

DISTRICT OF COLUMBIA CONTRACT APPEALS BOARD

PROTEST OF:

FEI CONSTRUCTION COMPANY)	
(A Division of Forney Enterprises, Inc.))	CAB No. P-0902
)	
Under Solicitation No. DCFB-2011-B-0167)	
(Formerly DCAM-2011-B-0167))	

For the Protester: Keith Forney, *pro se*. For the District of Columbia: Jon Kulish, Assistant Attorney General, Office of the Attorney General.

Opinion by Administrative Judge Maxine E. McBean with Chief Administrative Judge Marc D. Loud, Sr. and Administrative Judge Monica C. Parchment concurring.

OPINION

Filing ID #48443291

Forney Enterprises, Inc. (“FEI” or “protester”) challenged, pre award, the District’s ability to award a contract to any of the following offerors: Consys, Inc. (“Consys”), Specialty Construction Management, Inc. (“Specialty Construction”) and Benaka, Inc. (“Benaka”) under Solicitation No. DCFB-2011-B-0167. The three offerors were all evaluated as lower responsive bidders than protester. Initially, the protester alleged that each offeror failed to provide one or more required bid documents with its submission. However, in its Agency Report (“AR”), the District rebutted the protester’s initial protest grounds by showing that Consys, the lowest bidder and proposed contract awardee, had, in fact, submitted the disputed documents. Subsequently, FEI submitted two supplemental protests to challenge Consys for allegedly being nonresponsive due to the inadequacy of its subcontracting plan and its failure to meet certain work experience requirements set forth in section L.23 of the Solicitation. The District responded with a supplemental AR to explain that the proposed awardee had met each of the requirements at issue. Protester did not file comments to, or otherwise contradict, the District’s supplemental AR thereby conceding the factual allegations therein. Those allegations support a finding that Consys was the lowest evaluated responsive and responsible bidder.

The record before the Board shows that the contracting officer reasonably determined that Consys submitted the lowest responsive and responsible bid. Finding no evidence to support protester’s allegations and, therefore, no violation of procurement law or regulation on the part of the District, the Board denies the instant protest.

BACKGROUND

On August 24, 2011, the District’s Department of General Services (“DGS”) issued IFB No. DCFB-2011-B-0167¹ (“IFB” or “Solicitation”) on behalf of the Fire and Emergency Medical Services Department. (*See* AR at Ex. 1.) The IFB sought a contractor to “provide all labor, materials, equipment and supervision for the complete renovation and modernization of Engine Company No. 28 . . . and

¹ The IFB was originally issued by the Department of Real Estate Services, predecessor to the Department of General Services, as No. DCAM-2011-B-0167. (AR at Ex. 5, ¶ 2.)

Engine Company No. 29.” (AR at Ex. 1, § B.1.) The IFB was designated for the Open Market with a 35% SBE subcontracting set aside for contracts over \$250,000. (AR at Ex. 1, § B.2.) The IFB was revised six times prior to the deadline for receipt of proposals. The revisions are as follows: (i) on August 24, 2011, (Amendment No. 0001), the pre-bid conference date was changed; (ii) on September 14, 2011, (Amendment No. 002), the IFB number was changed, responses to questions by prospective bidders were provided and attached to the IFB, and certain sections of the IFB were amended; (iii) on October 7, 2011, (Amendment No. 003), the bid opening date was extended from October 11, 2011, to October 17, 2011; (iv) on October 13, 2011, (Amendment No. 004), the bid opening date was extended to November 7, 2011; (v) on November 7, 2011, (Amendment No. 005), the bid opening date was again extended to November 21, 2011; and (vi) on October 18, 2011, (Amendment No. 006), four attachments were added to the Solicitation including answers to additional questions from prospective bidders, additional specifications, and Special Responsibility Standards under Section L.23. (AR at Ex. 2.)

Relevant Terms of the IFB

Section B.2 of the IFB required a 35% SBE subcontracting set aside for contracts over \$250,000.

§ B.2 A bidder responding to this solicitation, unless exempted by Section H.13, must submit with its bid, a notarized statement detailing its subcontracting plan. Bidders responding to this IFB shall be deemed nonresponsive if and shall be rejected if the bidder fails to submit a subcontracting plan that is required by law. For construction contracts in excess of \$250,000, at least 35% of the dollar volume of the contract shall be subcontracted in accordance with Section H.13. The Subcontracting Plan shall meet the requirements described under Section H.17 of this solicitation.

(AR at Ex. 1.)

Section H.13 entitled “Mandatory Subcontracting Requirement” expands on this requirement:

§ H.13.1 For contracts in excess of \$250,000.00, at least 35% of the dollar volume shall be subcontracted to certified small business enterprises; provided, however, that the costs of materials, goods, and supplies shall not be counted towards the 35% subcontracting requirement unless such materials, goods, and supplies are purchased from certified small business enterprises.

§ H.13.2 If there are insufficient qualified small business enterprises to completely fulfill the requirement of paragraph H.13.1, then the subcontracting may be satisfied by subcontracting 35% of the dollar volume to any certified business enterprises; provided, however, that all reasonable efforts shall be made to ensure that qualified small business enterprises are significant participants in the overall subcontracting work.

(AR at Ex. 1.)

Section H.17 details the requirements of a responsive subcontracting plan, stating most pertinently

that failure to submit a compliant subcontracting plan would result in the bid being nonresponsive:

The prime contractor responding to this solicitation which is required to subcontract shall be required to submit with its bid, a notarized statement detailing its subcontracting plan. Bids responding to this IFB shall be deemed nonresponsive and shall be rejected if the bidder is required to subcontract in accordance with the provisions of Section H.13, H.14 or H.15, but fails to submit a subcontracting plan with its bid.

(AR at Ex. 1.)

Section L.23 – Special Standards of Responsibility – required offerors to demonstrate that they or their subcontractors had particular experience in the areas of placement of formwork, steel reinforcement, and masonry restoration. Section L.23, as revised by Amendment 0006, contains the following language:

§ L.23.6 For the cast-in-place requirement the contractor or its subcontractor shall provide evidence with its bid that it or its subcontractor specializes in placement of formwork, reinforcing steel, and concrete with a minimum of 3 years experience on projects of similar size and scope.

§ L.23.7 For clay masonry restoration and cleaning the contractor or its subcontractor shall provide evidence with its bid that it or its subcontractor is an experienced, preapproved masonry restoration and cleaning firm. Evidence that the company has completed work similar in material, design, and extent to that indicated for this Project with a record of successful in-service performance. Experience installing standard unit masonry is not sufficient experience for masonry restoration work.

§ L.23.8 Bids submitted in response to this IFB shall be deemed non-responsive and shall be rejected of [sic] the bidder fails to submit with its bid the above information required by Paragraph L.23.

(AR at Ex. 2.)

Bid Evaluations and the Protest

On November 21, 2011, DGS publicly opened the eight bids that it received in response to the IFB. (AR at Ex. 5, ¶ 7.) During the bid opening process, “bid prices were publicly read out aloud and recorded on the Bid Tabulation Sheet.” (*Id.*; *see also* AR at Ex. 4.) Also during the public opening, LSDBE/CBE (Certified Business Enterprise) preference points for each bidder were recorded and the appropriate percentage reductions were applied to calculate the evaluated prices. (AR at Ex. 5, ¶ 7.) The District determined that Consys was the lowest responsive bidder after the appropriate price reductions were applied. (*See* AR at Ex. 4.) Specialty Construction and Benaka were ranked second and third, respectively. (AR at Ex. 4.)

FEI filed the instant protest with the Board on November 23, 2011, in advance of the actual award notification by the District, to challenge any award to Consys, Specialty Construction or Benaka. (Protest 1, Nov. 23, 2011.) The District responded by filing the AR on December 15, 2011. Protester filed a Supplemental Protest on December 16, 2011, (Project Award Protest – Supplemental [hereinafter

1st Supplemental Protest]), and a Supplemental Submission II on January 17, 2012, (Project Award Protest – Supplemental Submission II [hereinafter 2nd Supplemental Protest]). The District filed a Supplemental AR in opposition to the first and second supplemental protests. (District’s Supplemental AR in Opp’n to First and Second Supplemental Protests and Protest of FEI Constr. Co. dated Jan. 23, 2012 [hereinafter Supplemental AR].) Protester did not file comments to the Supplemental AR.

On February 15, 2012, the District completed its evaluation of the “responsibility of Consys pursuant to IFB Section L.22 *Standards of Responsibility*, and L.23 *Special Standards of Responsibility*” and found that Consys, the proposed awardee, had the capacity to perform the contract. (Letter to the Board, Feb. 16, 2012.) The District then filed a “Determination and Findings of Responsibility” on February 16, 2012, and a “Determination and Findings to Proceed with Contract Award While a Protest is Pending” on March 15, 2012, (together, the “D&Fs”). Protester did not file comments challenging the D&Fs.

DISCUSSION

We exercise jurisdiction over this protest and its underlying allegations pursuant to D.C. Code § 2-360.03(a)(1) (2011).

In its initial protest, FEI alleged that Consys, Specialty Construction and Benaka had failed to include one or more documents that each offeror was required to submit with its bid. (Protest 1.) In particular, FEI cited the requirement for a subcontracting plan in Section B.2 and the requirement for cast-in-place and masonry restoration experience in Section L.23. (*Id.*) However, after FEI filed the protest, the District’s responding AR indicated that Consys had, in fact, submitted a subcontracting plan and other documents to establish its compliance with Section L.23. (AR 5, ¶ 11, AR 7.) According to the District, DGS was processing Consys, as the lowest responsible bidder, for contract award. (AR 4, ¶ 8.)

As a result, FEI subsequently challenged any contract award to Consys specifically. (*See* 1st Supplemental Protest.) And, although it no longer asserted that Consys had failed to include a subcontracting plan in its bid, the protester nonetheless alleged that the inadequacy of the subcontracting plan rendered Consys’ bid nonresponsive. (*Id.*) For example, protester contended that Consys’ subcontracting plan (i) consisted of unrealistic pricing for the interior renovation work, (ii) included subcontractors for demolition and waste management that were not properly certified to perform the proposed work, (iii) was mathematically unsustainable, and (iv) was not certified due to the absence of a notary seal. (1st Supplemental Protest 1-2; 2nd Supplemental Protest, ¶ 1.a.) In addition, protester alleged that Consys failed to meet the special standards of responsibility under Amendment 6 which required each bidder to demonstrate that its designated subcontractor possessed “a minimum of three years’ experience on projects of similar size and scope for cast-in-place concrete.” (1st Supplemental Protest 3; 2nd Supplemental Protest, ¶ 1.b.) Because protester has ceded one of its initial protest grounds by acknowledging that Consys had submitted a subcontracting plan, the Board’s review of the record is therefore narrowed to the remainder of protester’s allegations concerning (A) the adequacy of Consys’ subcontracting plan, including whether it was properly certified, and (B) Consys’ compliance with the requirements set forth in Section L.23 of the IFB.

The Board notes that protester has not filed an opposition to the Supplemental AR or challenged the D&Fs. The Board rules provide, in pertinent part:

- 307.3 Failure of the protester to file comments, or to file a statement requesting the case be decided on the existing record, or to request an extension of the time for filing, shall result in the closing of the record of the case and may result in dismissal of the protest.

307.4 When a protester fails to file comments on an Agency Report, factual allegations in the Agency Report's statement of facts not otherwise contradicted by the protester, or the documents in the record, may be treated by the Board as conceded.

Pursuant to Board Rule 307.4, we will therefore treat as conceded statements of facts in the Supplemental AR not otherwise contradicted by the protester or by any other documents in the record.

A. The Subcontracting Plan

FEI claimed that the subcontracting plan submitted by Consys as part of its bid was mathematically unsustainable, incomplete, and failed to satisfy the Solicitation's CBE requirement. (1st Supplemental Protest 1-2.) Since the District determined Consys to be the lowest responsive bidder, protester is therefore challenging the validity of the District's evaluation of the bids. "In reviewing a protest which challenges the propriety of an agency's evaluation of proposals, it is not the function of the Board to independently evaluate proposals and to substitute the Board's judgment for that of the agency." *Emergency Assocs. of Physician's Assistants & Nurse Practitioners, Inc.*, CAB No. P-0500, 46 D.C. Reg. 8527, 8532 (Dec. 15, 1998). However, we will "examine the record to determine whether the judgment was reasonable and in accord with the evaluation criteria listed in the solicitation and whether there were any violations of procurement laws or regulations." *Health Right, Inc., D.C. Health Coop., Inc., & The George Washington Univ.*, CAB Nos. P-0507, P-0510, P-0511, 45 D.C. Reg. 8612, 8635 (Oct. 15, 1997); *Trifax, Corp.*, CAB No. P-0539, 45 D.C. Reg. 8842, 8847 (Sept. 25, 1998). Yet, "the protester has the burden of affirmatively proving its case and the fact that the protester does not agree with the agency's technical conclusions does not itself render the evaluation unreasonable." *Emergency Assocs. of Physician's Assistants & Nurse Practitioners, Inc.*, CAB No. P-0500, 46 D.C. Reg. at 8532.

In this case, protester's allegations concerning the acceptability of Consys' subcontracting plan have been refuted by the District in its initial AR and the subsequent Supplemental AR. First, protester's assertion that Consys had failed to include a subcontracting plan in its bid was disproven by the District in the initial AR. (*See* AR 5, 7.) Second, in the Supplemental AR, the District explained that Consys was deemed responsible having satisfied the relevant CBE subcontracting requirements. (*See* Supplemental AR 6-12.) And, inasmuch as FEI failed to provide the Board with comments to the District's Supplemental AR, or evidence contradicting it, protester failed to meet its burden of affirmatively proving that Consys' subcontracting plan did not satisfy the Solicitation's requirements. As a consequence, the Board will treat as conceded the District's factual allegations in the Supplemental AR, including the finding of adequacy regarding Consys' subcontracting plan.

FEI has also alleged that Consys' bid was not properly notarized and therefore not properly certified. In fact, protester specifically questioned the expiration date of the notary's commission in Consys' bid. (2nd Supplemental Protest ¶ 1.a.ii.3.) The bid was notarized by Ms. Kelly Hayes and, according to the certificate of appointment, the State of Maryland issued her a commission effective October 12, 2010, through October 12, 2014. (AR at Ex. 9.) As such, Ms. Hayes' commission was inarguably valid when she notarized Consys' bid. For the aforementioned reasons, the Board denies FEI's protest grounds concerning both the adequacy and certification of Consys' subcontracting plan.

B. Special Standards of Responsibility

The protester has claimed that in order to meet the IFB's cast-in-place experience requirement, Consys relied on a subcontractor that does not have the requisite experience on projects of similar size

and scope. (2nd Supplemental Protest ¶ 1.b.ii.) FEI therefore asserts that Consys must be deemed nonresponsive² for failing to meet the IFB's special standards of responsibility. (*Id.*)

We have held that definitive responsibility criteria or special standards of responsibility are specific and objective standards designed to measure a prospective contractor's ability to perform the contract. *M.C. Dean*, CAB No. P-0505, 45 D.C. Reg. 8664, 8669 (Dec. 3, 1997). As a result, "[w]here an allegation is made that definitive responsibility criteria have not been satisfied, we will review the record to ascertain whether evidence of compliance has been submitted from which the contracting officer could reasonably conclude that definitive criteria have been met." (*Id.*) In *Cent. Armature/Fort Meyer Joint Venture*, CAB No. P-0478, 44 D.C. Reg. 6823, 6828-29 (June 6, 1997), the Board clearly stated the scope of the Board's review of a responsibility determination involving special standards of responsibility.

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 any reasonable basis. 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. 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.

* * *

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.

Id.

The IFB stated that "[f]or the cast-in-place requirement the contractor or its subcontractor shall provide evidence with its bid that it or its subcontractor specializes in placement of formwork, reinforcing steel, and concrete with a minimum of 3 years' experience on projects of similar size and scope." (AR at Ex. 2 § L.23.6.) Consys proposed G & D Construction, LLC ("G&D") as its subcontractor for all cast-in-place work and provided three past performance evaluations of G&D. (AR at Ex. 13C, at Exs. 16,17.)

² Protester describes this alleged deficiency as an issue of responsiveness because it claims that Consys failed to submit the required documentation under Section L.23. (See 2nd Supplemental Protest ¶ 1.b.ii.) However, Section L.23.8 describes the above as a responsibility matter. The Board has also clarified that information concerning contractor experience and the ability to perform fully the contract requirements relate to bidder responsibility, not bidder responsiveness. See *Space Master Internat'l, Inc.*, CAB No. P-0380-A, 41 D.C. Reg. 3687, 3689 (Oct. 20, 1993).

The performance evaluations provided evidence that G&D has been performing cast-in-place work from, at least, May 2008 to January 2012.

Based on the foregoing,³ the contracting officer's conclusion that Consys' bid satisfied the experience requirements set forth in Section L.23.6 was reasonable. Moreover, since the protester has not alleged or established fraud or bad faith on the part of the contracting officer, there is no basis for this Board to invalidate the contracting officer's responsibility determination of Consys.

CONCLUSION

The Board finds that the protester has not shown that the contracting officer wrongly determined that Consys submitted the lowest responsive and responsible bid to the Solicitation. Having found no violation of procurement law or regulation on the part of the District, we deny the instant protest.

SO ORDERED.

DATED: December 14, 2012

/s/ Maxine E. McBean
MAXINE E. MCBEAN
Administrative Judge

CONCURRING:

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

/s/ Monica C. Parchment
MONICA C. PARCHMENT
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³ Protester has also alleged that TPM Group, LLC (Consys' proposed subcontractor for demolition and waste management) lacks the requisite demolition and waste management experience to meet its obligations under the subcontracting plan. (1st Supplemental Protest ¶ 1.b.) However, waste management and demolition are not listed under Section L.23 as tasks requiring any specific certification or work experience.