

DISTRICT OF COLUMBIA CONTRACT APPEALS BOARD

PROTEST OF:

CNA, INC.)	
)	CAB No. P-0875
)	
Solicitation No: DCKA-2010-B-0166)	

For the Protester, CNA, Inc., Mr. John Cheeks, *pro se*. For the District of Columbia Government: Alton Woods, Esq., Assistant Attorney General, Office of the Attorney General.

Opinion by Chief Administrative Judge Marc D. Loud, Sr., with Administrative Judge Warren J. Nash, concurring.

OPINION

Filing ID 36454556

Protester CNA, Inc. (“Protester”) alleges various grounds in its protest against the District’s solicitation for the rehabilitation of Columbia Plaza, NE. CNA contends that the three other bidders to the procurement were “affiliate companies” and that their bids lacked proper “independent price determination(s)”. CNA also “questions” the “affirmative action preference certification(s)” given by the District’s Department of Local, Small, Disadvantaged, Business Enterprises (“DSLDBE”) to the other three bidders. The District filed a motion to dismiss, asserting that CNA submitted an unacceptable bid guarantee, was properly found nonresponsive, and that CNA’s protest lacks a clear and concise statement of its legal and factual grounds. The Board agrees that the protester submitted an unacceptable bid guarantee and was properly found nonresponsive. Accordingly, we dismiss the protest with prejudice.

BACKGROUND

The Office of Contracting and Procurement (“OCP”) advertised Invitation For Bids No. DCKA-2010-B-0166 on December 1, 2010 (“IFB”). The IFB directed all bidders to provide, *inter alia*, bid security with their bids as follows:

Section 102, Article 12 Bonding Requirements, Bid Guaranty of the Standards and Specifications for Highways and Structures 2005:

On all bids of \$100,000 or more, security is required to insure the execution of the contract. No bid will be considered unless it is so guaranteed. Each bidder must furnish with his bid either a bid bond (Form 264640-5) with good and sufficient sureties, a certified check payable to the Treasurer of the District of Columbia (uncertified check will not be accepted), negotiable United States bond (at par value), or an irrevocable letter of credit in an amount not less than five percent (5) of the amount of his bid... (Motion To Dismiss, p. 3-4).

The bids were due and opened on January 12, 2011, with four bidders responding to the IFB. Three bids were deemed responsive, and the protester's bid was deemed non responsive. The contracting officer determined that the protester failed to submit a valid bid security. (Motion To Dismiss Ex. 10, p.2, para. 9.) As bid security, the protester submitted a one-page handwritten note dated January 10, 2011, with its bid stating as follows:

CNA, INC THRU INVESTOR SHALL FURNISH A COPY OF REAL PROPERTY DEED IN LUI (sic) OF A BID BOND CERTIFICATE TO THE DEPT. OF PUBLIC WORKS OFFICE OF CONTRACTING AND PROCUREMENT FOR INVITATION DCKA-2010-B-0166..." (Motion to Dismiss, Ex. 13, p.2).

Additionally, the protester filed a motion with the Board on January 31, 2011, (after the bid opening) to submit a bid bond under seal. The District filed an opposition thereto on February 2, 2011, arguing that the protester's failure to raise the bid bond non responsiveness determination upon filing the initial protest rendered it untimely.

DISCUSSION

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

In its protest, CNA does not address the issue of its failure to submit a bid guarantee, nor challenge the District's non-responsiveness determination. To date, CNA has not disputed the District's contention that CNA sought to submit the handwritten "real property deed in lui (sic) of a bid bond certificate" as noted in the District's motion to Dismiss.

Rather, CNA's very succinct protest (2 pages) conclusively states that the top three bidders were "affiliate companies" and suggests something inappropriate occurred with their affirmative action preference certifications. There is nothing further in the record regarding either allegation (affiliate companies nor questionable certifications).

The Board has consistently recognized that a bid bond is a material requirement because it is a type of security that assures that a bidder will not withdraw its bid within the time specified for acceptance, and if required, will execute a written contract and furnish payment and performance bonds. *CNA Corporation, CAB No. P-0826, Feb. 5, 2010 (citations omitted)*. When a bidder supplies a defective bond, the bid itself is rendered defective and must be considered nonresponsive. *Nation Capital Builders, LLC, CAB No. P-0761, Nov. 20, 2007, 57 D.C. Reg. 741*. A nonresponsive bidder is not in line for award and therefore lacks standing to raise other challenges regarding an award. *C.P.F. Corp., CAB No. P-0521, Jan. 12, 1998, 45 D.C. Reg. 8697, 8699* (the Board will not consider protests by bidders who are not next in line for award if the protest is sustained).

In this case, the protester's "property deed" is not an acceptable form of bid guarantee. As noted herein, the bid solicitation identified the acceptable forms of bid guarantee, including the following:

On all bids of \$100,000 or more, security is required to insure the execution of the contract. No bid will be considered unless it is so guaranteed. Each bidder must furnish with his bid either a bid bond (Form 264640-5) with good and sufficient sureties, a certified check payable to the Treasurer of the District of Columbia (uncertified check will not be accepted), negotiable United States bond (at par value), or an irrevocable letter of credit in an amount not less than five percent (5) of the amount of his bid (Motion to Dismiss, Ex. 1, Section 102, Article 12 Bonding Requirements, Bid Guaranty of the Standards and Specifications for Highways and Structures 2005)

CNA's bid herein exceeded \$100,000. CNA's bid is nonresponsive, CNA is not in line for award and it therefore lacks standing herein.

The Board declines to grant the District's motion for sanctions and attorneys fees at this time. We note, however, that CNA's allegations of collusion in this protest are dangerously close to the conduct that warranted the warning we gave to CNA in CAB No. P-0826, (Feb. 5, 2010). Both the PPA and the Board's rules provide for sanctions where the Board determines that a protest is frivolous:

The Board may dismiss, at any stage of the proceedings, any protest, portion of a protest, it deems frivolous. In addition, the Board may require the protester to pay the agency attorney fees, at the rate of \$100 per hour, for the time counsel spent representing the agency in defending the frivolous protest or its frivolous parts. If the entire protest is dismissed on frivolous grounds, it may also assess the protester damages for each day the contract was suspended equal to the amount of liquidated damages specified in the contract for late completion of the contract. The Board shall not determine damages, if liquidated damages are not specified in the contract. In addition, counsel for the protester may be suspended or barred from practicing before the Board.

D.C. Code § 2-309.08(g); Board Rule 308.2. The Board encourages the *pro se* protester herein to carefully review Board rules before commencing further protest actions against the District.

Finally, the Board notes that the protester filed a Motion to Submit Bid Bond on January 31, 2011 (after the bid opening herein). The Board is not the correct entity to which a bid bond should be filed. Bid bonds should be filed in accordance with the requirements of the District's solicitation.

CONCLUSION

We dismiss the protest with prejudice.

SO ORDERED.

DATED: March 14, 2011

/s/ Marc D. Loud, Sr.
MARC D. LOUD, Sr.
Chief Administrative Judge

CONCURRING:

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

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