

DISTRICT OF COLUMBIA CONTRACT APPEALS BOARD

PROTESTS OF:

KEYSTONE PLUS CONSTRUCTION CORP.)
Solicitation No: DCAM-2009-B-0040)

CAB Nos. P-0822, P-0830, P-0832

For the Protester: John Hardin Young, Esq. For the Intervener: Mr. Keith Forney, President, FEI Construction Company. For the District of Columbia Government: Talia Cohen, Esq., Howard Schwartz, Esq., Assistant Attorneys General.

Opinion by Administrative Judge Warren J. Nash, with Chief Administrative Judge Jonathan D. Zischkau, concurring.

OPINION

Filing ID 29663771

Keystone Plus Construction Corporation protests the decision of the contracting officer to award to Forney Enterprises, Inc. ("FEI"), a contract for renovations of Building #52 at the University of the District of Columbia's ("UDC") Van Ness Campus. Keystone's bid was determined to be nonresponsive due to an inadequate certified business enterprise ("CBE") subcontracting plan. Because the CBE subcontracting plan in Keystone's bid was materially incomplete, Keystone's bid was nonresponsive pursuant to D.C. Code § 2-218.46(d). Accordingly, the contracting officer did not err in determining Keystone's bid to be nonresponsive. We dismiss in part and deny in part the consolidated protests.

BACKGROUND

On July 8, 2009, the District’s Office of Property Management, Contracts Division for the District of Columbia Government, issued Invitation for Bids No. DCAM-2009-B-0040 (“IFB”) in the Open Market for a contractor to provide all labor, materials, equipment, and supervision for the renovation of Building #52, University of the District of Columbia, Van Ness Campus, 4350 Connecticut Avenue, NW, Washington, DC, 20008. (Agency Report (“AR”); AR Ex. 1).

Between July 15, 2009, and August 25, 2009, the District issued 12 amendments. (AR Ex. 1). Section B.2 of the IFB provides:

Any prime contractor responding to this solicitation must submit with its bid, a notarized statement detailing its subcontracting plan. Proposals responding to this IFB shall be deemed nonresponsive and shall be rejected if the bidder fails to submit a subcontracting plan that is required by this solicitation. 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 M.1.5.

(AR Ex. 1). In addition, pursuant to Section M.1.1, the IFB allowed preferences in evaluating bids under the Small, Local, and Disadvantaged Business Enterprise Development and Assistance Act of 2005. (AR Ex. 1). Section L.9 of the IFB initially provided:

L.9 SUBMISSION OF SUBCONTRACTING PLAN:

L.9.1 Any prime contractor responding to this solicitation shall submit, within 5 days of the CO's request, a notarized statement detailing it [sic] plan. This plan shall meet the requirements described under Section M.1.10 of this solicitation.

L.9.2 A Contractor cannot make any changes to its subcontracting plan without prior written approval by the CO. The approved plan will be incorporated into and become part of the contract.

(AR Ex. 1). On August 21, 2009, the District issued Amendment 9, which required bidders to submit a subcontracting plan with the bid consistent with Sections B.2 and M:

(1) Section L.9 of the solicitation is hereby changed to read as follows:

L.9.1 Any prime contractor responding to this solicitation shall submit with the bid, a notarized statement detailing its subcontracting plan. This plan shall meet the requirements described under Section M.1.10 of this solicitation.

(2) All other terms and conditions remain the same.

The first page of the solicitation at section 6 of Standard Form A made applicable a provision stating: "Open Market with set aside for LSDBE subcontracting (see Sec-M)". (AR Ex. 1). The referenced Section M provides in pertinent part:

M.1.5 Mandatory Subcontracting Requirement

M.1.5.1 For construction contracts in excess of \$250,000, at least 35% of the dollar volume of the construction contract shall be subcontracted to certified small business enterprises; provided, however, that the costs of materials, goods and supplies shall not be counted towards this 35% subcontracting requirement unless such materials, goods and supplies are purchased from SBEs. . . .

M.1.6 Certified Business Enterprise Prime Contractor Performance Requirements

M.1.6.1 If a certified business enterprise is selected as a prime contractor and is granted a price reduction pursuant to the Act or is selected through a set-aside program under the Act, that certified business enterprise prime contractor shall perform at least 35% of the contracting effort, excluding the cost of materials, goods and supplies, with its own organization and resources and, if it subcontracts, at least 35% of the subcontracted effort, excluding the cost of materials, goods and supplies, shall be with certified business enterprises. . . .

M.1.9 Subcontracting Plan

Any prime contractor responding to this solicitation shall 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 fails to submit a subcontracting plan that is required by this solicitation. Once the plan is approved by the contracting officer, changes will only occur with the prior written approval of the contracting officer and the Director of DSLBD. Each subcontracting plan shall include the following:

M.1.9.1 A description of the goods and services to be provided by SBEs or, if insufficient qualified SBEs are available, by any certified business enterprises;

M.1.9.2 A statement of the dollar value of the bid that pertains to the subcontracts to be performed by the SBEs or, if insufficient qualified SBEs are available, by any certified business enterprises;

M.1.9.3 The names and addresses of all proposed subcontractors who are SBEs or, if insufficient SBEs are available, who are certified business enterprises;

M.1.9.4 The name of the individual employed by the prime contractor who will administer the subcontracting plan, and a description of the duties of the individual;

M.1.9.5 A description of the efforts the prime contractor will make to ensure that SBEs, or, if insufficient SBEs are available, that certified business enterprises will have an equitable opportunity to compete for subcontracts;

M.1.10 Compliance Reports

By the 21st of every month following the execution of the contract, the prime contractor shall submit to the contracting officer and the Director of DSLBD a compliance report detailing the contractor's compliance, for the preceding month, with the subcontracting requirements of the contract. The monthly compliance report shall include the following information. . . .

(AR Ex. 1). Viewing the solicitation as a whole, we find that the solicitation clearly required bidders to submit with their bids a certified business enterprise subcontracting plan and made the subcontracting plan submission a matter of bid responsiveness.

On August 31, 2009, the following eleven prospective contractors submitted bids in response to the IFB: (1) Chiaramonte Construction Company (\$5,342,094.03); (2) Horton & Barber (\$6,142,400.00); (3) Keystone (\$6,389,100.00); (4) FEI (\$6,450,400.00); (5) Hess Construction (\$7,150,000.00); (6) GCI, Inc. (\$7,341,500.00); (7) Specialty Construction (\$7,992,400.00); (8) Prince Construction Company (\$8,688,000.00); (9) Apex Services, Inc. (\$8,564,500.00); (10) Maryland Construction (\$8,184,483.00); and, (11) Ammka Inc. (\$9,649,600.00). (AR Ex. 2).

The District prepared an Evaluated Bid Tabulation indicating the following regarding the four lowest bidders: (1) Chiaramonte offered the lowest evaluated price of \$5,342,094.03; (2) Horton & Barber offered the second lowest evaluated price of \$6,142,400.00; (3) Keystone offered the third lowest evaluated price of \$6,389,100.00; and (4) FEI offered the fourth lowest evaluated price of \$6,450,400.00. (AR Ex. 2).

In its subcontracting plan, Keystone omitted the total dollar amount of subcontracts, and the total dollar amount of LSDBE subcontracts. For the LSDBE percentage set-aside, Keystone stated that the percentage equaled 35% but an asterisk below reads: "if awarded, [Keystone] shall subcontract a minimum of 35% to LSDBE's." (AR Ex. 3). This notation suggests that Keystone intended to have more than one LSDBE subcontractor. However, only one subcontractor is listed on the subcontracting plan, Swann Construction, and for that subcontractor, the lines requesting the total subcontract dollar amount and the percentage of the total set aside amount are left blank. The plan included Swann's address, telephone number, email address, LSDBE certifications, and statement of work items to be performed. (AR Ex.3). At an evidentiary hearing on January 7, 2010, Keystone witnesses provided no testimony to support a finding that its subcontracting plan included in its bid was materially complete. As described below, the evidence shows that the initial subcontracting plan was materially incomplete at the time of bid opening.

By letter dated August 31, 2009, Chiaramonte requested permission to withdraw its bid as its bid contained a mathematical error. (AR Ex. 2). In the belief that the District intended to award the proposed contract to Horton & Barber, Keystone file a protest with the Board on September 10, 2009 (docketed as CAB No. P-0822), challenging any contract award to Horton & Barber or any other company other than Keystone. On October 7, 2009, the District reviewed Horton & Barber's bid and found it to be nonresponsive due to an insufficient bid bond. (AR Ex. 6). On October 8, 2009, the District reviewed the bid of Keystone and found it nonresponsive due to an incomplete subcontracting plan. (AR Ex. 6).

On October 13, 2009, the contract specialist contacted Keystone's subcontractor, Swann Construction. (AR Ex. 7). Swann failed to respond to the contract specialist. On October 13, 2009, the contract specialist also contacted Keystone, requesting a list of its subcontractors and the percentages of work to be performed. (AR Ex. 7; Tr. 14). On October 14, 2009, Keystone sent an email to the District stating, in pertinent part:

Please find below our preliminary estimate of subcontractors for UDC Bldg 52

Subcontractor	Percentage	Designation
Dominion Electric of Washington, D.C.	20%	CBE
Swann Construction	19%	CBE
SEF Metal Fabricators	8%	DBE
Calvert Jones	53%	n/a

(AR Exs. 5, 6; Tr. 19). By a Determination and Findings for Award to Other than Low Bidder, dated October 21, 2009, the contracting officer determined inter alia that Keystone's bid was nonresponsive for failure to submit a complete subcontracting plan and, based on Keystone's

October 14, 2009 email, District officials noted that “[f]urther review revealed that Keystone intended to subcontract 100% of the contract out for completion. This is in violation of D.C. Code 2-218.46(b)(1) (A).” (AR Ex. 2).

On October 22, 2009, Keystone provided another subcontracting plan to the District via email. The plan, dated October 9, 2009, included only two subcontractors: Swann and Dominion Electric. (Keystone’s Exhibits B and C attached to Roubin affidavit of December 12, 2009).

On October 29, 2009, the District filed a motion to dismiss Keystone’s protest in P- 0822 based on mootness and lack of standing. On October 29, 2009, Keystone filed with the Board an additional protest (CAB No. P-0830) challenging the District’s rejection of Keystone’s bid as nonresponsive. On November 4, 2009, Keystone filed a response to the District’s motion to dismiss in P-0822. On November 5, 2009, Keystone filed a third protest (CAB No. P-0832) challenging FEI’s subcontracting plan. The Board consolidated protests P-0830 and P-0832. On November 12, 2009, the District filed a notice of intent to award dated November 10, 2009, in P-0822, P-0830 and P-0832 (consolidated) and filed a Determination and Findings to Proceed with Contract Award while a Protest is Pending. On November 25, 2009, the District filed its agency report and motion to dismiss in CAB Nos. P-0830 and P-0832. A hearing before the Board was held on January 7, 2010, and the parties have filed post-hearing briefs.

DISCUSSION

We exercise jurisdiction pursuant to D.C. Code § 2-309.03(a)(1). The main issue presented in these consolidated protests is whether the contracting officer properly determined that Keystone’s admittedly incomplete subcontracting plan furnished with its bid rendered Keystone’s bid nonresponsive.

D.C. Code §§ 2-218.46(d) and (e) provide:

(d) Bids or proposals responding to a solicitation, including an open market solicitation, shall be deemed nonresponsive and shall be rejected if the solicitation requires submission of a certified business enterprise subcontracting plan and the prime contractor fails to submit a subcontracting plan as part of its bid or proposal. A certified business enterprise subcontracting plan shall specify the following:

- (1) The name and address of the subcontractor;
- (2) Whether the subcontractor is currently certified as a certified business enterprise;
- (3) The scope of work to be performed by the subcontractor; and
- (4) The price to be paid by the contractor to the subcontractor.

(e) No prime contractor shall be allowed to amend the subcontracting plan filed as part of its bid or proposal except with the consent of the contracting officer and the Director. Any reduction in the dollar volume of the subcontracted portion resulting from such amendment of the plan shall insure [sic] to the benefit of the District.

There is no dispute that subsection 2-218.46(d) applies to this procurement and the procuring agency. As the facts amply demonstrate, the solicitation was an open market solicitation requiring submission of a certified business enterprise subcontracting plan. Section M of the solicitation tracks much of the language of D.C. Code § 2-218.46, including subsection 2-218.46(d). Thus, each bidder was required to submit a complete subcontracting plan including the name and address, current CBE certification status, scope of work, and price to be paid, for each subcontractor.

Keystone argues that the subcontracting plan language from Amendment No. 9, when read in conjunction with the mistakenly referenced Section M.1.10 regarding compliance reports, somehow makes the CBE subcontracting requirements only a matter of responsibility, which Keystone could have satisfied after bid opening but before contract award. Indeed, prior to enactment of D.C. Code § 2-218.46 in 2005, District procurement law addressed subcontracting plans in bids as a matter of bidder responsibility, not responsiveness. However, section 2-218.46, in regulating performance and subcontracting requirements, including CBE participation, mandates that CBE subcontracting plans, under certain defined circumstances which are applicable here, be a matter of bid responsiveness. Although Amendment No. 9 lacked the clarity and precision that one would expect, Section M, particularly M.1.9, of the solicitation provides more than adequate clarity that the subcontracting plan here was a matter of responsiveness. Each bidder in this procurement was required to submit a CBE subcontracting plan with its bid. In future applicable solicitations, contracting officers should make very clear in the relevant parts of the solicitation the fact that a CBE subcontracting plan is required with the bid, including the statutorily required information, and that a materially incomplete subcontracting plan at the time of bid opening will render the bid nonresponsive.

On the facts presented in the record, Keystone's subcontracting plan was materially incomplete so as to render its bid nonresponsive. In its subcontracting plan, Keystone omitted the total dollar amount of subcontracts, and the total dollar amount of LSDBE subcontracts. For the LSDBE percentage set-aside, Keystone stated that the percentage equaled 35% but states further: "if awarded, [Keystone] shall subcontract a minimum of 35% to LSDBE's." This suggests that Keystone intended to have more than one LSDBE subcontractor. However, only one subcontractor is listed on the subcontracting plan, and for that subcontractor, the lines requesting the total subcontract dollar amount and the percentage of the total set aside amount are left blank. Over a month after bid opening, on October 14, 2009, Keystone furnished by email a "preliminary estimate of subcontractors" for the project, listing four subcontractors with percentages of 20, 19, 8, and 53. On October 22, 2009, Keystone furnished a new subcontracting plan identifying the same subcontractor listed on the original subcontracting plan (but this time including a subcontract dollar amount and percentage set aside amount) plus an additional subcontractor with all of the information completed on the subcontracting plan form. At the evidentiary hearing, Keystone admitted that the original subcontracting plan submitted with its bid was incomplete and that it intended to complete its plan after notice of award. The omissions in the original subcontracting plan submitted with Keystone's bid, taken together, rendered that plan materially incomplete.

Because the CBE subcontracting plan in Keystone's bid was materially incomplete, Keystone's bid was rendered nonresponsive pursuant to D.C. Code § 2-218.46(d). Accordingly, the contracting officer did not err in determining Keystone's bid to be nonresponsive.

We have considered the other protest grounds raised by Keystone and these grounds are either moot or lack merit. With regard to Keystone's allegations regarding FEI, Keystone lacks standing to challenge the award.

CONCLUSION

For the reasons discussed above, we conclude that the contracting officer did not err in determining Keystone's bid to be nonresponsive based on a materially incomplete CBE subcontracting plan submitted with its bid. Accordingly, the protests are dismissed in part and denied in part.

SO ORDERED.

DATED: February 19, 2010

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

CONCURRING:

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