

GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

PROTESTS OF

J&R ROOFING CO , INC)
) CAB Nos P-548, P-550
Under IFB No DCPS-I-98022-OC) (Consolidated)

For the Protester Joel S. Rubinstein, Esq., Bell, Boyd & Lloyd For the Government Howard Schwartz, Esq., and Warren J. Nash, 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 ¹

OPINION

These consolidated protests challenge a solicitation and subsequent contract awards for roof replacement at various District public school buildings. J&R argues that the solicitation had a number of ambiguities that should have been clarified by the procuring agency, the District of Columbia Public Schools ("DCPS"), through solicitation amendments prior to bid opening. J&R also protests the contract awards which were made by the District of Columbia Financial Responsibility and Management Assistance Authority ("Authority") on the ground that J&R, not the awardees, were the low, responsive, and responsible bidder under seven of eight award groups defined by the solicitation. Although the District challenges our jurisdiction over the protests because the Authority awarded the contracts, we conclude that these protests are subject to the Procurement Practices Act and our protest jurisdiction. On the merits, we conclude that DCPS's responses or failures to respond to J&R's clarification requests do not warrant sustaining the solicitation protest. In addition, we conclude that J&R's protest of the awards is without merit. Accordingly, we deny both protests.

BACKGROUND

On April 15, 1998, the District of Columbia Public Schools ("DCPS") issued Solicitation No DCPS-I-98022-OC, entitled "Design-Build Roof Replacement FY98," to potential bidders for roof replacement at various public school buildings (Agency Report ("AR"), Ex. 1). Besides issuing the IFB, DCPS funded the procurement and developed the solicitation, with assistance from the United States Army Corps of Engineers (AR Ex. 4 (Ross Aff. ¶ 2)).

On the cover page, the solicitation states that

¹ Judge Booker, originally assigned as the presiding judge, resigned from the Board prior to the disposition of this case.

The undersigned offers and agrees that, with respect to all terms and conditions by the District of Columbia Public Schools under "AWARD" below, this offer and the provisions of the RFP/IFB will constitute a Formal Contract. All offers are subject to the terms and conditions contained in the solicitation.

Under the "AWARD" section on the cover page, it is stated that award is "to be completed by the District of Columbia Public Schools" and executed by a contracting officer on behalf of DCPS. (AR Ex 1) Section A 1 of the solicitation provides the following statement of intent:

It is the District of Columbia Public School's (DCPS) intent to procure design and construction services to replace the specified roofs from the most responsible vendors at the lowest available price and in the manner most advantageous to the District of Columbia Public Schools. The roofs are to be of commercial quality, which will operate efficiently and remain free of unreasonable failure and defects throughout its intended life span. The work includes, but is not necessarily limited to, construction of roofs for various schools located in the District of Columbia as identified herein.

Section A 2 specified that the resulting contract would be a firm-fixed-price type contract. The solicitation defined eight award groups and provided that bidders could bid on any or all of the eight award groups (*Id*). Sections E, F, and G provide that DCPS was to be responsible for all aspects of contract administration, performance evaluation, inspection, and final acceptance of the work. Section G provides that DCPS was responsible for payment of invoices, including progress payments and final payment, and contract administration. Warranty, liquidated damages, and termination rights were to be exercised by DCPS pursuant to Section H. Section I 5 2 provides that DCPS may accept an offer by a "written award or acceptance of offer mailed or otherwise furnished to the successful offeror." Section I 7 makes clear that the contract was to be funded by DCPS appropriated funds and that DCPS' "obligation under this contract is contingent upon the availability of appropriated funds from which payment for contract purposes can be made." DCPS was also the responsible District entity under the Suspension of Work, Changes, Default, Excusable Delays clauses. The Contract Disputes clause, Section I 15, provides that the DCPS CEO/Superintendent is responsible for issuing a final written decision on any dispute relating to a contract which is not resolved by informal discussions between the contracting officer and the contractor. The clause provides that the contractor may appeal the CEO/Superintendent's decision to the Contract Appeals Board. Section M 1 provides that DCPS will evaluate bids, will make awards, and may reject bids and waive informalities or minor irregularities in bids.

In the specifications, entitled "Design-Build Project Requirements," DCPS is repeatedly identified as the contracting agency with responsibility for contracting, design review, inspection, and payment authority. (AR Ex 1, Vol 2) In Section III, Part 1, Item 1.2, the specification states that "All questions concerning bid submissions shall be directed to the DCPS Contracting Officer in writing."

In Section II, Part 3, Item 1 2 1, the specification states

The information provided in the attached scopes of work and sketches is based on field observations and accessibility to roof areas at the time and is intended to be representative of the existing conditions. The documents in Appendix A are not design documents. It is the Contractor's responsibility to confirm existing conditions and verify quantities and dimensions in the bids and eventually prepare design documents for approval by DCPS.

DCPS issued Amendment 1 of the solicitation on April 17, 1998, Amendment 2 on April 24, 1998, and Amendment 3 on April 29, 1998 (AR Ex. 2, Tabs 1-3). Amendment 4, issued by DCPS on May 1, 1998, states that the "DCPS Contracting Officer for this project is Mr. Paul Ross" (AR Ex. 2, Tab 4, at 6 (Section 01010, Part 1, Item 1.2.B)). Attached to Amendment 4 was a 7-page DCPS document dated May 1, 1998, responding to prospective contractor's questions regarding the solicitation. With regard to one bidder's observation that dimensions in drawings provided by DCPS differed from actual dimensions measured by the bidder in the field, and that the bidder intended to "bid per plans and specifications," DCPS replied "This is a Design/Build contract. The roof diagrams attached to the bid documents must be field verified" (AR Ex. 2, Tab 4). DCPS issued Amendment 5 on May 2, 1998, and Amendment 6 on May 9, 1998 (AR Ex. 2, Tabs 1-6).

Bids from 17 bidders were opened on May 14, 1998, by DCPS. DCPS oversaw bid opening with assistance from the Corps of Engineers, DCPS reviewed the bids at bid opening, DCPS evaluated bids, and DCPS prepared the bid tabulation, all with assistance from the Corps of Engineers (AR Ex. 4 (Ross Aff. ¶ 2)). After DCPS evaluated the bids, it would have been customary for the DCPS contracting officer to notify the successful bidders of their awards and provide notices to proceed with work. That did not happen here. Rather, in a manner similar to that described in another DCPS protest, *A. L. Eastmond & Sons*, CAB No. P-551, Sept. 9, 1998, 45 D.C. Reg. 8826, 8830, a representative on behalf of the Authority awarded the contracts to the successful bidders. In making the awards, the Authority made several changes to each successful bidder's bid cover page. First, the heading "District of Columbia Public Schools" which appeared just above the title "Solicitation, Offer, and Award for Supplies and/or Services" on the original solicitation cover sheet, was crossed out. Second, the block on the form indicating that DCPS had issued the solicitation was modified by adding the following information:

Award Issued By

DC Financial Responsibility and Management
Assistance Authority (DCFRA)
One Thomas Circle, NW, Suite 900
Washington, DC 20005

Third, the line at the bottom of the form which originally read "Award (To be completed by the District of Columbia Public Schools)" was annotated by replacing "District of Columbia Public Schools" with "DCFRA." Fourth, the contract number was prefixed with "DCFRA." Finally, the contracting officer's signature block was changed by replacing the "District of Columbia Public Schools" heading with "DC Financial Responsibility Authority." The successful bidders who received awards on June 15, 16, and 18, and July 17, 1998, and their award groups, and contract prices are as follows:

Award Group	Contract Awardee	Contract Price
1	MTI Construction Co	\$1,716,825
2	Roofers, Inc.	\$2,237,975
3	H R. General Maintenance Corp	\$1,221,241
4	Roofers, Inc	\$2,054,966
5	Beta Construction Corp.	\$1,257,550
6	Brothers Construction	\$939,164 06
7	MTI Construction Co	\$1,396,082
8	Brothers Construction	\$1,748,214 83

On June 23, 1998, J&R filed a protest of an award under Award Groups 1-4 and 6-8 to any one other than itself. Enclosed with the protest was a copy of a protest letter of May 22, 1998, sent to the DCPS Chief Procurement Officer, challenging the responsiveness and responsibility of various other bidders. On July 13, 1998, the District moved to dismiss J&R's protests on the ground that the Authority, not the District government, is the contracting party, and its contracts are not subject to the Procurement Practices Act. The District filed its Agency Report on August 25, 1998.

DISCUSSION

Jurisdiction

The District states that the Authority has taken over the roof replacement procurement and that it, not DCPS, awarded the contracts to the successful bidders. According to the District, because the Authority awarded the contracts, and the Board lacks authority to consider protests of awards by the Authority, the Board must dismiss the protests. J&R argues that the Authority's power to enter into contracts pursuant to section 103 of Public Law No. 104-8, the Act which established the Authority, is not applicable to the DCPS solicitation here, where the solicitation was issued and conducted by and for DCPS, and contract performance will be administered and funded by DCPS. This jurisdictional issue is essentially the same as that raised and decided by us in an earlier protest, *A L Eastmond & Sons*, CAB No. P-551, Sept. 9, 1998, 45 D.C. Reg. 8826. As in *A L Eastmond*, all aspects of the solicitation and procurement leading up to award were conducted by the DCPS contracting officer. At the time DCPS issued the solicitation, the Procurement Reform Amendment Act of 1996, D.C. Law 11-259, made DCPS procurements subject to the Procurement Practices Act, D.C. Code § 1-1181.4(a) (Supp. 1998), and protests of those procurements subject to Board jurisdiction, *id.* § 1-1189.3(a)-(b). All six solicitation amendments were issued by DCPS, the last one issued only days before bid opening. The solicitation and amendments, including the protest procedures incorporated by operation of law in DCPS procurements,

make clear that the solicitation and any award under the solicitation was subject to the Board's protest jurisdiction. As in *A L Eastmond*, the Authority did not issue any solicitation amendment taking control over the procurement or eliminating protest rights of bidders. Nor did the Authority suggest that it intended to deprive bidders of their protest rights when it executed the contracts on behalf of DCPS. Therefore, based on the record presented to us, it is clear that Board protest jurisdiction was intended and never revoked and we properly exercise jurisdiction pursuant to D.C. Code § 1-1189.3 (Supp. 1998).

The Solicitation Protest

J&R challenges a number of solicitation provisions and failures of DCPS to clarify. We address them seriatim.

The first issue relates to a DCPS response to a question submitted by J&R during the bid phase. Attached to Amendment No. 4, dated May 1, 1998, were 7 pages of answers to questions submitted by various prospective bidders (AR Ex. 2, Tab 4). In its Question 11, J&R stated that a specified one-quarter inch per foot taper insulation, when installed, "will bury the existing through wall flashing." J&R states that "industry standards do not permit installing the specified counter-flashing eight inches above it" as indicated on specification page 07620-11 (Part 3.2), Item N. J&R asked for a corrected design parameter. In the same question, J&R also asked whether the tapered insulation could be omitted based on manufacturer warranties as in prior years. DCPS's response was, "Contractor will design the roof system to comply with the owners guide specifications and the recommendations of the manufacturers' representative." We have reviewed the specification provisions and the question and answer. The record does not demonstrate an irreconcilable conflict between the DCPS guide specifications and industry standards or manufacturer's recommendations.

J&R argues that for Hyde Elementary School, Section III (Scope of Work), Items C.4 and D.5 (both of which state "Install flashing around dormer window"), are unclear concerning whether DCPS "is referring to the facade at the south dormer only or the flashing only behind the horizontal wings." We agree with the District that these provisions are sufficiently clear.

J&R challenges language in Amendment No. 4, page 2, paragraph n, which states "Hyde ES, page 3, Add Alternate 1 subparagraph AA1, DELETE, the word East and insert, South." It is clear that this entire reference is in error because there was no subparagraph AA1 or "Add Alternate 1" in the Scope of Work for Hyde Elementary School and Amendment No. 4 deleted the "Add Alternate" paragraph from the original bid form. Thus, the proposed change to delete "east" and insert "south" was listed in error. This attempted change to a nonexistent specification represents a minor error in the solicitation and had no effect on the ability of firms to submit a bid for this school. J&R does not indicate in the protest record that it ever raised this issue with DCPS prior to submitting its May 14, 1998 protest letter to DCPS.

Also with regard to the Hyde Elementary School scope of work, J&R argues that the word "seal" in Item B.7 (B.7 states: "Install stepped wall counter flashing at the chimneys. Seal top and all joints.") is ambiguous and might mean either repointing the chimney brick with mortar or sealing by caulking. We

agree with the District that under customary trade usage, the work "seal" refers to using a sealant and that roofing contractors would understand this term and its customary trade usage. Because scopes of work for other schools in the solicitation explicitly call for repointing brick with mortar, the solicitation as a whole confirms the meaning intended in B 7 of Hyde's scope of work. J&R does not indicate in the protest record that it ever raised this issue with DCPS prior to submitting its May 14, 1998 protest letter to DCPS.

J&R states that, for Hyde Elementary School, Roofs A, D, and C were flat seam metal roofs on the building but the scope of work (*eg*, Item A 1) called for standing seam metal roofs on felt substrate. Stating that Roof A is too flat for installation of standing seam, and Roofs C and D are flat at the top, J&R stated that it needed to know whether standing seam was requested in all areas or only in the sloped areas. The District responds that under a design/build contract such as this one, the contractor was expected to use customary trade practice in assessing the exact areas for use of standing seam. We agree with J&R that DCPS should have responded to this question, but we conclude that DCPS's failure did not prevent J&R and the other bidders from making a reasonable estimate for a design/build bid. J&R does not indicate in the record that it raised this issue with DCPS prior to its May 14, 1998 protest letter to DCPS.

In its May 14 protest letter, J&R argued that various bid forms contained errors pertaining to roof elevations. J&R now concedes that those errors were corrected by Amendment No. 6, but maintains that the corrections were made only three days before bid opening and caused confusion in bid preparation. J&R may be correct that it caused confusion. Undoubtedly, DCPS should have corrected the errors as early in the bid process as possible in order to obtain the most accurate bids possible. Nevertheless, we are not convinced that the errors were so subtle as to prevent competent bidders from properly estimating the individual projects.

J&R complains that the bid form for Eaton Elementary School identifies "Johnson Elementary School" in one place on the last page. We believe that when the bid form is read in its entirety, there is no reasonable question as to which school is concerned.

J&R states that it sought additional information concerning the roof removal process over concrete substrates where bitumen from previous roof installation is often found adhered to the deck. J&R asked whether the remaining residue of bitumen that adhered to the substrate would be allowed to remain or whether it would have to sand, chip and scrape the concrete substrates. The District responds that no further answer is necessary because a contractor performing roofing replacement should be familiar with the residue standards consistent with customary trade practice and the roofing manufacturer's requirements necessary to retain the manufacturer's warranty. J&R has not shown any conflict between customary trade practice and DCPS's guideline specifications. Thus, we do not find merit in J&R's complaint.

J&R states that it had an unresolved question concerning the project requirements found at page 07552-19, part 3.7 E, specifically whether walk pads were required around all exhaust fans. We believe the requirement reasonably answers that question. It states "Walkway Pads: Provide walkway pads from roof hatches, access doors, and ladders to roof mounted mechanical and electrical equipment using units of manufacturer's standard size.

J&R argues that it received no response to its question concerning whether there is a requirement to have a full-time quality control inspector and/or project manager on each site. J&R also states that it requested but never received a description of the specific scope of work for the quality control inspector and/or project manager. We conclude that Amendment No. 2 provided bidders sufficient information with respect to these questions. Amendment No. 2, paragraph 1, added section 01440 ("Contractor Quality Control"), which specifies in detail the required quality control personnel, and performance and documentation requirements.

In its DCPS protest letter of May 14, 1998, J&R stated:

Several questions have been raised regarding omission of the specified one-quarter in (1/4") per foot slope for tapered insulation. If during inspection of each school it is determined that one or more schools already have a 1/4" per foot slope to the substrate, can the additional specified 1/4" per foot slope be omitted? This question has been asked but has not been answered.

This essentially restates the first issue, which was addressed in Item 11 of J&R's questions in the May 1, 1998 DCPS responses to bidder questions. The preamble to Part 2.5 ("Insulation Materials") at page 07552-11 states the contractor is to "[p]rovide preformed, roofing insulation boards that comply with requirements, selected from manufacturer's standard sizes and of thicknesses indicated, approved by roofing membrane manufacturer for roofing membrane system. Provide preformed, tapered insulation boards where indicated for sloping to drain. Fabricate with the following taper: a 1/4 inch minimum per 12 inches (1:48) typical for roofs, crickets, saddles and tapered edge strips." We believe the requirements provided adequate information to a roofing bidder.

Regarding the requirement for free flow drainage, J&R states that it asked DCPS for any information available on blockages or breakages within the existing rain leader systems but received no answer. The District responds that the scopes of work (section C) contained all available information for individual schools. In reply, J&R states on information and belief that there was a broken storm water pipe below slab at Stuart Hobson School which was not disclosed by DCPS. Clearly, a bidder prepares its bid based on what is disclosed and is reasonably discoverable through pre-bid inspection based upon the circumstances. Undisclosed and hidden defects are resolved through the Changes and Differing Site Conditions clauses during performance. Accordingly, we find no merit in J&R's argument.

With regard to J&R's question regarding whether the asbestos removal contractor might also act as the "Qualified Assessment Firm" mentioned in Part II-3-3, Section 2.1.1, we agree with the District that the solicitation did not require that the asbestos removal contractor and the qualified assessment firm be different entities and therefore no further DCPS response was required.

J&R states that it sought a contractual definition for masonry damage but received no response. We believe that in the absence of a DCPS definition, the contractor would interpret those terms according to customary trade usage.

Concerning the scopes of work which state, for example, "repair damaged roof mounted fixtures, including security lighting, conduits, and public address system and make operable," J&R sought information from DCPS identifying the specific problems with the fixtures and how to make them operable. In the DCPS question and answer responses of May 1, 1998, DCPS responded "Bid on what is available in the specification with the understanding that items mentioned must be made operable." We are satisfied that from the scopes of work and their pre-bid surveys and investigations, bidders were able to formulate a bid on the roof mounted fixtures.

Finally, J&R argues that the requirement of a minimum eight inch height above the roof membrane for base flashing, found at page Q7552-20, part 3 8 B, is impossible to meet due to the existing through-wall metal flashing height. J&R states that it received no response to a request for guidance. However, a review of part 3 8 indicates that the contract is to install flashing according to the roofing system manufacturer's written instructions and the specified requirements. J&R has not shown any intrinsic conflict between the flashing requirements and the roofing system manufacturer's written instructions.

In sum, none of the solicitation issues raised by J&R merit sustaining the solicitation protest, CAB No P-548.

The Protest of the Awards

J&R argues that no bidder other than J&R submitted either a fully executed tax certification affidavit as required by Section J of the solicitation, or the forms and other material required by the affidavit. The District correctly notes that submitting the tax certification affidavit is a matter of responsibility, not responsiveness, which can be corrected prior to award. *C&D Tree Service*, CAB No P-295, Nov 2, 1993, 41 D.C. Reg. 3691, 3698. In reply, J&R argues vaguely that "certain licensing documentation rises to a definitive criteria of responsibility." J&R errs on both counts. Thus, we reject this ground of protest.

J&R argues that the bids of Roofers, Inc., and several other bidders, were untimely because the bids were received by DCPS after 3 p.m. on May 14, 1998. The District responds that Amendments 5 and 6 changed the bid opening time from 3 p.m. to 4 p.m. and the bids were received prior to 4 p.m. and are thus timely. J&R replies that "bid closing time was established as 3 p.m. and was never changed" and that the "only thing that Amendment No. 6 changed was the bid opening date from May 11 to May 14." We do not agree. Amendment No. 5 states in pertinent part "The closing date and time of opening for subject solicitation is hereby extended from May 6, 1998, opening time 3:00 P.M. EST to **May 11, opening time 4:00 p.m. EST**." Amendment No. 6 states "The closing date and time of opening for subject solicitation is hereby extended from May 11, 1998, to **May 14, 1998**." Thus, Amendment No. 6 modified the bid opening from May 11, 1998, at 4 p.m., to May 14, 1998, at 4 p.m. No amendment ever changed bid opening time back to 3 p.m. Contrary to implication made by J&R, neither the solicitation nor the amendments established a different time for "bid closing" and "bid opening." Rather, the solicitation and amendments refer to the "closing date" and the "time of [bid] opening." Thus, bids were due by the time of bid opening on the closing date.

J&R argues that it was the low, responsive, and responsible bidder under Award Group 1, by challenging the lower bids of seven other bidders under that award group. With regard to MTI, the awardee under Award Group 1, J&R alleges that MTI "failed to include reference to having any experience with bitumen roofing systems," "failed to provide a clear description of how work assignments relate to schools in the Group packages as required by the specifications," and "failed to provide the required engineer's letter in connection with the Hyde Elementary School portion of the work." As the District correctly responds, these matters are not matters of responsiveness and do not merit rejection of MTI's bid. This also resolves J&R's challenge of the award made to MTI under Award Group 7.

J&R argues that it was the low, responsive, and responsible bidder under Award Group 2, by challenging the lower bids of six other bidders under that award group. With regard to Roofers, Inc., the awardee under Award Group 2, J&R alleges that Roofers "failed to submit a photocopy of the license of a professional engineer or architect, a definitive criteria of responsibility," and "restricted and therefore improperly qualified its bid by limiting its scope of work to what Roofers characterized as its 'practical approach' instead of performing what is required under the specifications." As the District correctly responds, the license is a matter of responsibility, that may be corrected prior to contract award. Although Section M 1 5, added by Amendment No. 2, states that bids omitting the license "will be considered non-responsive" that language does not convert what is clearly a matter of responsibility into one of responsiveness. See, e.g., *C&D Tree Service*, 41 D.C. Reg. at 3699-3700. Concerning the alleged qualification of Roofers' bid, we agree with the District that the reference to the "practical approach" was consistent with the requirements of this design/build contract which required bidders to use the scope of work as a guideline in developing a design that would meet the stated performance requirements. Thus, we conclude that the language in Roofers' bid, when properly construed, does not amount to a qualification of its bid. This also resolves J&R's challenge of the award made to Roofers under Award Group 4.

J&R argues that it was the low, responsive, and responsible bidder under Award Group 3, by challenging the lower bids of four other bidders under that award group. With regard to H.R. General Maintenance Corp., the awardee under Award Group 3, J&R alleges that H.R. "failed to provide any evidence of its subcontractor's experience." As the District correctly responds, this matter is not one of responsiveness and does not merit rejection of H.R.'s bid.

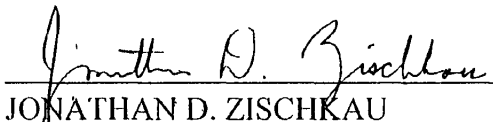
J&R argues that it was the low, responsive, and responsible bidder under Award Group 6, by challenging the lower bids of seven other bidders under that award group. With regard to Brothers Construction, the awardee under Award Group 6, J&R alleges that Brothers "lists no relevant experience for itself or its subcontractors and no specific work assignments as required under the specifications." As the District correctly responds, these are matters of responsibility and contract administration, not of responsiveness. J&R cites no valid ground meriting rejection of Brothers' bid. This also resolves J&R's challenge of the award made to Brothers under Award Group 8.

None of the grounds stated in J&R's award protest, CAB No. P-550, have any merit.

CONCLUSION


J&R's protests of the solicitation and the resulting awards are denied

DATED March 22, 1999

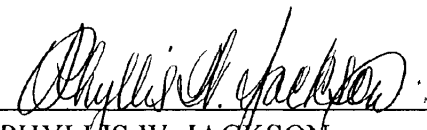


JONATHAN D. ZISCHKAU
Administrative Judge

CONCURRING



LORILYN E. SIMKINS
Chief Administrative Judge



PHYLLIS W. JACKSON
Administrative Judge