

DISTRICT OF COLUMBIA CONTRACT APPEALS BOARD

PROTEST OF:

NATION CAPITAL BUILDERS, LLC

Under IFB No. DCKA-2007-B-0082

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CAB No. P-0761

For the Protester, Nation Capital Builders, LLC, Leonard A. White, Esq. For the Government: Howard Schwartz, Esq., and Talia Sassoon Cohen, Esq., Assistant Attorneys General.

Opinion by Administrative Judge Warren J. Nash, with Chief Administrative Judge Jonathan D. Zischkau, concurring.

OPINION

(Filing ID 17323071)

Nation Capital Builders, LLC, (“NCB”) filed a protest on August 28, 2007, challenging the District’s rejection of its bid for failing to submit a bid bond. NCB argues that it was not required to submit a bid bond with its bid and that alternatively the contracting officer should waive the bond requirement as a minor informality. On October 23, 2007, the District’s Acting Chief Procurement Officer (“CPO”), pursuant to D.C. Code § 2-309.08(c)(2), determined that the District should proceed with contract performance while the protest is pending. On October 30, 2007, NCB filed a motion challenging the determination to proceed with performance under a recently awarded contract. For the reasons discussed below, we conclude that the CPO’s determination should be sustained. We further determine that the solicitation required a bid bond, NCB did not submit a bond with its bid, and that the contracting officer properly rejected NCB’s bid as nonresponsive. Accordingly, we deny the protest.

BACKGROUND

On June 29, 2007, the Office of Contracts and Procurement issued solicitation IFB No. DCKA-2007-B-0082 on behalf of the District Department of Transportation (“DDOT”) requesting bids to provide preventative maintenance activities to rehabilitate and maintain roadway and roadway assets, within the rights of way on the District’s portion of the National Highway System. (Agency Report, Ex. 1). The bid documents set forth a contract base term of one year with the possibility of four successive one-year options. Bids were submitted by several prospective contractors, including NCB, on August 13, 2007. By letter dated August 15, 2007, the DDOT contracting officer informed NCB that DDOT declared NCB’s bid non-responsive because NCB failed to submit a signed and completed bid bond. (Agency Report, Ex. 5). NCB protested the determination of non-responsiveness on August 28, 2007. Since the protest was filed before award of the contract, an automatic stay of performance went into effect pursuant to D.C. Code § 2-309.08(c)(1). By Determination and Findings (“D&F”) dated October 23, 2007, the Acting CPO determined that urgent and compelling circumstances that significantly affect interests of the District would not permit waiting for the final decision of the Board concerning the protest.

On October 30, 2007, the protester timely filed a Motion to Challenge the D&F alleging that the D&F does not provide substantial evidence of urgent and compelling circumstances that “significantly affect interests of the District.” (Motion at 1).

DISCUSSION

The solicitation at issue seeks a contractor to provide preventive maintenance activities to rehabilitate and maintain roadway and roadway assets within the rights of way on the District’s portion of the National Highway System. There is no question that providing for the maintenance of the roadway and roadway assets is a compelling and urgent requirement of the government. In the D&F, the CPO sets forth the District’s compelling need to proceed with contract award. According to the CPO, because the District could potentially lose up to 60 days of the construction season while it waited for a protest decision, and because waiting on a decision could impair the District’s ability to repair city streets before winter, the District could not wait to proceed with the preventative maintenance activities. The CPO clearly sets forth a compelling need to proceed with preventative maintenance services. For purposes of lifting the stay, once a compelling need for the services is shown, whether another contractor can also perform is irrelevant. *Whitman-Walker Clinic, Inc.*, CAB Nos. P-0672 and P-0674, July 25, 2003, 50 D.C. Reg. 7521. Accordingly, we deny NCB’s motion challenging the CPO’s determination to proceed with contract award.

Regarding the merits of the protest, NCB alleges that it is now ready to submit a bid bond and performance bond so that the District could award the contract to NCB. Although NCB’s protest is not a model of clarity, NCB seems to argue that the solicitation did not require a bid bond to be submitted with its bid. We assume that NCB is arguing that the District, by improperly rejecting NCB’s bid, improperly removed NCB from consideration as the lowest bidder for the procurement. The District responds that since the bid bond form was included in the IFB, the procurement clearly required the bidder to furnish a bid bond at bid opening.

NCB alleges that the bid bond form is ambiguous, and that the form allows the bidder to produce a bid bond up to 90 days after bid opening. NCB further alleges that in any event, the procurement regulations allow the contracting officer to accept a bid without a bid bond, if the bid is in the best interests of the District, citing 27 DCMR § 2702.1(b). The District responds that the language setting forth the bid bond period is not ambiguous, and that the bid bond form requires a bid bond to remain in effect for 90 days after bid opening. Additionally, the District responds that the contracting officer cannot waive the bid bond requirement unless the bid meets the criteria set forth in 27 DCMR § 2702.1. Section 2702.1 provides that the bid meet the requirements for a waiver under one of the other bid bond waiver exceptions of section 2702 *and* that the waiver be in the best interests of the District.

D.C. Code § 2-305.02(a)(1) provides that “[b]id security shall be required for all competitive sealed bids and competitive sealed proposals for construction contracts when the price is estimated by the Director to exceed \$100,000.” In the IFB, the District set forth an estimated price over \$100,000, thereby requiring all bidders to submit a bid bond. D.C. Code § 2-305.02(c) further requires that the District reject a bid that does not include a bid bond when

the IFB requires a bid bond. This Board has noted the well-settled doctrine that in deciding whether a bond is defective, we must determine whether the surety would be bound to its surety obligation by the bid bond as submitted. See *MC Services, Inc.*, CAB No. P-0570, March 18, 1999, 46 D.C. Reg. 8582; *HR General Maintenance Corp.*, CAB No. P-0557, February 2, 1999, 46 D.C. Reg. 8556. There is no question that the District required a bid bond in the IFB. Likewise, 27 DCMR § 2702.1 is clear and unambiguous when it requires the contracting officer to reject a bid when the bidder fails to comply with the bid security requirements. Therefore, since NCB's bid did not include a bid bond, and since NCB's bid was not eligible for a waiver of the bid bond requirement under any of the other subparts of section 2702, the contracting officer properly determined that NCB's bid was nonresponsive to the IFB.

In the response to the Agency Report, NCB questioned whether sealed bids for construction IDIQ type contracts require bid bonds at bid opening. NCB did not present this ground of protest in its protest filing. The District responded by noting that the protester should have sought clarification of this alleged impropriety in the IFB by filing a protest before bid opening. D.C. Code § 2-309.08(b)(1) provides that "[a] protest based upon alleged improprieties in a solicitation which are apparent prior to bid opening ... shall be filed prior to bid opening" The District contends that this protest ground is untimely and should be dismissed. We agree. Indeed, to the extent that NCB raises new protest grounds in its response to the Agency Report, those grounds are untimely and are hereby dismissed.

Since NCB did not provide a bid bond, the contracting officer properly rejected the bid. Accordingly, we deny the protest.

SO ORDERED.

November 20, 2007

/s/ Warren J. Nash
Administrative Judge

/s/ Jonathan D. Zischkau
Chief Administrative Judge