

GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

PROTEST OF:

IDEAL ELECTRICAL SUPPLY CORP.)	
)	
Under IFB No. OMS-1015-AA-GH)	CAB No. P-372

For the Protestor: Ken Rogers, Executive Vice President. For the Government: Howard S. Schwartz and Robert J. Harlan, Jr., Assistants Corporation Counsel.

Opinion by Administrative Judge Zoe Bush, with Administrative Judges Terry Hart Lee and Jonathan D. Zischkau, concurring.

OPINION

Ideal Electrical Supply Corporation (Ideal, Protestor), has timely challenged award of Items 1 through 6 of the above-captioned contract to C.I. Industries, Ltd. (CI). The solicitation was for traffic signal/street light posts and accessories to replace damaged posts throughout the District of Columbia. Ideal asserts that CI: (1) failed to comply with the mandatory financial criteria of the solicitation; and (2) is not a regular dealer pursuant Clause 30 of the General Conditions of the solicitation. Ideal requests that the Board sustain its protest, terminate the contract with CI and direct the Department of Public Works (DPW) to award the contract on a basis consistent with the law and regulations.^{1/}

In its agency report the District of Columbia responds that it properly determined CI to be a responsible bidder based on its "responsibility study and site inspection" and argues that its responsibility determination should not be disturbed. The District cites as support Group Insurance Administration, Inc., CAB No. P-309-B, 40 DCR 4485, September 2, 1992, and J&L Contract Services, Inc., CAB No. P-313, 40 DCR 4565, October 2, 1992. The District also contends that it complied with applicable District and federal regulations when it found that CI was a regular dealer under the Walsh-Healey Act. The District cites as support Shane Meat Company, CAB Nos. P-339, P-347 and P-349 (Consolidated), 40 DCR 4885, January 8, 1993.

^{1/}Ideal requested leave of the Board to engage in immediate discovery by deposition, interrogatories, and document production requests pursuant to Board Rule 309.1, 36 DCR 2714. However, in that the request was made prior to the filing of the District's agency report, the request was premature and is **DENIED**. See Board Rule 309.2. Ideal has also requested a conference and/or an evidentiary hearing on the protest as the Board may judge appropriate. However, we find it unnecessary to hold a conference pursuant to Board Rule 310 or an evidentiary hearing pursuant to Board Rule 311 because there are no issues of material fact which cannot be resolved on the written record.

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Ideal responded in opposition to the District's agency report. Ideal argues convincingly that CI failed to provide the financial responsibility documentation requested by DPW and that therefore the resulting Determination and Findings (D&F) of responsibility were the result of bad faith and a predetermination in favor of CI. Ideal reiterated that at the time of bid opening and contract award, CI was not a regular dealer under the Walsh-Healey Act.

As set forth in the agency report, the following facts are relevant here:

1. On September 2, 1992, the Department of Public Works issued solicitation number OMS-1015-AA-GH (IFB) for Traffic Signal/Street Light Posts and Accessories to replace damaged posts throughout the District. The IFB was divided into two aggregate award groups: Items 1 through 6 and Items 7 through 12. The IFB was for a one-year contract with two one-year options, and was a small business enterprise procurement. (Exhibit 1 to Agency Report).
2. Bids were opened on October 5, 1992. (Id.) Five bids were received. With regard to Items 1 through 6, the low bidder was CI, the second lowest bidder was Ideal, followed by Global Supply (Global), West Supply Company, Inc. (West), and North American Telecommunications, Inc. (Exhibit 3 to Agency Report).
3. On November 6, 1992, DPW requested that CI submit certain information including financial data, current and past production data, a written statement concerning financial assistance and analysis of operational procedures. (Exhibit 4 to Agency Report).
4. By memorandum dated February 18, 1993, DPW (Bureau of Traffic Services) reported on its physical inspection of the merchandise to be supplied by CI and recommended award of Items 1 through 6 to CI. (Exhibit 7 to Agency Report).
5. On April 16, 1993, DPW determined that CI was a responsible bidder and found that it had provided documentation which "clearly" indicates, inter alia, "Financial resources adequate to perform the contract. . . ."

The solicitation at issue required, under its Special Conditions, Section 18, Standards For Responsible Contracts, General Responsibility Criteria, Subpart A, that prospective contractors, "Furnish evidence of adequate financial resources, credit, or the ability to obtain such resources required for performance of the contract." (Exhibit 1 to Agency Report, page 25 of 26). This responsibility criterion is consistent with the District of Columbia Municipal Regulations where general requirements for responsible prospective contractors are set forth. 27 DCMR § 2200.4(a). DPW required CI to submit the following financial

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data: (1) cash flow statement; (2) financial rating (Dunn and Bradstreet, etc.) for the last two years; (3) list of any back taxes owed to the District Government or the Federal Government; and (4) letters of credit from banking or other financial institutions. (Exhibit 4 to Agency Report). In response, CI submitted: (1) a balance sheet; and (2) a letter from Nations Bank stating that Cabel Calloway of CI is a satisfactory customer. (Exhibit 5 to Agency Report). Based upon the record, clearly none of the items required by DPW for its financial responsibility determination was supplied by CI. It follows then that the April 16, 1993, D&F is without basis or support where it finds that CI had financial resources adequate to perform the contract.

The District cites Group Insurance Administration, Inc., supra, and J&L Contract Services, Inc., supra, for the proposition that the Board will only reverse an affirmative determination of responsibility where there is possible fraud or bad faith on the part of procurement officials or where the solicitation contains definitive responsibility criteria which have not been met. Here we find no evidence that DPW procurement officials had a specific, malicious intent to harm Ideal. Indeed, to the contrary, Ideal was awarded Items 7 through 12 of the solicitation. (See Exhibit 6 to Agency Report). However, we do find that there was insufficient information for DPW to conclude that the general standard of responsibility for adequate financial resources had been met concerning CI. Under the District's procurement regulations, in the absence of information clearly indicating that a prospective contractor is responsible, the District must make a determination of nonresponsibility. 27 DCMR § 2200.3. Here, there is simply no information which supports a determination of financial responsibility for CI; and therefore, pursuant to the District's procurement regulations, CI must be found nonresponsible. 27 DCMR §§ 2204.3, 2204.4.^{2/}

^{2/}The relevant regulations provide:

- 2204.1 Before making a determination of responsibility, the contracting officer shall possess or obtain information sufficient to satisfy the contracting officer that a prospective contractor currently meets the applicable standards and requirements for responsibility set forth in this chapter.
- 2204.2 The contracting officer shall obtain information regarding the responsibility of a prospective contractor who is the apparent low bidder or whose offer is in the competitive range. This information shall be obtained promptly after bid opening or receipt of offers.
- 2204.3 The prospective contractor shall promptly supply information requested by the contracting officer regarding the responsibility of the prospective contractor.
- 2204.4 If the prospective contractor fails to supply the information requested under § 2204.3, the contracting officer shall make the determination of responsibility or nonresponsibility based upon

(continued...)

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Our standard of review here is de novo and thus there is no presumption of agency correctness. Procurement Practices Act of 1985 (PPA), D.C. Code § 1-1189.3. Silver Spring Ambulance Service, Inc., CAB No. P-218, 40 DCR 4913 (January 15, 1993); Group Insurance Administration, Inc., supra. We do recognize that the determination of a prospective contractor's responsibility is the duty of the contracting officer and that that official is vested with wide discretion and business judgment. See 27 DCMR §§ 2200, 2204. Therefore, in reviewing a determination concerning general standards of responsibility, we will not overturn a finding of responsibility or nonresponsibility unless the protestor shows bad faith on the part of the agency or that the determination lacks any reasonable basis. Theodor Arndt GmbH & Co., B-237180, 90-1 CPD ¶ 64 (1990); Oertzen & Co. GmbH, B-228537, Feb. 17, 1988, 88-1 CPD ¶ 158; Gulton Industries, Inc., B-227132, Aug. 19, 1987, 87-2 CPD ¶ 179. Here, we find that there is no reasonable basis for an affirmative determination of responsibility. Where a prospective contractor fails to provide necessary proof of responsibility, a finding of nonresponsibility must follow. Group Insurance Administration, supra; J&L Contract Services, supra; Theodor Arndt GmbH & Co., supra; Creative Systems Electronics, Inc., B-235388, 89-2 CPD ¶ 175 (1989); Construct Sun, Inc., B-234068, 89-1 CPD ¶ 431 (1989); J&J Engineering, Inc., B-233463, 89-1 CPD ¶ 147 (1989); Enclave One Inc.; Ward Jones Construction Co., B-232383, 88-2 CPD ¶ 488 (1988). Therefore, the first ground of the protest is **SUSTAINED**.

We turn next to the issue of whether CI is a regular dealer pursuant to the Walsh-Healey Public Contracts Act, 41 U.S.C. §§ 35-45 (Walsh-Healey Act). This Board has previously held:

. . . that its role with regard to protests which challenge Walsh-Healey certifications is not to determine the legal status of a bidder as a regular dealer or manufacturer, in that that determination is to be made by the contracting agency, and if challenged, reviewed by the Small Business Administration or Secretary of Labor. 41 C.F.R. § 50-201.101(b)(1). Our role in this regard is to determine if the contracting agency has complied with applicable District and federal regulations and procedures.

Shane, supra, at 4893.

²/(...continued)

available information. If the available information is insufficient to make a determination of responsibility, the contracting officer shall determine the prospective contractor to be nonresponsible.

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The contracting officer shall use the following sources of information, as appropriate, to support determinations of responsibility or nonresponsibility:

Furthermore, CI was made aware of this regulatory requirement by the Administrator in his November 1992 letter. (Exhibit 4 to Agency Report)

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Thus, our role here is to determine whether DPW has complied with applicable District and federal regulations and procedures. In this regard we consider 27 DCMR § 2202.1 which provides:

As prescribed in chapter 43 of this title, the contracting officer shall investigate and determine whether the contractor is eligible to receive an award under the Walsh-Healey Act, 41 U.S.C. §§ 35-45, and shall not rely on the contractor's representation, if either of the following apply:

- (a) A protest of eligibility has been lodged in accordance with federal law and regulations; or
- (b) The contracting officer has reason to doubt the validity of the representation.

Because Ideal has challenged CI's status as a regular dealer, the District asserts in its agency report that counsel for DPW has advised DPW to investigate and determine this matter. In order for the Board to confirm that DPW is in compliance with 27 DCMR § 2202.1, we would normally require an affidavit from a responsible official within DPW that such an investigation has been undertaken. However, we will not require such an affidavit in this case for the reasons stated below. We further point out, however, that even if CI is not properly certified as a regular dealer, that would not render it nonresponsive. The Board has previously held:

In the case before us, the Protestor asserts that the successful bidder improperly has certified that it is a regular dealer and that therefore its bid is nonresponsive and nonresponsible. Having found that we may not and need not determine Hood's legal status under the Walsh-Healey Act, the Board does find that Protestor's challenge, even if successfully made to DAS or the Secretary of Labor, would not necessarily render the bid nonresponsive or the bidder nonresponsible. A bidder's status under Walsh-Healey is not a matter of bidder eligibility. Antenna Products Corp., B-227116, B-227116.2, March 23, 1988, 88- CPD ¶ 297. Where a bidder, as here, certifies compliance with Walsh-Healey, its bid is responsive, and whether the bidder is in fact eligible under Walsh-Healey is not an element which affects a bid's responsiveness. Y. T. & T. Corp., B-20824, March 22, 1983, 83-1 CPD ¶ 283. Furthermore, certification under Walsh-Healey does not constitute a definitive responsibility criterion. Merrick Eng'g., Inc., B-238706.2, June 14, 1990, 90-1 CPD ¶ 546. The Walsh-Healey certification is not a specific and objective standard established to measure an offeror's ability to perform the contract; rather, the certification concerns an offeror's general legal status and is applicable to all federal procurements for the manufacture or furnishing of materials, supplies, articles and equipment in an amount exceeding \$10,000.00. Id. Finally, failure to complete Walsh-Healey certification does not go to responsiveness but is

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an error or omission and minor defect which may be corrected prior to award.
Id.

Shane Meat Co., supra, at 4893-4894.

Therefore, Protestor's second challenge to CI's responsibility must fail.

Having found that DPW erred in issuing an affirmative determination of responsibility for CI regarding its financial resources, and having found that CI must, instead, be found nonresponsible because of its failure to provide information with respect to the general standard of responsibility for adequate financial resources, we consider now the appropriate remedy. We turn to the Procurement Practices Act of 1985 (PPA) for guidance. The PPA provides at § 1-1189.8(e)(1):

In addition to other relief, except enjoining a contract award, the Board may order, when a protest is sustained, that the contract awarded under the solicitation be terminated for the convenience of the District. A determination in this regard shall be based on considerations such as:

- (A) Best interest of the District government;
- (B) Seriousness of the procurement deficiency;
- (C) Existence of prejudice to other bidders or offerors;
- (D) Maintaining the integrity of the procurement system;
- (E) Good faith of District government officials and other parties;
- (F) Extent of contract performance; or
- (G) Impact of termination on the using agency's activities and mission.

Based on these considerations, we find that this contract should be terminated for the convenience of the District of Columbia. We believe that it is in the best interest of the District to procure from contractors with the financial wherewithal to perform their obligations to the District. In this regard, the procurement deficiency, i.e., no showing that the contractor has adequate financial resources to perform, is serious because it relates to the issue of whether the contractor has the ability to render satisfactory performance. There is also prejudice to other bidders, especially the Protestor; because if DPW had properly found CI to be nonresponsible, Protestor was next in line for award of Items 1 through 6.

In terminating this contract, we are mindful that this action is necessary to maintain the integrity of the procurement system. The contract was awarded on April 16, 1993, and so there are four months of performance of the first year of the contract. In that Protestor is currently performing the second half of the contract, should DPW determine that it is next in line for award and responsible to perform, there should not be an undue interruption of performance or continuity.

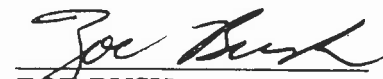
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Therefore, for the above stated reasons, we direct that CI's contract be terminated for the convenience of the government and that award be made to Ideal if it is found by DPW to be eligible for award, and if not, to the next lowest, responsible bidder. We do not direct DPW to investigate whether CI is a regular dealer because that would be a futile exercise. The protest is hereby **SUSTAINED** in part, and **DENIED** in part.

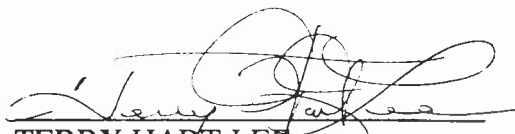
The District is hereby directed to report to the Board within 30 days of receipt of this Order on its efforts to comply with this Order.

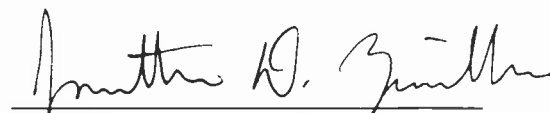
So **ORDERED**.

DATE: August 13, 1993


ZOE BUSH
Chief Administrative Judge

CONCUR:


TERRY HART LEE
Administrative Judge


JONATHAN D. ZISCHKAU
Administrative Judge