

Government of the District of Columbia
CONTRACT APPEALS BOARD
717 14TH STREET, N.W., SUITE 430
WASHINGTON, DC 20005



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DATE: February 8, 1995

TO: Mose Lewis, III, Esquire
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SUBJECT: CAB No. P-419 & P-423, Protests of H&M Supply Company, Inc.

Attached is a copy of the Board's opinion in the above-referenced matter.


MIA J. HOUSE
Clerical Assistant (Typist)

Attachment

GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

PROTESTS OF:

H&M SUPPLY COMPANY, INC.)	
)	CAB Nos. P-419 & P-423
Under IFB Nos. OMS 4047-AA-AC)	(Consolidated) ¹
and OMS 3219-AA-GR)	

For the Protester: Mose Lewis, III, Esquire, Powers & Lewis. For the Government: Warren J. Nash and Howard S. Schwartz, Assistants Corporation Counsel.

Opinion by Administrative Judge Jonathan D. Zischkau, with Administrative Judges Lorilyn E. Simkins and Cynthia G. Hawkins-León, concurring.

OPINION

H&M Supply Company, Inc. ("H&M") protests the District of Columbia Department of Public Works' ("DPW") failure to award it contracts under Invitation Nos. OMS 4047-AA-AC and OMS 3219-AA-GR even though it was the low bidder in both cases. The District asserts that the contracting officer properly determined that H&M was not a responsible bidder based on performance deficiencies regarding five prior contracts with the District. We deny the consolidated protests.

FACTS

On March 2, 1994, DPW issued Invitation for Bids No. OMS 3219-AA-GR in the small business enterprise market to obtain Rosemount transmitters for use by the Water and Sewer Utility Administration ("WASUA"). (Agency Report ("AR") P-423 Exhibit 1). Of the seventeen vendors that received IFB's, eight vendors submitted bids which were opened on April 7, 1994. H&M had the lowest evaluated bid. LAM Supply Company had the next lowest evaluated bid. (AR P-423 Exhibit 4).

On May 13, 1994, DPW issued Invitation for Bids No. OMS 4047-AA-AC in the small business enterprise market to obtain Belfort Instrument rain gage replacement equipment for use by WASUA. (AR P-419 Exhibit 1). Of the thirteen vendors that received IFB's, eight vendors submitted bids which were opened on June 22, 1994. H&M had the lowest evaluated bid. (AR P-419 Exhibit 2). LAM Supply had the next lowest evaluated bid. (AR P-419 Exhibit 4).

For both solicitations, the contracting officer determined that H&M was not a responsible

¹ The Board *sua sponte* has consolidated these protests for purposes of decision because they present-identical issues based on essentially the same set of facts.

bidder, primarily based on H&M's failure to timely deliver goods to the District under five supply contracts awarded in the past two years. (AR P-423 Exhibit 3; AR P-419 Exhibit 3). The contracting officer prepared and executed a "Determination and Findings for Award to Other Than Low Bidder" for each solicitation. (AR P-423 Exhibit 4; AR P-419 Exhibit 4). The Director of the Department of Administrative Services ("DAS") approved those determinations on August 17, 1994. (*Id.*). Determining that LAM Supply was the lowest responsive and responsible bidder under each IFB, the contracting officer awarded contracts to LAM Supply on October 19 and October 20, 1994, respectively. (AR P-423 Exhibit 8; AR P-419 Exhibit 8).

By letters dated October 25, 1994, and filed with the Board on October 27, H&M timely protested the awards. On October 28, the Board mailed notices to DPW and H&M's counsel acknowledging receipt and docketing of the protests. In its protests, H&M contends that it should have been awarded the contracts because its evaluated bid prices were lower than LAM Supply's evaluated bid prices. On November 28, 1994, the District filed its agency reports, arguing that the contracting officer properly determined H&M to be nonresponsive in view of H&M's failure to make timely deliveries in five prior supply contracts. The agency reports' certificates of service indicate that the District served the agency reports on the bidders, including H&M, but not H&M's counsel, by mail on November 28. The District served H&M counsel with the agency reports (less the exhibits, according to H&M counsel) by mail on December 22 which counsel received on December 23. H&M states that it received the agency report exhibits for the first time on January 10, 1995. On January 17, 1995, H&M responded to the agency reports, arguing that the agency reports were untimely filed and should be disregarded, and, with regard to the merits, H&M should have been determined a responsible bidder and awarded the contracts. On January 25, the District moved for leave to file a limited reply to H&M's timeliness argument. Being unopposed, we grant the motion. In reaching our conclusions on the protests, we have considered each of the party's submissions.

DISCUSSION

The Board has jurisdiction over these protests pursuant to D.C. Code § 1-1189.3 (1992).

Timeliness of the Agency Reports

H&M argues that we should disregard the agency reports because the District has failed to comply with the Board's filing deadlines, *i.e.*, neither the November 28 certificate of service nor the December 22 amended certificate indicate that the agency reports were filed within 25 days of the Board's protest acknowledgments. Board Rule 305.1 requires that "[a]s expeditiously as possible but no later than twenty-five (25) days of receipt of the Board notice specified in subsection 303.4,² the contracting agency shall file a[n] [agency] report with the Board" Board Rule 305.2 provides that the agency shall simultaneously provide a copy of the agency report to the protester and all interested parties. H&M points to Board Rule 305.9 which states that the factual allegations contained in the protest may be treated as conceded by the Board when the agency fails to submit an agency report. The District replies that the

² Actually, the Board's notice is specified in Board Rules 303.2 and 303.3.

contracting officer did not receive the Board's October 28 acknowledgments until November 15, and thus, the November 28 filing was timely.

There is no question that timely filing and service of a complete agency report is important for the just and expeditious resolution of a protest. If we assume that the District received the October 28 acknowledgments by November 2,³ then the agency's filing on November 28 was timely. Although the District inadvertently failed to serve the agency reports on protester's counsel until a month or more beyond the deadline, a mistake readily admitted by the District, the circumstances simply do not justify our treating the protests' factual allegations as conceded.

The Responsibility Determination

H&M agrees that some of its prior contracts with the District were not performed in a timely manner and that some were terminated for default. Citing 27 DCMR § 2202.4, H&M argues, however, that the contracting officer should have determined that it was responsible because the prior contract deficiencies were beyond H&M's control (H&M says it could not perform timely because the District did not timely pay amounts due on completed contracts) and H&M has taken appropriate corrective action (H&M says it is now financially sound and is able to ensure payment of suppliers in a more timely fashion).

Bidder responsibility is a prerequisite to award under an IFB. D.C. Code § 1-1183.3(e); 27 DCMR § 2200.1; *C.P.F. Corp.*, CAB No. P-413, Nov. 18, 1994, 7 P.D. 6023, 6029. Here, the evidence shows that the contracting officer properly obtained information for the responsibility determination, *see* 27 DCMR § 2204, and analyzed that information with regard to the general criteria governing responsibility, *see id.* §§ 2200, 2202. Section 2202.4 provides:

A prospective contractor that is or recently has been seriously deficient in contract performance shall be presumed to be nonresponsible. The contracting officer may determine that contractor to be responsible if the circumstances of the prior deficiency were properly beyond the contractor's control or if the contractor has taken appropriate corrective action.

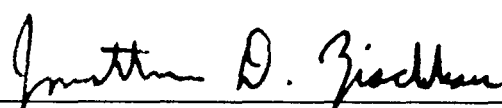
Based on the information available to the contracting officer concerning H&M's recent and serious performance deficiencies on other supply contracts, the contracting officer reasonably determined that H&M was nonresponsible for purposes of the two solicitations at issue and the DAS Director properly approved those determinations. *See Marathon Watch Co.*, B-247043,

³ With disturbing frequency, the Board has been informed that its protest acknowledgments are being received by contracting officers many days after the Board's mailing. First, the 25 day deadline in Board Rule 305.1 is measured from the date of agency receipt (*i.e.*, the agency's initial receipt from the U.S. Postal Service), not contracting officer receipt. Except in demonstrated instances where an acknowledgment gets misdirected in the U.S. Postal Service's system, we assume that the agency is receiving our acknowledgments within a very few days of Board mailing.

Apr. 23, 1992, 92-1 CPD ¶ 384; *Automated Datatron Inc.*, 68 Comp. Gen. 90, 91 (1988), 88-2 CPD ¶ 481. Noting that we are not determining the propriety of any of the default terminations, *see Medical Extension Services, Inc.*, CAB No. P-378, 41 D.C. Reg. 3918, 3924; *Automated Datatron Inc.*, 68 Comp. Gen. 90, 88-2 CPD ¶ 481, it is clear to us that there was sufficient evidence to support the contracting officer's nonresponsibility determinations at the time those determinations were prepared by the contracting officer and approved by the DAS Director.⁴

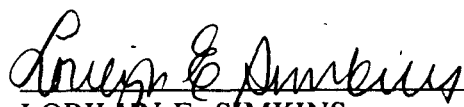
Accordingly, the protests are denied.

DATE: February 8, 1995

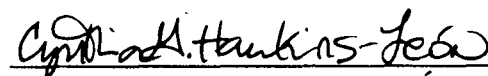


JONATHAN D. ZISCHKAU
Administrative Judge

CONCURRING:



LORILYN E. SIMKINS
Chief Administrative Judge



CYNTHIA G. HAWKINS-LEÓN
Administrative Judge

⁴ A nonresponsibility finding is not the same as a suspension or debarment determination. Neither the findings of nonresponsibility nor our decision to sustain those findings render H&M ineligible to bid on future solicitations. A contracting agency may well find H&M responsible in future procurements.