFB itself mandated that *at least* 35% of the dollar value of the project work be subcontracted by the prime contractor because of the higher dollar value of this procurement as noted earlier. The IFB also did not specify, or limit, the role that could be performed by any proposed subcontractor such that Denison's support of the tree planting function performed by C&D under the contract was not improper.

As another basis for attempting to invalidate the contract award, Lorenz also argues that there has been past litigation, judgment liens, and criminal cases filed against C&D and its principals which the District is alleged to have failed to properly investigate while determining the awardee's qualifications. (Protest 7 n.9). Lorenz, however, concedes that it is unknown whether all of its cited tax lien and criminal cases actually involve C&D's principals or other parties with the same names. (Protest 7 n.9). Moreover, the record in this case reflects that, prior to contract award, the District checked the District and federal debarment databases and confirmed that C&D was not suspended or debarred at bid opening and, thus, the District reasonably determined that C&D was not precluded from receiving the contract award. (AR Ex. 5).

Based upon these factors, the Board believes that it was reasonable for the District to ultimately find that C&D, along with its subcontractor Denison, were qualified and as a team could reasonably meet the IFB performance requirements.⁹ Therefore, the contracting officer's ultimate conclusion that C&D's stated qualifications met the IFB requirements was not unreasonable or in violation of the IFB requirements.

Bidder Responsibility

Lorenz also protests the District's determination that the awardee was a responsible bidder as set forth in its initial protest filing in this matter. (Protest 5-6). Specifically, Lorenz alleges that, contrary to the IFB responsibility requirements, the awardee: 1) failed to obtain its FCR in the District of Columbia; 2) failed to obtain the BBL required of companies doing business in the District under §47-2851.02 of the District of Columbia Code; and 3) failed to comply with corporate tax law requirements which precluded the awardee's ability to obtain the Clean Hands Certification in the District. (Protest 5-6). The protester asserts that this was in violation of the terms of the IFB which required that offerors meet these registration, licensing and certification requirements prior to contract award.

Bidder responsibility is a prerequisite to contract award. District of Columbia Code §2-353.02(a). The contracting officer must make a written determination as to whether the prospective

⁹ Well after its November 18th protest was filed in this matter, Lorenz made a number of allegations challenging the qualifications, and responsibility, of Denison. These allegations are obviously untimely and do not provide grounds that can be considered by the Board for overturning the subject award decision. (*See, e.g.*, Protester's August 19, 2011, Supplemental Evidence in Support of Motion for Limited Discovery).

contractor is responsible, and in the absence of information clearly indicating that the contractor is responsible, the contracting officer shall determine the contractor to be nonresponsible. 27 District of Columbia Municipal Regulations (“DCMR”) §§2200.1 – 2200.3. The general standards of responsibility are set forth in 27 DCMR § 2200.4.

In making the determination of responsibility, the contracting officer is vested with wide discretion and business judgment. Therefore, in reviewing a determination concerning general standards of responsibility, the Board will not overturn a finding of responsibility or nonresponsibility unless the protestor shows bad faith on the part of the contracting agency or that the contracting officer's determination lacks any reasonable basis. *Children, Children, Children, Inc.*, CAB No. P-0858, Jan. 7, 2011 *citing Anchor Construction Corp.*, CAB No. P-0737, Jan. 9, 2007, 54 D.C. Reg. 2066, 2068; *Ideal Electrical Supply Corp.*, CAB No. P-0372, Aug. 13, 1993, 41 D.C. Reg. 3603, 3606.

In this case, there is no evidence that the District’s responsibility determination with regard to the awardee was made in bad faith or lacked a reasonable basis. First, the protester has not shown that the awardee failed to meet the General Standards of Responsibility for bidders as set forth in Section L.18 of the IFB by virtue of C&D’s response to the RDD prior to contract award concerning its financial and operational capabilities to perform the contract. Instead, the protester primarily challenges whether the awardee failed to meet additional responsibility criteria, including the FCR, BBL and Cleans Hands Certification, prior to contract award.

However, as stated earlier as it relates to the license and registration requirements, Section H.21 of the IFB only generally stated that the successful bidder must obtain all required licenses, permits and registrations immediately after contract award. No fixed date or deadline was attached to this requirement to further define or limit the period within which the successful bidder was required to obtain these approvals after award assuming this provision was to apply to the FCR and BBL requirements.

Similarly, Section L.15 of the IFB also seemingly addresses these same registration, license and certification requirements. In this regard, L.15 provided that the bidder could either produce evidence of these approvals with their bid submission or, alternatively, certify to the contracting officer their intent to obtain these approvals prior to award.

Undoubtedly, C&D did not provide its FCR or its BBL with its original bid submission and only provided it to the contracting officer on December 8, 2010 after the contract had been awarded on November 8, 2010. Nonetheless, as discussed above, Sections H.21 and L.15 of the IFB, read together, clearly evidence that the contracting officer could reasonably accept evidence of the FCR and BBL requirement being met after bids were submitted and even after the contract was awarded.

Indeed, this Board, as well as other bid protest tribunals such as the Government Accountability Office (“GAO”), have repeatedly held that these very types of registration, license and certification requirements are matters of responsibility and may be met by a bidder after bid opening and even after contract award. *See C&D Tree Services, Inc.*, DC CAB No. P-440, March 11, 1996, 44 D.C. Reg. 6426, 6433-6439, *citing Modern Electric, Inc.*, DC CAB No. P-

341, April 5, 1993, 40 D.C. Reg. 5068, 5069; *see also Chem-Spray-South*, B-400928.2, June 25, 2009, 2009 CPD ¶ 144, *citing Serguranca, Ltd.*, B-294388, Oct. 24, 2004, 2004 CPD ¶ 207. Therefore, the Board does not believe that the contracting officer acted unreasonably in accepting this documentation from C&D after the award decision was made. Moreover, C&D was also clearly and reasonably deemed to have met the other general responsibility criteria in the IFB.

In addition, while there was initially a question as to whether C&D could obtain the required Clean Hands Certification, this issue was later resolved in favor of C&D prior to contract award. As noted earlier, the contracting officer first received a report that C&D could not obtain the Clean Hands Certification and, after further investigation with OTR, the contracting officer learned that this information was incorrect. As a result, this administrative error was corrected and a valid Clean Hands Certification was issued by OTR and DOES for C&D as required by the IFB.

For these reasons, the Board finds that C&D was properly deemed by the District to have met the responsibility criteria in the IFB and, therefore, that the District did not act arbitrarily in finding C&D to be eligible for award.¹⁰

The Evaluation Results

Lorenz further cites to a number of professional accolades which it purports to have received from its clients in arguing that the District's award decision was generally improper and arbitrary and capricious as Lorenz was allegedly more qualified. Lorenz's allegations that it is more qualified, at best, constitute mere disagreement with the District's award decision. The protester has the burden of affirmatively proving its case and the fact that the protester does not agree with the agency's technical conclusions does not in itself render the evaluation unreasonable. *Emergency Associates of Physician's Assistants & Nurse Practitioners, Inc.*, CAB No. P-500, Dec. 15, 1998, 46 D.C. Reg. 8527, *citing Contel Information Systems, Inc.*, B-220215, Jan. 15, 1986, 86-1 CPD ¶ 44; *Litton Systems, Inc.*, 63 Comp. Gen. 585, 84-2 CPD ¶ 317.

Lorenz also challenges the bid price evaluation and maintains that it and C&D's prices were essentially equal because Lorenz's bid was lower priced in the base year. Therefore, Lorenz asserts that it should have received the award given its claim of having superior qualifications. The IFB, however, advised bidders that award would be made to the overall lowest priced responsible and responsive bidder. (IFB Section B.1.2). Undeniably, C&D proposed \$3,955,192 in total to perform the contract's four Aggregate Award Groups over the life of the contract which was lower than Lorenz's total bid of \$4,127,760. Thus, the fact that Lorenz's bid may have been lower in the base year did not justify making the award to Lorenz at an overall higher cost.

¹⁰ Over the course of these proceedings before the Board, Lorenz also argued that C&D has failed to meet these registration, license and certification legal requirements for many years preceding the present contract award. C&D's history of legal compliance on other procurements, other than the present contract, are not relevant to this proceeding and, thus, do not provide sufficient or timely bases for challenging the present contract award.

CONCLUSION

Based upon the factors discussed herein, we conclude that the District's source selection decision was reasonable and consistent with the IFB and, thus, the Board finds no violation of procurement law in this matter.

The protest is DENIED.

SO ORDERED.

DATED: September 29, 2011

/s/ Monica C. Parchment
MONICA C. PARCHMENT
Administrative Judge

CONCURRING:

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

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