

GOVERNMENT OF THE DISTRICT OF COLUMBIA  
CONTRACT APPEALS BOARD

PROTEST OF:	)	
	)	
CENTRAL ARMATURE/FORT MEYER	)	
	)	
JOINT VENTURE	)	CAB No. P-478
	)	
Under IFB 95-0056-AA-2-0-KA	)	

For the Protester: Christopher M. Kerns, Esquire. For W. M. Schlosser, an interested party: Michael Cohen, Esquire. For the Government: Howard S. Schwartz and Warren J. Nash, Assistants Corporation Counsel, D.C.

Opinion by Chief Judge Lorilyn E. Simkins with Administrative Judges Phyllis W. Jackson and Jonathan D. Zischkau, concurring.

**OPINION**

Central Armature/Fort Myers Joint Venture ("Joint Venture" or "Protester") protests the potential award of IFB 95-0056-AA-2-0-KA by the District of Columbia, Department of Public Works ("DPW") to the apparent low bidder W. M. Schlosser Co. Inc. ("Schlosser") for electrical and mechanical rehabilitation of the 9th and 12th Streets Expressways Project. The Joint Venture alleges that either DPW relaxed the "Special Standards of Responsibility" ("Special Standards"), or alternatively that Schlosser misrepresented its compliance with the Special Standards. The Special Standards required, among other things, that the prospective contractors have a subcontract with or be a master electrician licensed in the District of Columbia. Protester claims that Schlosser did not meet the special standard of responsibility. The record demonstrates that Schlosser has a subcontract with an electrical contractor possessing a District of Columbia license. We, therefore, deny the protest.

**BACKGROUND**

DPW originally scheduled the bid opening of IFB 95-0056-AA-2-0-KA for October 1, 1996, but extended the opening to October 8, 1996 in order to add, among other items, the following "Special Standard of Responsibility" (Addendum 4):

The bidder must demonstrate that the company including the Master Electrician performed electrical construction work on a minimum of three (3) comparable transportation projects in the last five years and have a D.C. Electrical License. . .

The bidder shall submit as part of the responsibility review the following:

- a. For each project, list name of project; description and scope of work performed by Subcontractor; total project cost; project cost for Subcontract's portion of the work; date of contract completion; was project completed in the agreed time; Owner contact, including address and telephone number; Construction Manager or General Contractor contact, including address and telephone number; and
- b. For project personnel to be assigned to this project, submit resumes of key project personnel, including Master Electrician and commitment of their performance. Each resume shall include detailed qualifications of the personnel, i.e. education, years of experience, types of projects worked on, and locations of projects.

The Master Electrician shall be assigned at the jobsite while the electrical work is being performed for the duration of the contract.

(Agency Report ("AR"), Exhibit 1).

DPW received four bids on October 8, 1996. (AR, Exhibit 2, bid tab). Schlosser was the apparent low bidder with a bid price of \$8,288,000, and Joint Venture was the apparent second low bidder with a bid price of \$8,758,912. (*Id.*)

By letter dated October 15, 1996, DPW requested that bidders submit responsibility information required by Addendum No.4, as well as a "pay item schedule indicating each pay item as prime contractors portion of work or subcontractor's portion of work." On October 15, 1996, Schlosser submitted its response to the Special Standards of Responsibility. (AR, Attachment 1). Schlosser informed DPW that it planned to award the electrical work to Singleton Electric ("Singleton"). Schlosser attached a firm resume for Singleton, detailing recent comparable electrical work on three projects which it had performed in the last 5 years. The materials submitted for Singleton also included a resume of the Master Electrician it anticipated using on the project. The resume described his education, listed the jurisdictions where he was licensed with the dates of licensure and his work experience with Singleton from 1986 to 1996. Schlosser also submitted its firm resume, which summarized its 35 years of experience as a general contractor. The submission listed five comparable projects on which Schlosser had worked during the last 5 years, three of which were completed for DPW. Schlosser and Singleton both cited work on the I-395 Center Leg of the Inner Loop Rehabilitation of the Mall Tunnel, completed for DPW. Schlosser's submission included resumes of its key personnel. By letter dated, November 8, 1996, Schlosser submitted to DPW a copy of Singleton's District of Columbia electrical license # 744000017. (AR, Attachment 2).

Fort Myers Construction Corporation and Central Armature Works, Inc. formed a joint venture for the purpose of bidding on IFB 95-0056-AA-2-0-KA in the belief that the above Standards required that the prime contractor be a licensed electrical contractor, employing a licensed master electrician possessing the above qualifications, as well as meet the remaining criteria. (Protest, p.2).

Central Armature is an electrical contractor licensed in the District and Fort Myers is a construction firm experienced in mechanical work.

By letter dated November 26, 1996, the Joint Venture inquired of DPW whether other bidders had submitted the information required by Addendum 4. (Protest, Attachment 3).

By letter dated January 3, 1997, DPW informed the Joint Venture that the Office of Corporation Counsel had reviewed the submissions of Schlosser and determined it to be responsive and responsible. (Protest, Attachment 4). The Joint Venture states that it understood this to mean that DPW:

had finally received adequate submissions by Schlosser indicating that either it or its subcontractor met or exceeded all of the requirements of the Standards, including the requirement that the company have a master electrician with minimum qualifying experience, that the company have a D.C. electrical license, that the company have adequate minimum project qualifications called for, and that Schlosser demonstrated that 'the master electrician shall be assigned to the jobsite while the electrical work is being performed for the duration of the contract.' If Schlosser itself could not make such commitments, Joint Venture reasonably presumed . . . Schlosser had appropriately submitted to DC-DPW a written subcontract that its subcontract had so committed.

(Protest, p. 3-4).

On January 21, 1997, Schlosser requested Central Armature to submit a bid to Schlosser on four bid items under the IFB. The Joint Venture contends that those were major electrical bid items. On January 28, 1997, the Joint Venture filed its protest with the Board.

On February 3, 1997, Joint Venture moved the Board for an Order allowing expedited discovery.

On February 13, 1997, Schlosser filed a Motion to Dismiss Protest on the grounds that the protest is invalid on its face. Schlosser contends that its submittal to DPW on October 15, 1996 met the Special Standards of Addendum No. 4. Further, Schlosser attached to its motion excerpts from the 1997 *Blue Book of Building and Construction* for the Washington, D.C. area demonstrating that Central Armature is not only an electrical contractor, but also provides fan repair, pumps, machine work and mechanical components. Schlosser asserts that three of the four items, for which Schlosser sought bids from Central Armature, included no electrical work and that the fourth item, Item 622-143, could be segregated into electrical (controllers) and non-electrical portions (motors). Schlosser maintains that its president spoke to Tony Schmidt of Central Armature on January 20, 1997, the day before it telefaxed the list of four items for Central Armature to price, and clearly communicated to Schmidt that Schlosser sought pricing from Central Armature for only the non-electrical portion of Item 622-143. Schlosser's motion to dismiss also included an October 16, 1996 "letter of intent" from

Schlosser to Singleton which states, "upon receipt of our prime contract from the District, we will send you your subcontract." Attached to the letter of intent is Singleton's scope of work, which excluded the motor portion of Item 622-143 and did not list Items 623-103, 623-211 and 640-103. Schlosser argues that even if it had solicited a price from Central Armature for the electrical portion of Item 622-143, Item 622-143 comprises such a small portion of the electrical work on the project that an award to Schlosser would still be proper.

On March 3, 1997, the District filed its Agency Report with the following three attachments: the IFB and amendments, the bid tabulation sheet; and Schlosser's February 12, 1997 Motion to Dismiss. The Agency Report states that DPW officials had not completed evaluation of Schlosser's bid and had not yet determined to award the contract to Schlosser.

On March 5, 1997, the Joint Venture filed an Opposition to Motion to Dismiss Protest, asserting that Schlosser's October 16, 1996 letter of intent to award a subcontract to Singleton was insufficient to meet the special standards of responsibility contained in Addendum No 4. The Protester argues that the letter of intent does not evince an absolute and final commitment by the electrical contractor so as to satisfy the Special Standard requirements. The Protester argues that the District cannot find that Schlosser is responsible if the electrical licensee has no binding commitments.<sup>1</sup>

On March 6, 1997, Schlosser filed a pleading entitled "Motion for Summary Disposition," asserting that the protest is invalid as a matter of law and that there are no material facts in dispute. Schlosser's March 6 motion advances the same explanation of its January 20th call to Central Armature and attaches a notarized affidavit of Andrew Schlosser, president of W. M. Schlosser, Inc. Mr. Schlosser asserts:

7. Prior to bid, Schlosser received quotations and work scopes from two electrical subcontractors, M.C. Dean, Inc. and Singleton Electric, Inc. . . Both subcontractors excluded from their work scopes the furnishing of motors under bid item 622-143. (Attachment C and D)<sup>2</sup>. . . .

---

<sup>1</sup>The Protester objected to Schlosser's filing a motion to dismiss, which it pointed out was the procedural equivalent to a motion for summary judgment, an "extreme remedy that is appropriate only when there are no material facts in issue and when it is clear that the moving party is entitled to judgment as a matter of law." *Maddox v. Bano*, 422 A.2d 763 (D. C. App. 1980). The Protester argued that there were unresolved factual issues and that the letter of intent was legally insufficient to satisfy the requirements of the Special Standards. (Opposition to Motion to Dismiss Protest).

<sup>2</sup>Attachment C and D to Andrew Schlosser's affidavit are work scopes from M.C. Dean and Singleton Electric respectively. The work scopes confirm Schlosser's statement that both electrical subcontractors sought to exclude from their scopes of work the furnishing of the motor portion of item 622-143.

10. On or about January 20, 1997, I called Central Armature to solicit pricing for contract work items 622-143 (Motors and Controllers), 623-103 (Fan Rehabilitation), 623-211 (Fan Diffuser Cowlings), and 640-103 (Replace Fan Discharge Transitions). Of these items, only item 622-143 contains any electrical work. I spoke with Tony Schmidt of Central Armature. Since we already had an agreement with Singleton to perform the electrical portion of item 622-143, I specifically informed Mr. Schmidt that I was only soliciting pricing for the non-electrical portion of item 622-143. Mr. Schmidt said that he did not know whether Central Armature would be interested in submitting a bid, but he asked me to fax him a list of the items that I wanted prices on.

11. The value of the electrical portion of contract item 622-143 comprises approximately two percent of the electrical work on the project.

Motion for Summary Disposition, Exhibit 1, p. 2.

On March 18, 1997, Protester filed an Opposition to Motion for Summary Disposition. As a new ground of protest, Protester argues that the Special Standards require a contractor to have a Master Electrician in its employ, and that it is not sufficient for a contractor to satisfy those requirements through a subcontractor. The Joint Venture also objected to a summary disposition of the case based on Schlosser's factual assertions that only Item 622-143 involves any electrical work, and that the electrical portion of Item 622-143 comprises only 2% of the total value of electrical work of the project. Protester states: "Schlosser's summary conclusions and factual arguments regarding the scope, value and nature of the electrical work are all evidentiary problems which cannot be evaluated in the context of a 'Summary Disposition.' For example, the four bid items for which Schlosser has requested Central Armature to bid may all be considered related to a single critical electrical work item, consisting of an exhaust/discharge/fresh air fan system for the vehicular tunnels." (Opposition, p. 3.)

On April 1, 1997, the Joint Venture filed a pleading entitled "Additional Citations to Authority in Support of Bid Protest," directing the Board's attention to 27 DCMR §§ 2201-2206, the District's procurement regulations on responsibility determinations.

On April 7, 1997, Schlosser filed its Reply to Opposition to Motion for Summary Disposition arguing that the Protester's March 18 Opposition raised several new untimely grounds of protest which the Board should not consider. Schlosser points out that allegations that a contractor cannot satisfy the special standards through a subcontractor were made well after the 10-day filing requirement and are therefore untimely. Additionally, Schlosser argues that the contract's Special Standards can be satisfied by the qualifications of a prospective subcontractor. As this ground of protest was made well after the 10-day filing period, we decline to address it. However, if we were to address this issue, we would agree with Schlosser's substantive position.

On April 15, 1997, the Board held a telephone conference with the parties to inquire about DPW's intention to award the contract. Additionally, we sought to find out if any discovery matters,

pursuant to the Protester's February 3, 1997 discovery motion, remained unresolved. The Protester indicated that it was not seeking additional discovery.

On April 17, 1997, DPW's Contracting Officer executed a Determination and Findings ("D & F") determining that Schlosser and Singleton were responsible.

On April 24, 1997, the Board initiated another telephone conference requesting DPW to explain the basis of its responsibility D&F, what evidence it considered in determining Singleton's commitment to perform as the electrical subcontract, and information about the nature of work Items 622-143, 623-103, 623-211 and 640-103.

By letter dated May 16, 1997, the District submitted an affidavit executed by Gary Burch, the Chief Engineer of the District and Administrator, Design, Engineering and Construction Administration for DPW. Burch's affidavit states that he considered the information submitted with Schlosser's bid, its October 15, 1997 submission of additional information including the list of projects completed by Schlosser with references and letters of recommendations, information on key personnel from both companies and information on comparable projects completed by Singleton. He also noted that Schlosser had submitted a copy of Singleton's electrical license. Burch stated that he was familiar with both Schlosser and Singleton because of their past performance of construction and electrical work for DPW. He observed that he had worked as an engineer for the District of 32 years and that Schlosser had been a responsible contractor during that entire time performing complicated work. After his review, Burch determined that Schlosser and Singleton were responsible, and that Schlosser met the special responsibility standards by employing a subcontractor with a Master Electrician licensed in the District. Further, Burch stated that: Item 623-103 is 90% mechanical work with no electrical work; Item 623-211 and Item 640-103 are both 100% mechanical work with no electrical work. Item 622-143 consists of 97% electrical work, but only 2% of the total dollar value of the contract.

On May 28, 1997, Schlosser filed a copy of its subcontract with Singleton, which was executed on March 13, 1997.

### **Discussion**

It is well settled that the Board will not overturn an affirmative responsibility determination unless a protester can show fraud or bad faith on the part of the contracting officials, a bidder's failure to adhere to definitive responsibility criteria, or that such a determination lacked a reasonable basis. *See e.g. Dixon Pest Control Services, Inc.* CAB No. P-401 Ap. 6, 1994, 42 D.C. Reg. 4528, 4529; *C.P.F. Corp.*, CAB No. P-413, Nov. 18, 1994, 42 D.C. Reg. 4902, 4909. A contracting agency has broad discretion in determining whether bidders meet definitive responsibility criteria since the agency must bear the burden of any difficulties experienced in obtaining the required performance. *Prime Mortgage Corp.*, 69 Comp. Gen. 618 (1990), 90-2 CPD ¶ 48. When a solicitation contains definitive responsibility criteria, which are specific and objective standards established by an agency to measure a bidder's ability to perform a particular contract, the agency must obtain evidence that the bidder

meets those criteria. *United Materials, Inc.* B-243669, 91-2 CPD ¶ 161; *Calculus, Inc.*, B-228377.2, Dec. 7, 1987, 87-2 CPD ¶ 558. There is no dispute that the Special Standards contained in Addendum No. 4 constitute definitive responsibility criteria since they established specific and objective standards.

The scope of our review is focused on ascertaining whether evidence of compliance has been submitted from which the contracting officer reasonably could conclude that the definitive responsibility criteria had been met. The relative quality of the evidence is a matter for the judgment of the contracting officer. Nevertheless, we also insist on the presence of objective evidence demonstrating compliance with the definitive responsibility criteria. *Topley Realty Co., Inc.*, 65 Comp. Gen. 510 (1986) 86-1 CPD ¶ 398.

We have reviewed the detailed submissions regarding responsibility, which Schlosser presented to DPW, including the information on its personnel, past performance on several contracts and the materials it submitted on Singleton's personnel, past contract performance, and its District of Columbia electrical license. Finally, we have reviewed the letter of intent from Schlosser to Singleton, and their subcontract. Since the Special Standards involve matters of responsibility, evidence of compliance with such provisions may be provided any time up to actual award. *Gelco Services, Inc.*, B-253376, Sept. 14, 1993, 93-2 CPD ¶ 163, recons. denied, B-253376.2, Oct. 27, 1993, 93-2 CPD ¶ 128. Addendum 4 requires a contractor to demonstrate the master electrician's commitment to perform. We find that the letter of intent constituted sufficient evidence of commitment for the contracting officer to consider Singleton's qualifications in determining whether Schlosser met the definitive responsibility criteria. See *id.*; *Hardie-Tynes Mfg. Co.*, 69 Comp. Gen. 359 (1990), 90-1 CPD ¶ 347, *aff'd* on reconsid, B-237938.2, June 25, 1990, 90-2 CPD ¶ 587. Further, Schlosser submitted a subcontract which substantiated its representations that Singleton will perform the electrical work.

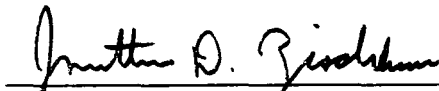
Accordingly, we deny the protest.

DATE: June 6, 1997



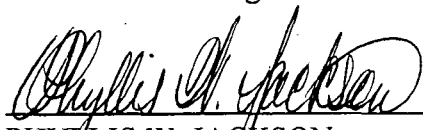
LORILYN E. SIMKINS

Chief Administrative Judge



JONATHAN D. ZISCHKAU

Administrative Judge



PHYLLIS W. JACKSON

Administrative Judge

**Government of the District of Columbia**

CONTRACT APPEALS BOARD  
717 14TH STREET, N.W., SUITE 430  
WASHINGTON, D.C. 20005



(202) 727 6597

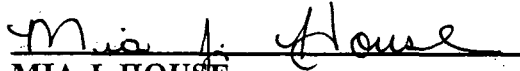
**DATE: June 6, 1997**

**TO: Christopher M. Kerns, Esquire**  
**Central Armature/Fort Meyer**  
**Construction Corp.**  
**2237 33rd Street, N.E.**  
**Washington, D.C. 20018-1505**

**Howard S. Schwartz**  
**Assistant Corporation Counsel**  
**441 4th Street, N.W., Room 1060N**  
**Washington, D.C. 20001**

**SUBJECT: CAB No. P-478, Protest of Central Armature/Fort Meyer**  
**Joint Venture**

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

  
**MIA J. HOUSE**  
**Clerical Assistant**

**Attachment**

**cc: Michael Cohen, Esquire**  
**W.M. Schlosser**  
**2400 51st Place**  
**Hyattsville, MD 20781-1396**



**CONTRACT APPEALS BOARD**

717 14th Street, N.W., Suite 430

Washington, D.C. 20005

Phone (202) 727-6597

Fax (202) 727-3993

**FAX** transmittal + Maiked

**Date:** June 9, 1997

**To:** Christopher M. Kerns, Esquire  
Fort Meyer Construction Corporation

**Fax:** (202) 526-0470

**From:** Mia House

**Re:** CAB No. P-478, Protest of Central Armature/Fort Meyer

**Pages including cover:** 8

**Note:** Opinion

**Privileged and Confidential:**

All information transmitted hereby is intended only for the use of the addressee(s) named above. If the reader of this message is not the intended recipient or the employee or agent responsible for delivering the message to the intended recipient(s), please note that any distribution or copying of this communication is strictly prohibited. Anyone who receives this communication in error should notify us immediately by telephone and return the original message to us via the U.S. Mail.

CONTRACT APPEALS BOARD

717 14th Street, N.W., Suite 430

Washington, D.C. 20005

Phone (202) 727-6597

Fax (202) 727-3993

FAX transmittal + Mailed

Date: June 9, 1997

To: Howard S. Schwartz  
Assistant Corporation Counsel

Fax: (202) 347-8922

From: Mia House

Re: CAB No. P-478, Protest of Central Armature/Fort Meyer

Pages including cover: 8

Note: Opinion

Privileged and Confidential:

All information transmitted hereby is intended only for the use of the addressee(s) named above. If the reader of this message is not the intended recipient or the employee or agent responsible for delivering the message to the intended recipient(s), please note that any distribution or copying of this communication is strictly prohibited. Anyone who receives this communication in error should notify us immediately by telephone and return the original message to us via the U.S. Mail.

**CONTRACT APPEALS BOARD**

717 14th Street, N.W., Suite 430

Washington, D.C. 20005

Phone (202) 727-6597

Fax (202) 727-3993

**FAX** transmittal + Mail

**Date:** June 9, 1997

**To:** Michael Cohen, Esquire  
W.M. Schlosser

**Fax:** (301) 773-9263

**From:** Mia House

**Re:** CAB No. P-478, Protest of Central Armature/Fort Meyer

**Pages including cover:** 8

**Note:** Opinion

**Privileged and Confidential:**

All information transmitted hereby is intended only for the use of the addressee(s) named above. If the reader of this message is not the intended recipient or the employee or agent responsible for delivering the message to the intended recipient(s), please note that any distribution or copying of this communication is strictly prohibited. Anyone who receives this communication in error should notify us immediately by telephone and return the original message to us via the U.S. Mail.