

GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

PROTESTS OF:

GRANTURK EQUIPMENT CO., INC., et al.)	
)	CAB Nos. P-568, P-571, P-578
Under IFB No. 98-0043-AA-OMS-GH)	(Consolidated)

For the Protester, GranTurk Equipment Co., Inc.: Frederick D. Cooke, Jr., Esq., Rubin, Winston, Diercks, Harris & Cooke, LLP. For the Protester, B&B Equipment Co., Inc.: Mr. Jim Baikauskas, *pro se*. For the Protester, Mid-Atlantic Waste Systems: Mr. Rich Hood, *pro se*. For the Government: Howard Schwartz, Esq., and H. Christopher Malone, Esq., Assistants Corporation Counsel.

Opinion by Administrative Judge Jonathan D. Zischkau, with Chief Administrative Judge Lorilyn E. Simkins and Administrative Judge Phyllis W. Jackson, concurring.

OPINION

The Department of Public Works ("DPW") determined that the bid of GranTurk Equipment Company, Inc., for refuse trucks was nonresponsive because its proposed truck did not meet certain specification requirements. GranTurk protested, claiming that its proposed truck complied with the specifications. The District moved to dismiss this protest ground as untimely filed. GranTurk also challenges a post-award bilateral modification of the contract awarded to Maryland Industrial Trucks, Inc. We agree with the District that GranTurk's protest was untimely filed with regard to the nonresponsiveness issue and that the challenge to the contract modification is without merit. Accordingly, GranTurk's protest is dismissed in part and denied in part. B&B Equipment Company and Mid-Atlantic Waste Systems also filed protests challenging the modification of the awardee's contract. We dismiss B&B's protest because B&B lacks standing. We dismiss Mid-Atlantic's protest because it was untimely filed.

BACKGROUND

On February 10, 1998, the Department of Public Works issued IFB No. 98-0043-AA-OMS-GH for the acquisition of certain vehicles, including dump trucks, refuse trucks, wagons, vans, and sport utility vehicles. (District's Motion to Dismiss, Ex. 1). Bid Items 5 and 6 solicited bids for refuse trucks that consisted of two general parts, a low entry forward cab truck and a rear loading body. Sections 5.4.1, 5.22, 6.4.1, and 6.22 of the specifications required seats for three persons, consisting of a vinyl bucket seat for the driver and a vinyl bench seat for two persons for Items 5 and 6. (*Id.*). Section 5.38 of the specifications provided that the maximum length was 308 inches from bumper to tailgate. Section 17 of the Special Conditions required bidders to submit descriptive literature of the bid items being proposed. (*Id.*, Ex. 1, at 113). DPW issued Amendment Nos. 1-8 which amended certain portions of the specifications not pertinent here and extended the bid opening date to June 22, 1998. (*Id.*, Ex. 2).

On June 22, 1998, DPW opened the bids. Three bidders, GranTurk, Maryland Industrial Trucks, Inc. ("MIT"), and Mid-Atlantic Waste Systems, submitted bids for Items 5 and 6. GranTurk was the apparent low bidder on Items 5 and 6. (*Id.*, Ex. 3). GranTurk offered a low entry forward cab truck manufactured by Fontaine Modification Company and a rear loading body manufactured by Leach. (GranTurk Protest ¶ 5; District Ex. 5). GranTurk also submitted a bid as a subcontractor to provide the Leach rear loading bodies for the refuse trucks offered by MIT in its bid for Items 5 and 6. (Protest ¶ 5).

In a memorandum dated June 23, 1998, Mr. Wayne Thomas of DPW's Division of Fleet Services found that the bid of GranTurk was nonresponsive for Item 5 because the cab of the refuse truck proposed by GranTurk had only two seats, not the required three seats, and the overall length of the truck was more than 308 inches. (*Id.*, Ex. 4). Mr. Thomas also determined that GranTurk's bid on Item 6 was nonresponsive because the cab of the refuse truck proposed by GranTurk had only two seats. The descriptive literature submitted by GranTurk with its bid described a Fontaine cab having only two seats and a total length of the truck (cab plus rear loading body) exceeding 308 inches.

Also on June 23, 1998, B&B Equipment Company filed a protest alleging that the specifications for refuse truck cabs were unduly restrictive because they could be supplied by only one source, Crane Carrier Truck Manufacturing of Oklahoma. We ultimately dismissed that protest because it was not timely filed. *B&B Equipment Co.*, CAB No. P-549, Aug. 26, 1998, 45 D.C. Reg. 8823. DPW's Division of Fleet Services was asked to respond to the protest allegation. In a June 24, 1998 memorandum, Mr. Thomas stated that a representative from the cab's manufacturer, Fontaine, had indicated that its cab could meet the three-person seating requirement if some engineering modifications were made to the cab. (*Id.*, Ex. 6).

On June 25, 1998, DPW's contracting officer signed a determination for awarding Items 5 and 6 to MIT, the second low bidder, on the basis that GranTurk's proposed vehicles did not meet the specifications. (District Ex. 8).

GranTurk states that it did not receive a copy of Mr. Thomas' June 23 memorandum regarding the nonresponsiveness of GranTurk's bid on Items 5 and 6. GranTurk representatives assert in affidavits that the first time they learned from the District that GranTurk's bid for Items 5 and 6 had been determined nonresponsive was on December 29, 1998, in a conversation between the contracting officer and GranTurk's Senior Vice President. (GranTurk Reply, filed February 16, 1999 (Chernin Aff. ¶ 7; Ritchie Aff. ¶ 10). We find otherwise. On July 10, 1998, GranTurk sent a letter to DPW's contracting officer, which stated:

We have been informed that . . . our bid has been considered non-responsive for the following reason: "In connection with item #5; (1) Descriptive literature did not show three man cab." This reason reflects an apparent [misreading] of our bid. If we were not supplying a three man cab we would certainly have taken an exception. Of course, we did not. . . . "In connection with item #5; (2) Descriptive literature does not show 308" overall length." The descriptive literature shows a . . . bumper to back of cab dimension . . . of

102". The body length is 205" The resulting overall length of 306" is better than the maximum of 308" in the bid specs. . . . With regard to item #6; "Descriptive literature didn't support three man cab seating." Our response is the same as item #5. We ARE supplying three man seating. . . . We wish to reiterate in the strongest possible terms that our bid meets your bid specifications. There is absolutely no reason to reject our bid as non-conforming. . . .

(District Ex. 9). GranTurk now states that its information was based on "rumor." In a July 17, 1998 letter, DPW's contracting officer replied as follows:

My office has received your letter of July 10, 1998, which provides information clarifying the refuse trucks bid by your company in response to the subject solicitation. I have forwarded this information to the Fleet Services Division (FSD) and requested that the technical evaluation for the refuse trucks bid by your company be reexamined taking into consideration this additional information. I anticipate having a response from FSD within the coming week and will inform you of the agency's conclusions.

However, if you wish to file a protest, it should be filed with the Contract Appeals Board

....

(District Ex. 10). GranTurk argues that DPW's July 17 letter does not definitively state that GranTurk had previously been found nonresponsive by the DPW. Reading GranTurk's July 10 letter together with the contracting officer's July 17 reply, we find that GranTurk was on reasonable notice that its bid on Items 5 and 6 had been determined nonresponsive but that DPW was going to reexamine the matter based on the new information provided by GranTurk. Although the contracting officer did not expressly state that GranTurk had been determined nonresponsive in the July 17 reply, that was not necessary because GranTurk itself stated in the July 10 letter that it had been so "informed." Thus, the contracting officer's indication to "reexamine" the matter logically presupposes and affirms the prior nonresponsiveness determination of which GranTurk had been informed.

GranTurk received a further notice of the contracting officer's June 25, 1998 determination of nonresponsiveness when it received the District's August 3, 1998 filing in B&B's solicitation protest in CAB No. P-549, which contained the following statement: "On June 25, 1998, the Contracting Officer for DPW executed a determination and findings that found MIT responsible for Items 5 and 6, since it found GranTurk nonresponsive for Items 5 and 6." (Motion of the District of Columbia to Dismiss Protest or, in the Alternative Agency Report, filed August 3, 1998, at 5-6).¹

¹ There are a number of other disputed events which the District claims provided GranTurk notice of the nonresponsiveness determination. GranTurk's representatives deny receiving notice. None of the disputed events alter our finding that GranTurk received notice of the nonresponsiveness determination long before December 29, 1998, as alleged in its January 8, 1999 protest.

On November 5, 1998, DPW awarded the contract to MIT for Items 5, 6, and 7. (AR Ex. 20). On December 22, 1998, the contracting officer and MIT executed a bilateral modification substituting a Dempster body for the Leach body under Item 5.

GranTurk's senior vice president states that on December 29, 1998, she spoke with DPW's contracting officer and that the contracting officer advised her "that he was going to recommend an award of a contract for items 5 and 6 to MIT because the GranTurk bid was non responsive and that the MIT bid had been amended to delete GranTurk as the subcontractor to provide the Leach truck bodies because he had allowed MIT to substitute another subcontractor to provide the refuse truck bodies." (Protest ¶ 13; *cf.* GranTurk Reply filed February 16, 1999 (Ritchie Aff. ¶¶ 8-9)).

On February 5, 1999, B&B Equipment filed a new protest, docketed as CAB No. P-571, challenging the bilateral modification to MIT's contract by which the Leach body was replaced with the Dempster body. On March 1, 1999, the District moved to dismiss this protest on the ground that B&B lacks standing because it was neither an actual or prospective bidder having failed to submit a bid on Item 5. B&B has not responded to the motion.

On March 9, 1999, Mid-Atlantic Waste Systems filed a protest, docketed as CAB No. P-578, also challenging the bilateral modification to MIT's contract. In a March 26, 1999 conference, Mid-Atlantic and the District agreed that this contract modification issue was raised in the related protests of GranTurk and B&B and that additional filings were unnecessary because the protest issue has been adequately briefed.

DISCUSSION

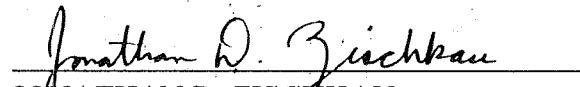
Protests, other than those based upon alleged improprieties in a solicitation, must be filed not later than 10 business days after the basis of protest is known or should have been known, whichever is earlier. D.C. Code § 1-1189.8(b) (Supp. 1998). GranTurk knew the basis for its protest challenging the nonresponsiveness determination by July 1998 but did not file a protest until January 8, 1999. The contracting officer's undertaking to reexamine the nonresponsiveness determination did not toll the deadline for filing its protest. *CUP Temporaries, Inc.*, CAB No. P-263, Aug. 31, 1993, 41 D.C. Reg. 3615, 3616; *Tandy Construction, Inc.*, B-238619, Feb. 22, 1990, 90-1 CPD ¶ 206.

Regarding GranTurk's challenge of the modification of "MIT's bid," that argument must fail because the December 22, 1998 bilateral modification was made to the contract awarded to MIT on November 5, 1998. The post-award modification had no effect on bidders or the underlying competition because MIT's bid was responsive notwithstanding the post-award substitution of one truck body for another. This disposition resolves the issues raised by B&B and Mid-Atlantic in their protests. The protests of B&B and Mid-Atlantic must be dismissed, however, because the record shows that: (1) B&B lacks standing to protest award Item 5 since it did not submit a bid; and (2) Mid-Atlantic's protest is untimely because Mid-Atlantic received notice of the basis for its protest when it received a copy of the District's February 1, 1999 motion to dismiss (filed in GranTurk's protest), but did not file until March 9, 1999.


- 5 - *GranTurk Equip., et al.*, CAB Nos. P-568, P-571, P-578


Accordingly, GranTurk's protest is dismissed in part and denied in part. The protests of B&B and Mid-Atlantic are dismissed.

DATED: March 26, 1999


JONATHAN D. ZISCHKAU
Administrative Judge

CONCURRING:


LORILYN E. SIMKINS
Chief Administrative Judge


PHYLLIS W. JACKSON
Administrative Judge