

District of Columbia Register

JUN 2 1989

GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

PROTEST OF:

POTOMAC TECHNOLOGIES, INC.)	
)	
Under IFB No. 7091-AA-45-0-7-CW)	P-0057

For the Protest: John William Mannix, Esquire. For the Government: Nancy Hapeman, Assistant Corporation Counsel, D.C.

Opinion by Administrative Judge Marlin with Administrative Judges Booker and Davis concurring.

OPINION

This protest¹ filed by Potomac Technologies, Inc. (PTI) challenges the rejection of its bid extension offer by the contracting officer for the Department of Administrative Services (DAS). PTI also protests the subsequent contract award to Haas Hardware, alleging that, but for DAS' wrongful rejection of its bid, PTI would have been the low bidder and would therefore have been awarded the contract under Invitation for Bids No. 7091-AA-45-0-7-CW (IFB).

The subject IFB was issued by DAS on December 5, 1986 and solicited in the sheltered market a lime shaker scrubber for use by the Water and Sewer Utility Administration of the

¹This case originated during a period of time when the District of Columbia Contract Appeals Board was functioning pursuant to Commissioner's Organization Order No. 9, D.C. Code, Supplement V (1978), as amended by Mayor's Order 82-224, 30 DCMR 497 (January 28, 1983). Pursuant to section 1-1189.1 of the District of Columbia Procurement Practices Act of 1985, a new independent agency denominated as the Contract Appeals Board was created. This new Board became operational on August 1, 1988, and succeeded to jurisdiction of all contract dispute cases pending before the previously established Board.

JUN 2 11

- 2 -

Department of Public Works (DPW). See Agency Report at 2. Bid opening occurred on January 8, 1987. There were three responses to the IFB and PTI was the apparent low bidder. Id. at 2.

Section 11 of the Instructions to Bidders included in the IFB provided that, unless a bidder stated a shorter time period, the contracting officer would have sixty days from the date of opening to accept a bid. Id., exh. C at 2. Sometime in March 1987, DAS determined that, due to administrative delays, it would not be able to award a contract within the specified bid acceptance period. Id. at 3. A DAS contract specialist then contacted the three bidders to request that they submit letters extending their respective bid acceptance periods for an additional thirty days. This request was communicated to PTI by telephone on March 10, 1987. Id. at 3 and exh. D. In response to this request, PTI sent to DAS a letter, dated March 13, 1987, stating, in relevant part:

In response to your call on March 10, 1987, PTI is pleased to resubmit our quote...PTI is pleased to provide the services indicated on page 5 of 9 of the Invitation at the price of \$14,670.76, a 4.5% increase on the original price submitted on January 8, 1987. This increase is necessitated by the price increase of the supplier, being that more than 60 days have expired since bid opening. Id., exh. D.

By letter dated March 19, 1987, DAS again requested an extension of PTI's bid acceptance period and, in response to PTI's attempt to extend its bid at a higher price, DAS stated:

It is requested that time for acceptance of your bid be extended to April 8, 1987. ... In response to your letter, dated March 13, 1987, we are not asking for another quote on the subject IFB. But, as this letter indicates, our office is asking for a bid-price

JUN 2 1989

- 3 -

extension. Id., exh. E.

Both Haas Hardware and Jo-Na Corporation responded in writing to DAS' request, in which they agreed to extend the acceptance period for their respective bids at the original prices. See Id. at 4 and exh.G.

By letter dated March 27, 1987, Carl Jones, President of PTI, responded to DAS' second request for a bid extension. Regarding its earlier submission of a bid extension at a higher price than its original bid, PTI stated:

Our letter of March 13, 1987 was not an attempt on our part to request subject IFB [sic] but in fact a condition of extending our prices. This extension is necessary because of the inordinate amount of time it takes to award the contracts. Our suppliers of this equipment quoted us their best prices based on terms and conditions of the IFB. He can not be expected and is not willing to furnish this equipment under terms and conditions of the IFB without consideration. In view of wage rates and material increases that is expected in the upcoming month. [sic] Id., exh. F.

In early May, Haas Hardware again extended the bid acceptance period, until July 8, 1987, and stated "all pricing and specifications remain extended as quoted on the [original] bid." Id., exh.I.

On June 8, 1987, the District awarded the contract under the subject IFB to Haas Hardware. Id. at 4 and exh. J. On that same date, DAS wrote to PTI informing it that a contract had been awarded to Haas. Regarding the grounds as to why PTI did not receive the award, the letter stated, in relevant part:

Since you were unable to extend the bid acceptance period for the subject solicitation, award has been made to the second lowest responsive, responsible bidder, Haas Hardware. Id., exh.K.

- 4 -

PTI'S PROTEST

On June 22, 1987, PTI filed its protest of DAS' actions with this Board. In its protest letter, PTI argues that DAS acted improperly, arbitrarily and without any authority in rejecting its bid, inasmuch as PTI was the low, responsive and responsible bidder. See Protest Letter at 3. In support of this contention, PTI argues that its letter of March 13, 1987, agreeing to an extension of its bid, but at a slightly increased price, was a valid bid extension.

In the alternative, PTI argues, that even if DAS did have the authority to reject PTI's bid extension, it is estopped from doing so. PTI contends that DAS had a duty to inform PTI if the terms of its extension were not acceptable, arguing,

[b]ecause the DAS had once responded to PTI's extension with a request for clarification, the DAS became bound by such prior practice to inform PTI if the agency had additional or continuing reservations regarding PTI's time extension or if the agency planned to reject PTI's bid. Protest Letter at 4.

By its silence after receipt of PTI's letter of March 27, DAS represented to PTI that its bid extension was acceptable. Id. at 4. PTI contends that it reasonably relied on DAS' silence and that reliance now will work to PTI's detriment if DAS is allowed to claim that PTI did not remain the low bidder. Id. at 5. Thus, PTI argues, under the doctrine of equitable estoppel, DAS should be prohibited from asserting that PTI's response to the request for a bid price extension was not responsive or that DAS had not agreed to the time extension at the revised price. Id. at 5.

- 5 -

DISTRICT'S REPLY

In its Agency Report, the District argues that it was precluded from accepting PTI's bid extension at an increased price as to do so would afford PTI an unfair advantage over other bidders. In order to preserve the integrity of the competitive bidding system, the District does not allow material modification of bids after bid opening. See Agency Report at 5. Referring to sections of the District's Materiel Management Manual and citing decisions of the Comptroller General, the District argues that allowing a bidder to revise a bid after bid opening would be tantamount to considering a second bid after the time for submitting bids had concluded, Id. at 7.

Regarding PTI's argument that DAS should be estopped from asserting that PTI was not responsive to the request for extension of the bid acceptance period, the District argues that there is no basis for the invocation of the doctrine of equitable estoppel. The District contends that in its letter of March 19, 1987, DAS clearly and unequivocally informed PTI that a new quote was not being sought but that the District was seeking an extension of the original bid at the original price. PTI, in apparent deliberate disregard of DAS' notice that a bid at an increased price would not be acceptable, once again submitted an increased bid price. As DAS had already informed PTI of the unacceptability of such a bid, the District contends, DAS was under no further obligation to inform PTI of its on-going objections. Id. at 10. The District asserts that it has never

- 6 -

made any representations to PTI regarding the extension of its bid at an increased price other than that such an "extension" would be unacceptable. Id. at 11.

DECISION

This protest arose before the promulgation of regulations implementing the District of Columbia Procurement Practices Act (PPA),² at a time when the Materiel Management Manual governed the District's procurement process. Section 2620.8 of the Manual speaks of maintaining the integrity of the competitive bidding process and states:

...It is equally clear that to allow one bidder, after bid opening, to take some action materially affecting his bid so that it may be accepted would be prejudicial to other competitors not afforded a similar opportunity. Therefore, to get the best initial price the one-shot bid procedure is used and material modification of bids after opening is forbidden. Materiel Management Manual, sec. 2620.8 (A) (1)³

Bid Extensions

PTI contends that its modification of the initial bid price is not prejudicial to other bidders and does not jeopardize the integrity of the District's competitive bidding system as PTI was already the apparent low bidder at bid opening and the increase it sought still would have left its bid lower than all others.

²D.C. Code, sec. 1-1181 et seq. (1987), which became effective on February 21, 1986.

³The Materiel Management Manual has been superceded by regulations published in 27 DCMR, sec. 600 et seq. (July 1988). Although the policy of one-shot bidding expressed in Sec. 2620.8 has not been specifically incorporated into Title 27, the purposes of the PPA reaffirm the need to maintain the integrity of the competitive bidding process. See PPA, sec. 1-1181.1(2).

JUN 2 1989

- 7 -

The Board is unpersuaded by PTI's contentions. The Materiel Management Manual does not speak specifically to the mechanics of bid acceptance extensions or the scope of modifications which may be placed upon a bid without affecting its validity. However, the section of the Manual which refers to the integrity of the competitive "one-shot" bidding system, when given a plain and reasonable reading, gives notice to bidders that modification of an original bid price after bid opening will not be allowed.

The Board finds that PTI's attempted modification was prejudicial to other bidders and threatens the integrity of the competitive bidding system. If such a practice as PTI urges were allowed, there would be nothing to prevent a bidder from initially submitting a very low bid in order to be declared the apparent low bidder and then, later, after other bid prices have been disclosed, increasing its bid price while still keeping it lower than that of the next low bidder. If such alterations were allowed, the entire purpose of the competitive bidding system would be defeated.

It is fundamental to the integrity of the system that bidders are each given one shot at bidding on a particular contract and that each submits its bid without knowledge of the content of the other bids.

A bidder's extension must be unqualified and unconditional. No material modifications, such as increases in bid price, may be allowed. The submission of an extended bid, with a revised price, amounts to a second bid. The original bid is withdrawn or

- 8 -

cancelled. Additionally, we note that the failure to validly extend a bid, when an extension is requested, results in the expiration of the first bid, which is precisely what occurred here.

While the Board is not bound by decisions of the Comptroller General, this large body of federal government contract law frequently is helpful and persuasive when we are confronted with similar factual situations. On many occasions, the Comptroller General has ruled that to allow modification of bid prices after opening is incompatible with the precepts of a competitive bidding system. See N.W. Packing Co., 50 Comp. Gen. 383 (1970), 70 CPD par.110; Klein Construction Co., B-201599 March 2, 1981, 81-1 CPD par. 158; and S.J. Groves and Sons, Co., B-207172, (November 9, 1982), 82-2 CPD par. 423.

Equitable Estoppel

PTI's attempt to invoke the principle of equitable estoppel is ill-founded. First of all, DAS did not make the misrepresentations PTI alleges. When PTI first submitted its extension at an increased price, DAS informed PTI that the extension was not acceptable as a new quote was not being sought. Secondly, we note that there is no legal requirement that the District notify a bidder that a revised bid constitutes a withdrawal of an original bid. Bidders for government contracts are held to a knowledge of basic principles of procurement law. They proceed at their own risk when they take actions unprotected by statute, regulations or standard contracting practice.

- 9 -

Finally, even assuming arguendo that the DAS did represent, through its silence, to PTI that its bid extension had been accepted, the principles of equitable estoppel could not properly be invoked. While the purpose of equitable estoppel is to prevent a party from benefitting from its misrepresentations to another, it is clear that a purpose which can not be accomplished directly due to lack of authority can not be accomplished indirectly by an estoppel. McCormick v. Market Bank 165 U.S. 538 (1897). Since, as a matter of law, DAS is without authority to allow a bidder to materially modify its bid after bid opening, such a result can not be achieved through estoppel.

CONCLUSION

We will not leave this subject, however, without noting that delays in awarding contracts past the published deadline, necessitating bid extensions, can be unfair to bidders who strive to establish their lowest competitive bid. Furthermore, bid extensions can result in increased costs to the taxpayer, as occurred here when the contract ultimately was awarded to a contractor whose original bid was higher than PTI's.

Requests for extensions of bids are sometimes necessary and unavoidable (the District has provided no explanation for this request) but should be discouraged. The District should conduct procurement so that bidders will have confidence that their lowest competitive bid will be the basis for determining the award of a contract.

PTI's attempt to increase its originally submitted bid price

District of Columbia Register

JUN 2 1

- 10 -

while extending the bid acceptance period did not constitute a valid bid extension. Therefore, DAS' refusal to accept PTI's extension was proper and its award to Haas Hardware was in accordance with the dictates of the Materiel Management Manual which was in effect at the time.

Accordingly, the protest is hereby denied.

February 13, 1989

DATE

David H. Marlin
DAVID H. MARLIN
Administrative Judge

Claudia Booker
CLAUDIA D. BOOKER
Administrative Judge

William L. Davis
WILLIAM L. DAVIS
Chief Administrative Judge