

## DISTRICT OF COLUMBIA CONTRACT APPEALS BOARD

PROTEST OF:

M.C. DEAN, INC.	)	
	)	CAB No. P-0825
Under Solicitation No. DCKA-2009-B-0100	)	

For the Protester, M.C. Dean, Inc.: Lawrence M. Posen, Esq. For the Intervener, Fort Myer Construction Corporation: Christopher M. Kerns, Esq. For the District of Columbia Government: Robert Schildkraut, Esq., Assistant Attorney General.

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

### OPINION

*Filing ID 29144954*

M.C. Dean, Inc., has protested the award of a contract to the low bidder, Fort Myer Construction Corporation. M.C. Dean contends that Fort Myer's bid is nonresponsive because the bid contained the following alleged irregularities: (1) the bid did not include a letter of agreement between PEPCO and Fort Myer; (2) the Disclosure of Lobbying Activities form was not signed; (3) the bid did not contain a completed and signed Equal Employment Opportunity Employer Information Report; and (4) the bid did not contain Fort Myer's Clean Hands Certification or license to transact business in the District. The contracting officer executed a determination and findings that the incomplete forms in Fort Myer's bid constituted a minor informality and that it was in the best interests of the District to waive the solicitation requirements related to these items. We conclude that the contracting officer did not violate law, regulation, or the terms of the solicitation by waiving the minor informalities in Fort Myer's bid, and determining that the bid was responsive. Accordingly, we deny the protest.

### BACKGROUND

On August 4, 2009, the District's Office of Contracting and Procurement ("OCP"), on behalf of the District's Department of Transportation ("DDOT") issued Invitation for Bids ("IFB") No. DCKA-2009-B-0100. (Agency Report ("AR"), at 2; AR Ex. 2). The IFB was seeking a contractor to supply and install traffic signal control equipment and other communication devices in accordance with contract specifications. Three amendments were issued. (AR Ex. 3). The bid opening occurred on September 18, 2009, with three bids being submitted. (AR Ex. 1). The results of the bid submissions are as follows: Fort Myer \$1,250,808.27; M.C. Dean \$1,280,116.40; and Utility Systems C&E, LLC, \$1,427,763.00. (AR Ex. 4). On September 25, 2009, M.C. Dean filed its protest. On October 26, 2009, the contracting officer signed a "Determination and Finding of Minor Informality in Ft. Myer's Bid Submission" ("D&F"). (AR Ex. 6). We discuss the facts relevant to each of the challenged portions of Fort Myer's bid.

### PEPCO Agreement

The IFB contained a deliverables requirement in section F.2 for each bidder to provide in its bid a letter of agreement between PEPCO and the bidder for electric services disconnect/reconnect. (AR at 4-5; AR Ex. 2). Fort Myer did not provide such an agreement in its bid. However, no bidder, including M.C. Dean, provided such a letter. (AR at 4-5). M.C. Dean in its comments on the Agency Report agrees that the contracting officer appropriately waived the requirement for the PEPCO agreement to be submitted in the bid.

### Disclosure of Lobbying Activities form

Fort Myer submitted but did not sign the Disclosure of Lobbying Activities form referenced in section J.1.11 of the IFB. At the top of the form, printed instructions state: "Complete this form to disclose lobbying activity pursuant to 31 U.S.C. 1352." (AR Ex. 5a). Fort Myer inserted the words "Not Applicable" at the top of page 1 of the form. (AR Ex. 5a). The contracting officer understood this designation to mean that Fort Myer had not engaged in lobbying activities requiring execution of the form. In his D&F, the contracting officer determined that it was in the best interests of the District to waive the need for Fort Myer to sign the form. (AR at 5; AR Ex. 6).

### Equal Employment Opportunity Employer Information Report

IFB section J.1.12 requires bidders to prepare and submit an "Equal Opportunity/Non Segregated Facilities Certificate (1 Page)" and section J.1.5 requires bidders to prepare and submit "E.E.O. [Equal Employment Opportunity] Compliance Documents (6 Pages)." (AR Exs. 2a, 2b). Fort Myer completed and signed the Equal Employment Opportunity Policy Statement and the Assurance of Compliance with Equal Employment Opportunity Requirements. (AR Ex. 5a). In Fort Myer's bid, the Equal Employment Opportunity Employer Information Report is blank except for Fort Myer's typed notation at the top of the page reading "See attached 2008 Employer Information Report EEO-1." (AR Ex. 5a). Immediately following the Information Report is Fort Myer's referenced 2008 EEO Information Report containing a spreadsheet of Fort Myer EEO data, a blank "Employment Data" one-page form, and a partially completed and signed "Projected Goals and Timetables for Future Hiring" form. The contracting officer in his D&F determined that any page that was not completed was a minor informality because Fort Myer submitted all of the required data, when considering all of Fort Myer's bid submission, including its own computer generated form, *i.e.*, the 2008 Employer Information Report. (AR Ex. 6).

### Clean Hands Certification and License to Transact Business in the District

A "Clean Hands Certification" is required by section L.13.2 of the solicitation. (AR Ex. 2c). This section also requires each corporate bidder to provide a copy of its license, registration, or certification to transact business in the District or a statement of intent to obtain such documentation. Fort Myer's bid provided neither a Clean Hands Certification nor a license to transact business in the District nor a statement of intent to obtain the license. The contracting officer in his D&F found that the Clean Hands Certification merely duplicates checks conducted by the District's Department of Tax and Revenue and the District's Department of Employment Services to certify the legal tax status of the bidder before award. (AR at 6; AR Ex. 6). The

contracting officer provided a copy of the tax certifications from the Department of Tax and Revenue and Department of Employment Services. (AR Ex. 6). Further, the contracting officer determined in the D&F that a copy of the license to transact business in the District was not required as it had previously been determined that Fort Myer held such a license. The contracting officer determined that it was in the best interests of the District to waive the need for these documents. (AR at 6-7; AR Ex. 6).

On October 26, 2009, Fort Myer intervened in the protest. On October 29, 2009, the District filed its Agency Report. M.C. Dean filed comments on November 9, 2009. On November 18, 2009, the District responded to M.C. Dean's comments. As of November 18, no contract had been awarded under the IFB.

## **DISCUSSION**

We exercise jurisdiction over this protest pursuant to D.C. Code § 2-309.03 (a)(1), and address M.C. Dean's challenges to Fort Myer's bid responsiveness due to alleged irregularities in the bid documents. The test for responsiveness is whether a bid offers to perform the exact thing called for in an IFB, so that the acceptance of the bid will bind a bidder to perform in accordance with all of the terms and conditions of the solicitation without exception. *Omni Elevator Co.*, B-241678, Feb. 25, 1991, 91-1 CPD ¶ 207. A bid defect which is not material does not require rejection of the bid. Rather, it may be waived as a minor informality. A defect is minor if it does not affect price, quantity, delivery or quality or otherwise affect the bidder's obligations under the contract." *Walker Construction*, B-246759, Mar. 30, 1992, 92-1 CPD ¶ 319. Further, 27 DCMR § 1535.1 provides that "[m]inor informalities or irregularities in bids may be waived if the contracting officer determines that the waiver is in the best interest of the District." When it is in the best interest of the District, "the contracting officer shall give the bidder an opportunity to cure any deficiency resulting from a minor informality or irregularity in a bid, or waive the deficiency." 27 DCMR § 1535.4.

### PEPCO Agreement

M.C. Dean in its comments on the Agency Report agrees that the contracting officer appropriately waived the requirement for the PEPCO agreement to be submitted in the bid.

### Disclosure of Lobbying Activities form

M.C. Dean contends that the failure to complete and sign the Disclosure of Lobbying Activities form renders Fort Myer's bid nonresponsive. We agree with the District that the contracting officer properly understood Fort Myer's "Not Applicable" designation at the top of the form to mean that Fort Myer had not engaged in lobbying activities requiring execution of the form. We sustain the contracting officer's determination that it was in the best interests of the District to waive the need for Fort Myer to sign the form. (AR at 5; AR Ex. 6). We have previously held that a bidder's failure to complete a Disclosure of Lobbying Activities form to be a minor irregularity that does not render a bid nonresponsive because such an omission does not affect the material obligations of the bidder. *Modern Electric, Inc.*, CAB No. P-0341, Apr. 5, 1993, 40 D.C. Reg. 5068, 5069.

Equal Employment Opportunity Employer Information Report

M.C. Dean argues that Fort Myer did not comply with the IFB by preparing and submitting an Equal Employment Opportunity Employer Information Report. We agree with the District that the contracting officer properly determined that Fort Myer's bid contained the requested Equal Employment Opportunity employer information even though Fort Myer used its own form in one case to provide some of the requested data. *See Modern Electric, Inc.*, 40 D.C. Reg. at 5069 (failure to sign EEO certificate did not affect any material term of the solicitation and could be waived by the contracting officer).

Clean Hands Certification and License to Transact Business in the District

M.C. Dean argues that the contracting officer had no reasonable grounds for waiving the requirement that Fort Myer prepare and submit a Clean Hands Certification and license to transact business in the District. We disagree. The contracting officer in his D&F found that the Clean Hands Certification merely duplicates checks conducted by the District's Department of Tax and Revenue and the District's Department of Employment Services to certify the legal tax status of the bidder before award. The contracting officer provided copies of those agencies' certifications. (AR Ex. 6). In addition, the contracting officer determined in the D&F that a copy of the license to transact business in the District was not required as it had previously been determined that Fort Myer held such a license. We see no error by the contracting officer in determining that it was in the best interests of the District to waive the minor informalities in Fort Myer's bid.

Finally, M.C. Dean labels the D&F a *post-hoc* rationalization of the contracting officer's actions and thus the D&F is entitled to little or no weight. We cannot agree. Although the D&F was prepared after the protest filing, it preceded award as the District points out in its reply to M.C. Dean's comments. Moreover, as described above, the contracting officer articulates in the D&F reasonable grounds to support his determination to waive the minor informalities in Fort Myer's bid for each of the items challenged by M.C. Dean.

In sum, we conclude that the contracting officer's determination to waive the minor informalities in Fort Myer's bid did not violate law, regulation, or the terms of the solicitation.

**CONCLUSION**

For the reasons discussed above, we deny M.C. Dean's protest.

DATED: January 21, 2010

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

CONCURRING:

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