

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD**

717 14th STREET, N.W., Suite 430
Washington, D.C. 20005

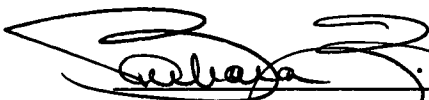
August 14, 1997

TO: Maximo A. Pierola, President
Tito Contractors, Inc.
7308 Georgia Avenue, N.W.
Washington, DC 20012

Christopher Lipscombe, Esquire
DC Public Schools
415 12th Street, N.W., 8th Floor
Washington, DC 20004

SUBJECT: CAB No. P-477, TITO CONTRACTORS, INC.

Attached is a copy of the Board's Opinion denying protest.


BARABARA THOMPSON
Secretary to the Board

GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

PROTEST OF:

TITO CONTRACTORS, INC.)	
)	CAB No. P-477
Under Solicitation No. 024-AA-04-0-6-GS)	

For the Protester: Mr. Maximo A. Pierola, *pro se*. For the District of Columbia Public Schools: Christopher Lipscombe, Esquire, Legal Counsel.

Opinion by Administrative Judge Jonathan D. Zischkau, with Chief Administrative Judge Lorilyn E. Simkins, concurring.

OPINION

Tito Contractors, Inc., has filed a protest with regard to Solicitation No. 024-AA-04-0-6-GS on the grounds that the District of Columbia Public Schools erroneously rejected its bid as nonresponsive and failed to allow Tito to correct a bid error in which Tito had transposed two unit prices in its bid. D.C. Public Schools states that it appropriately rejected Tito's request to correct the alleged bid mistake and that in any event Tito's bid was unreasonably low. We conclude that the Procurement Officer should have allowed Tito's bid correction because the error was clear, adequately demonstrated, and had no ultimate impact on its total bid price. Nevertheless, we are unable to conclude that the Procurement Officer's determination that Tito's bid was unreasonably low lacked any reasonable basis. Accordingly, we deny the protest.

BACKGROUND

On September 19, 1996, the District of Columbia Public Schools ("DCPS") issued Solicitation No. 024-AA-04-0-6-GS for school closing/consolidation renovation work at Ferebee-Hope, Phelps, and Weatherless Schools. The work included installing four cosmetology labs, two at Phelps and one each at Ferebee-Hope and Weatherless. On September 25, 1996, DCPS received and opened three bids in response to the solicitation, as follows:

	<u>Tito Contractors</u>	<u>R. George & Co.</u>	<u>PCMG</u>
Unit Bid A (Ferebee-Hope)	\$164,317	\$121,000	\$211,596
Unit Bid B (Phelps)	\$124,107	\$183,000	\$218,582
Unit Bid C (Weatherless)	\$ 75,889	\$ 82,000	\$105,997
Total bids	\$364,313	\$386,000	\$536,175

(Agency Report, filed April 14, 1997, Exhibit C). The government estimate for the entire project was \$429,161.41. (Agency Report Exhibits, filed April 2, 1997, Exhibit 2). By letter dated September 26, 1996, DCPS questioned Tito's unit bid price for Phelps School and requested confirmation from Tito. (*Id.*, Exhibit 4). By letters dated September 30, 1996, DCPS requested detailed cost breakdowns for the unit bids of the other bidders. (*Id.*). Tito responded with its price confirmation and detailed breakdown for Ferebee-Hope and Phelps on September 26, 1996, and Weatherless on October 1, 1996. The other two bidders responded on September 30, 1996. In its September 26 response, Tito stated that it had made a clerical error in its bid by transposing the unit prices for Unit Bid A (Ferebee-Hope) and Unit Bid B (Phelps). Thus, the bid for Ferebee-Hope should have read \$124,107 (rather than \$164,317) and the bid for Phelps should have read \$164,317 (rather than \$124,107). The detailed price breakdown sheets submitted to DCPS with its September 26 letter support Tito's claim of a transposition error.

On October 2, 1996, DCPS's Facilities Division determined that Tito's corrected bid for Phelps nevertheless failed to include adequate costs to cover substantial mechanical items. (Agency Report Exhibits, filed April 2, 1997, Exhibit 6). Tito's bid indicated \$30,000 for mechanical work, George's bid provided for mechanical costs of \$71,600, and the government estimate provided for mechanical costs of \$90,000. On October 8, 1996, DCPS made a determination rejecting Tito's bid and its request to correct its bid, and approving award to the second low bidder, George. (*Id.*, Exhibit 7). By letter of October 16, 1997, DCPS notified Tito that its bid was rejected and that its claim of bid error was disallowed. On October 21, 1996, DCPS entered into a contract with George. (*Id.*, Exhibit 10).

On October 25, 1996, Tito protested to DCPS's Acting Procurement Officer¹ the rejection of its bid as nonresponsive and DCPS's failure to accept its request for bid correction. Although the Procurement Officer was required to render a decision within ten days of receipt of the protest, the record indicates that no decision was issued. On November 8, 1996, Tito appealed to the Superintendent. Although the Superintendent was required to render a decision within twenty days, the record indicates that no decision was issued. By letter of January 16, 1997, Tito sought review by the new chief executive officer of DCPS. On January 27, 1997, Tito filed its protest with the Board.

DISCUSSION

This protest is governed by the Procurement Practices Act prior to the amendments made by the Procurement Reform Amendment Act of 1996 and we exercise jurisdiction pursuant to former sections 104(e) and 903 of the Procurement Practices Act.

¹ Prior to the Procurement Reform Amendment Act of 1996, D.C. Law 11-259, Apr. 12, 1997, which amended the Procurement Practices Act, DCPS disputes and protests were initially brought first to the Procurement Officer and then to the Superintendent prior to Board review. See District of Columbia Public Schools Procurement Procedures Manual § 5-101.29 (Nov. 1987).

Two issues on the merits are presented, (1) whether DCPS erred in rejecting Tito's request to correct the transposition error in its bid, and (2) whether DCPS erred in determining that Tito's bid for Phelps School was unreasonably low rendering Tito nonresponsible.

DCPS argues that section 3.201.22 ("Mistakes Discovered After Opening but Before Award") of the DCPS Procurement Procedures Manual does not allow correction of Tito's bid. Referencing subpart (a), which concerns correcting minor informalities, DCPS argues that correction would affect the prices for Unit A and Unit B, that there was nothing on the face of the bid document placing DCPS on notice of a possible clerical error, and that Tito submitted no evidence to substantiate its alleged mistake or intended bid. Although it is obvious that swapping Tito's Unit A and Unit B bid prices affects the unit prices, the error does not affect the total price bid by Tito. We do not understand DCPS's assertion that Tito submitted no evidence to substantiate its mistake and intended bid. The detailed bid work sheets clearly show Tito's bid of \$164,317 for Phelps School and \$124,107 for Ferebee-Hope School. We also believe that Tito's transposition error is reasonably evident from a comparison of Tito's bid with George's bid and the government estimate. The Procurement Officer made just such a comparison when he determined shortly after bid opening that the unit bid price of \$124,107 for Phelps set forth in Tito's bid was so low as to require a price confirmation and detailed cost breakdown from Tito. As a matter of fact, DCPS used the \$164,317 figure in ultimately determining that Tito's unit bid for Phelps was unreasonably low.

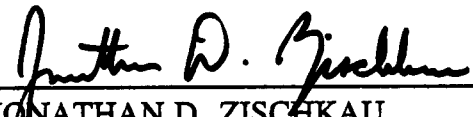
The Procurement Officer's determination that Tito's unit bid for Phelps was unreasonably low is a close question even under the deferential standard of review we apply to responsibility determinations. We will not overturn a determination of responsibility unless a protester can show fraud or bad faith, a bidder's failure to adhere to definitive responsibility criteria, or that such a determination lacked a reasonable basis. *C.P.F. Corp.*, CAB No. P-413, Nov. 18, 1994, 42 D.C. Reg. 4902, 4908; *Dixon's Pest Control Services, Inc.*, CAB No. P-401, Apr. 6, 1994, 42 D.C. Reg. 4528, 4529; *Ideal Electrical Supply Corp.*, CAB No. P-372, Aug. 13, 1993, 41 D.C. Reg. 3603, 3606. If the contracting officer determines that the price bid by a prospective contractor is so low as to appear unreasonable or unrealistic, the contracting officer may determine the prospective contractor to be nonresponsible. 27 DCMR § 2200.5.² We have sustained nonresponsibility determinations where a bid was unreasonably or unrealistically low. *J&L Contract Services, Inc.*, CAB No. P-313, Oct. 2, 1992, 40 D.C. Reg. 4565 (sustaining contracting officer's determination that bidder was nonresponsible because bid was so low that bidder could not meet the minimum wage and fringe benefit costs necessary to provide the required services); *Top Service Construction, Inc.*, CAB No. P-409, July 12, 1994, 42 D.C. Reg. 4628, 4630 (sustaining determination of nonresponsibility where the bid was significantly below government estimates and omitted and understated other costs of performance).

² DCPS regulations are silent on this point. Therefore, we apply the District-wide procurement regulations implemented pursuant to the Procurement Practices Act.

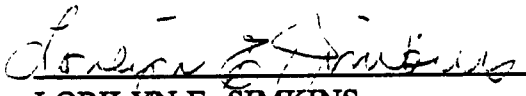
Here, DCPS's Procurement Officer properly obtained additional information from the bidders concerning their cost breakdowns in order to make his responsibility determination. The Procurement Officer focuses on the significant difference in the mechanical component for Phelps bid by Tito (\$30,000) and George (\$71,000) and the mechanical portion in the government's estimate for Phelps (\$90,000). In the light of the record presented by DCPS and the lack of any rebuttal by Tito, we conclude that the nonresponsibility determination had a reasonable basis.

Accordingly, the protest is denied.

DATE: August 13, 1997


JONATHAN D. ZISCHKAU
Administrative Judge

CONCURRING:


LORILYN E. SIMKINS
Chief Administrative Judge