GOVERNMENT OF THE DISTRICT OF COLUMBIA

CONTRACT APPEALS BOARD

PROTEST OF:

Fort Myer Construction Corporation	)	
	)	CAB No. P-0688
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 Intevenor, Capitol Paving of D.C.: Douglas Datt, Esq., Gavett and Datt, P.C. For the Government: Howard S. Schwartz, Esq. and Talia S. Cohen, Esq., Assistants Attorney General.

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 3742512*)

Fort Myer Construction Corporation was the second low bidder on each of the two award groups of a procurement for paving services. The Lane Construction Corporation was the low bidder on each award group. Fort Myer protested against award of both award groups to Lane alleging that the solicitation forbids award of both award groups to the same contractor. The District asserts that the language of the solicitation does not require award of each of the two award groups to different contractors. The Board finds that the language relied upon is, at best, ambiguous, and that the ambiguity was apparent prior to bid opening. A protest based upon alleged improprieties in a solicitation which are apparent prior to bid opening . . . shall be filed with the Board prior to bid opening . . . ." Rule 302.2(a). As the subject protest was filed after bid opening, the protest is untimely. Fort Myer's protest is dismissed.

DISCUSSION

The subject solicitation was issued December 5, 2003, requesting bids for repairs to curbs, gutters, sidewalks, utility cuts, and base pavements citywide. On February 12, 2004, the Contracting Officer issued Addendum 3, which, among other changes, requested separate bids for work in Wards 1 through 4 and Wards 5 through 8. The addendum added a new Section I.19, entitled "Manner of Award" which states:

> It is the District's intention to make multiple awards to two separate contractors. Award, if made will be to a separate bidder in the aggregate for each group of items indicated by the Aggregate Award Group as listed below. Bidder must quote unit prices on each item within each group to receive consideration. In the event that the District is unable to make an aggregate award, the District may award on an individual basis each item within an aggregate award. NO BIDDER WILL BE AWARDED MORE THAN ONE AWARD GROUP. (Emphasis in original).
>
> I.19.1 Award Group 1- Wards 1, 2, 3 and 4
>
> I.19.2 Award Group 2 – Wards 5, 6, 7 and 8.

(Exhibit 1).

Although inartfully worded, the inserted clause clearly provided that the entire citywide requirement would not be awarded to a single contractor. The inserted clause divided the citywide requirements into two award groups and stated that the District would make awards to "two separate contractors." The clause emphasized its intent by summarizing at the end of the paragraph in all capital letters "NO BIDDER WILL BE AWARDED MORE THAN ONE AWARD GROUP."

On February 26, 2004, the contracting officer issued Addendum 4, which replaced[1] Section I.19 as added by Addendum 3 with a new Section I.19 reading as follows:

> It is the District's intention to award two separate contracts. Award, if made will be to a separate bidder in the aggregate for each group of items indicated by the Aggregate Award Group as listed below. Bidder must quote unit prices on each item within each group to receive consideration.
>
> I.19.1 Award Group 1 – Wards 1, 2, 3 and 4
>
> I.19.2 Award Group 2 – Wards 5, 6, 7 and 8.

(Exhibit 1).

The revised clause contained in Addendum 4 is less clear than the Addendum 3 clause, but, if read alone, it could reasonably be interpreted also to preclude award of both award groups to a single contractor. The first sentence of the Addendum 3 clause is modified in the Addendum 4 clause to state that the District intends to "award two separate contracts" instead of to make "multiple awards to two separate contractors." This modification of the language supports the District's assertion that award was permissible to only one contractor. The second sentence, however, remains unchanged. It reads "Award, if made will be to a separate bidder in the aggregate for each group." While the term "separate contracts" in the revised first sentence could include two contracts made with a single contractor, or two contracts made with two contactors, it is more difficult to read "a separate bidder . . . for each group" in the unchanged second sentence as meaning anything other than award to two separate contractors, since it would make little sense to refer to each of the bids from the same contractor for each of the separate award groups as coming from "a separate bidder." But the second sentence in Addendum 4 cannot be read in isolation. Addendum 4 followed and changed a clause inserted by Addendum 3. It is not therefore reasonable to assume the revised clause was not intended to make any change from the original clause. An interpretation which gives reasonable meaning to an amendment is preferred to an interpretation which renders the amendment superfluous. *See*, Restatement, Second, Contracts § 203, Comment b. This is particularly true where, as here, the drafter of Addendum 4 specifically deleted the emphasized notice that "no bidder will be awarded more than one award group." The deletion clearly indicated that the District intended to reserve the right to award both award groups to a single contractor. In context, the most reasonable interpretation of the Addendum 4 clause is that the District was permitted to award both award groups to a single contractor. At best, the language of the clause is ambiguous.

Fort Myer filed this protest after bid opening. Pursuant to statute and our rules, "[a] protest based upon alleged improprieties in a solicitation apparent prior to bid opening . . . shall be filed with the Board prior to bid opening . . . ." D.C. Code § 2-309.09 and Rule 302.2(a). "A bidder who fails to seek clarification of an ambiguity on the face of a solicitation prior to bid

[1] The Board assumes that the new language replaced the previous section of the same designation. The Addendum is silent as to whether the original § I.19 was to be deleted.

opening risks a contrary interpretation of the allegedly ambiguous provision and is precluded from raising such issues to the Board after opening." *Maryland Construction, Inc.*, CAB No. P-0650, Jan. 17, 2002, 50 D.C. Reg. 7398, 7399. Here, the better reading of Addendum 4's section I.19 is that the District retained the right to award both award groups to a single contractor. To the extent that the language could be read differently, Fort Myer was obligated to seek clarification prior to bid opening. It did not do so. Accordingly, the protest is dismissed as untimely.[2]

June 16, 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

[2] In light of the Board's decision to dismiss the protest as untimely, Protester's Request for Discovery is denied.