

GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

PROTEST OF:

Fort Myer Construction Corporation)	
)	CAB No. P-0685
Under Solicitation No. POKA-2003-B-0048-JJ)	

For the Protester, Fort Myer Construction Corp.: Joe R. Caldwell, Jr., Esq., O. Kevin Vincent, Esq. and Robert J. Wagman, Esq., Baker Botts L.L.P. For the Government: Howard S. Schwartz, Esq. and Talia S. Cohen, Esq., Assistants Corporation Counsel.

Opinion by Administrative Judge Matthew S. Watson with Chief Administrative Judge Jonathan D. Zischkau and Administrative Judge Warren J. Nash concurring.

OPINION

LexisNexis Filing ID 3531737

Fort Myer Construction Corporation was the second low bidder on each of the two award groups of a procurement¹ for road repair services. The Lane Construction Corporation was the low bidder on each award group. Fort Myer protests against award to Lane alleging that Lane's bid was nonresponsive due to a failure to include a notarized subcontracting plan as part of its bid.² The District responds that failure to submit a subcontracting plan is a matter of responsibility which may be cured after bid opening and not a matter of responsiveness required to be complete at the time of bid opening. The Board agrees with the District and finds the low bid to be responsive. Fort Myer's protest is denied.

BACKGROUND

The facts are not in dispute. On December 5, 2003, the Office of Contracting and Procurement ("OCP") issued Solicitation No. POKA-2003-B-0048-JJ ("IFB") on behalf of the District's Department of Transportation for repairs to curbs, gutters, sidewalks, utility cuts, and

¹ Fort Myer's own bid was rejected by the contracting officer as nonresponsive for failure to quote a price for one pay item. Fort Myer protests this rejection. In light of the Board's holding that award to the low bidder is proper, it is not necessary to determine whether Fort Myer's bid was responsive to resolve this protest. Fort Myer has filed a subsequent protest (CAB No. P-0688) against award of both award groups to Lane. In the event the Board determines that award of both award groups to the same contractor violates the terms of the solicitation, the issue of the responsiveness of Fort Myer's bid will be ripe for decision.

² Capitol Paving of D.C. was the third low bidder. Fort Myer asserts that Capitol's bid is also nonresponsive for the same reasons as Lane's. Although Capitol also did not submit a subcontracting plan, the issue of the responsiveness of Capitol is not identical to the responsiveness of Lane. Section M.B. of the solicitation, which requires the subcontracting plan, incorporates § M.C. Section M.C.'s requirements apply only to "any contractor seeking a preference on the basis of proposed subcontracting" Capitol is itself a certified local business enterprise and is not required to seek preference on the basis of proposed subcontracting. In light of the Board's holding, it is not necessary to determine whether Capitol properly claimed its LBE status.

base pavements. (Agency Report (“AR”) Ex. 1). Section M.B. of the IFB provided that the contractor must either be a local, disadvantaged or resident business enterprise, or subcontract 50 percent of the dollar value of the contract to such an enterprise. Section M.B. further required that the contractor “shall submit with its bid or proposal a notarized statement detailing its subcontracting plan.” (*Id.*).

On March 5, 2004, Fort Myer and two other bidders timely submitted bids in response to the IFB. (AR Ex. 2). In lieu of a subcontracting plan, Fort Myer submitted a notarized statement that it was a local business enterprise and therefore not required to submit a subcontracting plan. As part of its notarized statement, Fort Myer included a certification that it would perform 99% of the contract work and an agreement to liquidated damages in the event that it violated the certification.³ Each of the bidders signed their bids accepting all of the terms of the solicitation without reservation and agreed to perform “in strict accordance with the terms of the solicitation. . . .” (Block 19), however, neither of the two low bidders included a subcontracting plan or statement of any sort concerning the set-aside requirements with their bids or otherwise specifically acknowledged the subcontracting requirements. Upon opening the bids, the District initiated a pre-award review of Lane as the apparent low bidder, requesting, among other items, a subcontracting plan. On March 17, 2004, Lane submitted a subcontracting plan which complied with the contract requirements.⁴

DISCUSSION

“Generally, a requirement that bidders list subcontractors in their bids involves a matter of responsibility because it relates to the agency's need to evaluate the subcontractors' qualifications or the bidders' ability to meet equal employment opportunity and minority business requirements.” *A. Metz, Inc.*, B-213518, April 6, 1984, note 2, 84-1 Comp. Gen. Proc. Dec. ¶ 386, 1984 U.S. Comp. Gen. LEXIS 1326. Notwithstanding the general rule, however, a qualification requirement may become an element of responsiveness if specific notice of the requirement is given and bidders are cautioned that failure to deliver the required item with the bid may result in rejection of the bid. *See Welsh Construction Co*, B-183173, Mar. 11, 1975. 1975 U.S. Comp. Gen. LEXIS 2351. No such notice and caution was given in the subject solicitation. Indeed, the language of the solicitation can be read to the contrary. Section M.B. states that “[o]nce the plan is approved by the contracting officer, changes will only occur with the prior written approval of the contracting officer” implying that the bidder may make changes after submission of the bid, but prior to approval by the contracting officer. If the subcontracting plan was essential to a responsive bid, the plan would be final upon submission and no changes

³ The procurement regulations provide that “if a solicitation contains LBE or DBE requirements, it shall also contain a liquidated damages clause in the event that a prime contractor fails to make good faith efforts to comply with its plan.” (27 DCMR 804.9) The subject solicitation technically complies with the regulation, however, the amount of liquidated damages is so trivial as to make the provision meaningless. The solicitation provides for liquidated damages of “twenty-five dollars (\$25)” for each day that the contractor is in violation of the subcontracting requirements. This amounts to a maximum of \$9,125 if the contractor were in violation for a full year. The subcontracting plan submitted by the low bidder estimates the total value of subcontracts as \$4,870,059 for the first year. This penalty for violation of the set-aside requirements is hardly likely to be an incentive to comply with the contract terms.

⁴ Lane subsequently amended its subcontracting plan on March 23, 2004.

could be permitted after bid opening. The Board notes that the procurement regulation requires that the subcontracting plan be “notarized.” (27 DCMR § 804.9). While this requirement may underscore the importance⁵ of the plan, the Board does not find that notarization makes the required plan an element of responsiveness.

By signing the bid without reservation, Lane committed itself unequivocally to the terms of the contract, including the 50% set-aside subcontracting requirement. *C&D Tree Service, Inc.*, CAB No. P-0295, Nov. 2, 1993, 41 D.C. Reg. 3691, 3696-97; 1993 DCBCA LEXIS 342. The Board finds that Lane’s bid was responsive and that the District could properly receive the subcontracting plan after receipt of bids in order to determine Lane’s responsibility. The protest is denied.

May 5, 2004

/s/ Matthew S. Watson
MATTHEW S. WATSON
Administrative Judge

Concur:

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

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

⁵ Other than distinguishing the document from other required submissions, notarization appears to be of little legal effect.