

By Amendment No. M001, dated June 23, 2008, the District extended the bid opening date to July 11, 2008. (AR Ex. 2). In addition, Amendment No. M001, revised Section C.3.4 of the IFB by deleting “accreditation by the Department of Health and Human Services (DHHS)” and inserting “certification by the D.C. Department of Health and” (AR at 3; AR Ex. 2). By Amendment No. M002, dated July 8, 2008, the District again extended the bid opening date

to July 25, 2008. By Amendment No. M003, dated July 9, 2008, the District revised, among other things, Section B.5.1 by increasing the minimum and maximum quantities of samples to be collected annually as follows: minimum 24,000 and maximum 50,000. In addition, Amendment No. M003 revised the certification requirement back to that of the original certification requirement articulated in the IFB Section C.3.4: “[t]he Contractor shall ensure that the urinalysis testing services are conducted in a fully qualified laboratory that has received accreditation by the Department of Health and Human Services (DHHS) CLIA certified facility.” (AR Ex. 2).

By July 25, 2008, the date of bid opening, the following four bidders submitted bids: (1) B&W, (2) We Care, (3) Norton Medical Industries (“Norton”), and (4) Clear Choice Systems (“Clear Choice”). (AR at 3; AR Ex. 6). OCP tabulated the bids as follows:

<u>Bidder</u>	<u>Total maximum bid price for base and four option years</u>
Norton	\$ 2,618,750.00
B&W	\$ 3,650,000.00
Clear Choice	\$ 5,362,466.00
We Care	\$13,000,000.00

(AR Ex. 4). After reviewing the bids, the contracting officer determined that the bids of Norton and Clear Choice were nonresponsive because they failed to provide DHHS accreditation that they were CLIA certified facilities and were certified small business enterprises. (AR at 4; AR Ex. 5). The contracting officer then recommended award to B&W, as it was the lowest responsive and responsible bidder certified as a small business enterprise possessing a DHHS certificate of compliance as a CLIA facility. (AR at 4; AR Ex. 7). On October 1, 2008, the District awarded the contract to B&W but We Care did not receive notice of the award until October 24, 2008. On October 31, 2008, We Care filed the instant protest. The District filed its Agency Report on November 20, 2008. We Care responded to the Agency Report on December 8, 2008, and the District filed a reply on December 15, 2008.

DISCUSSION

We exercise jurisdiction over this protest pursuant to D.C. Code § 2-309.03(a)(1).

The protest raises two issues for the Board’s consideration: whether the contracting officer properly determined that B&W was certified by the DHHS as a CLIA certified facility and whether B&W was a responsible bidder.

We Care asserts that B&W was only certified to receive samples but not to conduct the actual tests, citing the Mandatory Guidelines for Federal Workplace Drug Testing Programs (“Guidelines”). In addition, We Care argues that the District is ignoring federal law since it failed to award the contract to a certified laboratory as listed on page 59640 of the Federal Register, Volume 73, No. 197, dated October 9, 2008. However, the District points out that the

Guidelines only apply to workplace drug testing of federal employees and that here the IFB is for treatment services for the District, not workplace drug testing. We see no basis in the record for concluding that the contracting officer erred in determining that the IFB required the awardee to have accreditation by the DHHS as a CLIA certified facility and that B&W was properly accredited as such a facility. The District states that the Center for Medicare & Medicaid Services regulates all laboratory testing (except research) performed on humans in the United States through the Clinical Laboratory Improvement Amendments and that “[i]n total, CLIA covers approximately 200,000 laboratory entities.” (District’s Dec. 15 Reply, Ex. B). We Care has not rebutted the showing made by the District regarding B&W’s CLIA certification.

Regarding the responsibility challenge, We Care argues that B&W cannot perform the contract work at a unit price of \$13 per sample when We Care has been performing similar work at a contracted unit price of \$45. We Care provides no evidence that B&W’s bid is below the cost of performance and more importantly fails to show that B&W’s unit price renders it a nonresponsible bidder. Thus, we find no evidence to support We Care’s responsibility challenge.

CONCLUSION

We Care has not demonstrated that the contracting officer erred in determining B&W to be a properly accredited CLIA facility and to be a responsible bidder. Accordingly, we deny the protest.

SO ORDERED.

DATED: June 9, 2009

/s/ Jonathan D. Zischkau
JONATHAN D. ZISCHKAU
Chief Administrative Judge

CONCURRING:

/s/ Warren J. Nash
WARREN J. NASH
Administrative Judge