

DISTRICT OF COLUMBIA CONTRACT APPEALS BOARD

PROTEST OF:

TWITTY TREE)	
)	CAB No. P-0838
Solicitation No: DCKA-2009-B-0123)	

For the Protester, Twitty Tree: Mr. Amos L. Twitty, *pro se*. For the District of Columbia Government: Alton E. Woods, Esq., Assistant Attorney General, Office of the Attorney General. For the Intervener, C&D Tree Services, Inc.: Richard L. Moorhouse, Esq., Greenberg Traurig, LLP.

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

OPINION

Filing ID 30533645

On January 15, 2010, Twitty Tree protested a contracting officer's determination that it was nonresponsible because its bid was unreasonably low and its prices imbalanced. Twitty Tree contends that its pricing was realistic. The contracting officer subsequently rescinded the January 4 letter, and stated that as a result of bid reevaluation, Twitty Tree was nonetheless determined to be nonresponsible in accordance with 27 DCMR §§ 2200.1-2200.5, based on lack of appropriate experience, accounting and operational controls, equipment, and a certified arborist. Twitty Tree did not respond to the District's agency report. As the District rescinded its nonresponsibility determination of January 4, 2010, that effectively moots the basis of Twitty Tree's protest. Moreover, Twitty Tree has not responded to the subsequent nonresponsibility determination issued by the contracting officer. Because the latter nonresponsibility determination violates neither the law nor the terms of the solicitation on the record before us, we sustain the contracting officer's determination and deny the protest.

BACKGROUND

On October 6, 2009, the District's Department of Transportation's ("DDOT") Urban Forestry Administration advertised IFB No. DCKA-2009-B-0123 ("IFB") for tree removal services in the Washington Times newspaper. The IFB was also posted on the same date on the Office of Contracting and Procurement ("OCP") website. Thirty companies requested and received copies of the IFB. The IFB was structured for the District to make awards based on four aggregate award groups consisting of two wards each. (Agency Report ("AR") Ex. 1). The aggregate award groups listed in the IFB are as follows:

- Aggregate Award Group 1 – Wards 1 & 2
- Aggregate Award Group 2 – Wards 3 & 4
- Aggregate Award Group 3 – Wards 5 & 6
- Aggregate Award Group 4 – Wards 7 & 8

(AR Ex. 1)

The IFB specified that each award group would be awarded to the responsible contractor with the lowest responsive bid for that particular award group. The IFB could result in multiple awards, or one contractor could receive the award for all groups. (AR Exs. 1, 9).

On November 3, 2009, bids were opened by OCP with nine companies responding to the IFB. The companies responding to the IFB were: Twitty Tree, C&D Tree Services, Inc., Motir, Excel, Greentree, Community Bridge, Adirondack Tree Experts, Mario Galo, and F.A. Bartlett. Twitty Tree submitted a low bid of \$1,265,054, and was the apparent low responsive bidder for all aggregate award groups. (AR Ex. 9).

By letter dated November 18, 2009, the contracting officer requested responsibility data from Twitty Tree. On November 19, 2009, DDOT conducted a site visit at Twitty Tree's facility in Capitol Heights, Maryland. (AR Ex. 10). The contracting officer's technical representative, John P. Thomas, Associate Director, Urban Forestry Administration, reported on the results of the site visit:

On Thursday, November 19th, 2009, I and four members of my staff made a site visit to Twitty Tree Service. During the visit we found that Twitty did not have enough equipment, staff or property to perform the scope of work of the contract. During the visit we spoke about all the specifics of the contract and the requirements contained within the scope of work. We discussed the liquidated damages, work flow, equipment needs, administrative processes and staffing certifications. During the conversation Twitty Tree Service did not address all of our concerns and appeared to be formulating his plan while we spoke. Twitty was not aware of the level of complexities required in the contract. Twitty had experience in tree removal as it pertained to land clearing for development of residential work. Prior to the visit I went to their web site to review their company. I found reference to "topping" trees as a service which is not an accepted practice with the certifications and best management practices in the tree care industry. The site in which Twitty was located appeared to house other company's equipment's. After review of the equipment Twitty did not have all of the required pieces of equipment nor had versions that were to substitute for them. The chip truck had a tarp for a cover and was an open body style not a hard body chip truck and the stump grinder was a SC252 which will take three to four times longer to grind larger stumps [than] bigger stump grinders.

(AR Ex. 10 ¶5). The results of the site visit led the contracting officer to conclude that Twitty Tree did not have the equipment, personnel, experience, or resources to perform the contract. (AR Ex. 9 ¶5). On November 27, 2009, Twitty Tree provided the requested written responsibility data to the contracting officer. (AR Ex. 3). On November 30, 2009, during a meeting with the contracting officer, Twitty Tree verified its bid and was informed by the contracting officer that it was the apparent low bidder for each of the four aggregate award groups. Twitty appeared surprised that it had been determined to be the low bidder for all of the groups and indicated that it would not be interested in receiving the award for all of them.

Twitty told the contracting officer that it would like to be considered for only aggregate award groups three and four since the wards in each of these groups were close to its place of business. (AR at 4; AR Ex. 9). Twitty Tree provided additional information to the contracting officer in writing on December 14, 2009. (AR Ex. 9). The contracting officer concluded that based on the information provided by Twitty Tree and based on the site visit, Twitty Tree should be determined nonresponsible, finding that:

(a) Twitty does not possess a satisfactory performance record in accordance with [27 DCMR] Section 2200.4(a). Twitty does not have the requisite experience to perform this contract. Twitty only listed housing developments, homeowner associations, and commercial clients as their current largest clients. They have never performed a contract of comparable size and scope. They list no government agencies and told me during the November 30, 2009 meeting that they have never performed a government contract. The subcontractors proposed by Twitty also failed to list any previous experience with government contracts. For this reason, I believe that their bid may be grossly understated and does not include allowances for maintenance of traffic, especially in a congested urban environment like the District of Columbia and;

(b) Twitty does not meet the requirements of Section 2200.4(e) because they do not possess the necessary organization experience, accounting and operational controls or the ability to obtain them. Based on the findings of the site visit made of the Twitty facility by the COTR on November 19, 2009, Twitty does not possess adequate equipment to perform the contract. Additionally, Twitty does not have an ISA Certified Arborist, although he indicates that an Arborist from Florida will join him if he is awarded a contract. However, he did not submit a Letter of Commitment confirming an arrangement with the Arborist. None of the proposed subcontractors employs an Arborist as well.

(AR Ex. 9). By letter of January 4, 2010, the contracting officer informed Twitty Tree that it was determined to be nonresponsible due to its unbalanced bid pricing and some unreasonably low line item prices. (AR Ex. 11). The letter is not based upon a supporting determination and findings.

Twitty Tree filed a protest challenging the contracting officer's determination, by a letter of January 13, 2010, addressed to the contracting officer, which was received by the Board on January 14, 2010. In its protest, Twitty Tree verified its unit prices, arguing that the prices proposed "were fair and reasonable based on its business and financial status with consideration of the market fluctuating up or down." (AR Ex. 4). Twitty Tree provided additional information to the contracting officer by telephone on January 21 and 22, 2010. (AR Ex. 9).

On January 22, 2010, a determination and findings ("D&F") was signed by the District's Chief Procurement Officer approving the contract officer's recommendation to proceed with contract performance after receipt of the protest. (AR Ex. 7). This determination for award to other than low bidder includes a pricing analysis and concludes that "the bid of Twitty Tree should be rejected because it is unreasonably low and poses an unacceptable risk to the District

of Columbia Government.” (AR Ex. 5 at 4). The contracting officer’s determination also pointed to Twitty Tree’s lack of experience in performing a contract of this size and complexity:

A review of Twitty’s past performance references indicate that the company has experience performing tree removal for construction companies, commercial entities and homeowner associations ranging from \$52,000.00 to \$190,000.00 in value. The company has no experience performing tree removal services for municipal, county or state governments where the scope [of] work and reporting requirements are of a higher level and complexity.

....

On January 22, 2010, [Twitty Tree] stated that their prices were based on their costs with performing previous contracts. It appears from the bidder’s past performance reference that he may not have sufficient data to prepare bid prices that take into consideration all costs.

(AR Ex. 5). On January 28, 2010, the contracting officer sent a letter to Twitty Tree rescinding the letter of January 4, 2010, and informing Twitty Tree that it had been found nonresponsible pursuant to 27 DCMR §§ 2200.1-2200.5. (AR Ex. 11). The District filed its agency report on February 4, 2010. Twitty Tree has not responded to the agency report.

DISCUSSION

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

Because the contracting officer rescinded his January 4, 2010 determination that Twitty Tree was nonresponsible for an unreasonably low and unbalanced bid, that portion of the protest is moot. However, because we read Twitty Tree’s protest as challenging its being determined nonresponsible, we must address the contracting officer’s January 28, 2010 determination that Twitty Tree was nonresponsible. In the District’s procurement regulations regarding responsibility, 27 DCMR §2200.5 states that “to be found responsible, a prospective contractor shall meet all of the following requirements:

- (a) Financial resources adequate to perform the contract, or the ability to obtain them;
- (b) Ability to comply with the required or proposed delivery or performance schedule, taking into consideration all existing commercial and governmental business commitments;
- (c) A satisfactory performance record;
- (d) A satisfactory record of integrity and business ethics;
- (e) The necessary organization, experience, accounting and operational controls, and technical skills, or the ability to obtain them;
- (f) Compliance with the applicable District licensing and tax laws and regulations;
- (g) The necessary production, construction, and technical equipment and facilities or the ability to obtain them; and

(h) Other qualifications and eligibility criteria necessary to receive the award under applicable laws and regulations.

The contractor has the burden of establishing its responsibility and “in the absence of information clearly indicating that a prospective contractor is responsible, the contracting officer shall make a determination of nonresponsibility.” 27 DCMR §2200.3; *Goel Services, Inc.*, CAB No. P-0804, Feb. 2, 2010. The contracting officer determined that Twitty Tree did not have appropriate experience, accounting and operational controls, equipment, and a certified arborist to perform the work. Twitty Tree failed to rebut the findings in the record based on the responsibility submissions, and the declarations of the contracting officer and the contracting officer’s technical representative. Thus, we see no basis for overturning the contracting officer’s determination of nonresponsibility.

CONCLUSION

Twitty Tree has not rebutted the contracting officer’s bases for determining it to be nonresponsible. Accordingly, we deny the protest.

SO ORDERED.

DATED: April 12, 2010

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

CONCURRING:

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