

GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

PROTEST OF:

FLOW CONTROLS, INC.)	
)	CAB No. P-89
Under IFB No. 8045-AA-66-0-8-LT)	

For the protester: Donald R. Smith, President. For the Government: Nancy Hapeman, Assistant Corporation Counsel, D.C.

Opinion by Administrative Judge Sharpe¹ with Administrative Judges Booker and Marlin concurring.

O P I N I O N

This case is before the Board on the Motion of Respondent District of Columbia to Dismiss for Lack of Timely Filing and Mootness of Issue Raised in Protest. The motion (hereinafter referred to as the District's Motion to Dismiss) and an accompanying memorandum were filed on April 27, 1988.

The protest² was filed by Flow Controls, Inc. (FCI) on February 12, 1988, and concerns Invitation for Bids No. 8045-AA-66-0-8-LT (IFB). The IFB solicited bids for a single, aggregate award group consisting of two items--indicator

¹Judge Sharpe's participation in this case is pursuant to the authority contained in the D.C. Procurement Practices Act of 1985, D.C. Code, sec. 1-1189.2(c)(2) (1987 Replacement).

²This 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 No. 82-224, 30 DCR 497 (January 28, 1983) and Mayor's Order No. 86-65, 33 DCR 3006 (May 16, 1986). Pursuant to sec. 1-1189.1, 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 protest cases pending before the previously established Board.

pressure differentials (Item No. 1) and manifold valves (Item No. 2). See Memorandum in Support of District's Motion to Dismiss, Attachment 1 at 5. The bids of the apparent low bidder and second low bidder (FCI) were rejected as nonresponsive because they, according to the District, offered "an item that did not meet the requirements of the specifications for item numbered two of the IFB." See Memorandum in Support of District's Motion to Dismiss at 2. Specifically, FCI's bid was determined to be nonresponsive because, with respect to Item No. 2, it bid on a 1/2-inch FNPT connection, carbon steel rather than a 1/4-inch FNPT connection, stainless steel. Id. and Protest at 1. The contract was awarded to the third low bidder, Mays and Associates, Inc. (Mays). See Memorandum in Support of District's Motion to Dismiss at 2. FCI asks that Mays' contract be terminated and the contract be awarded to it.

We address the first ground upon which the District's motion is predicated (the protest is untimely). Before doing this however, it is necessary that we discuss an inconsistency in the IFB specifications and one aspect of FCI's bid. As admitted by the District, the item description for Item No. 2 specified a 1/4-inch FNPT connection and stainless steel whereas the model number stated in the IFB for Item No. 2 specified a 1/2-inch FNPT connection and carbon steel. See Memorandum in Support of the District's Motion to Dismiss at 3. With regard to Item No. 2, FCI included the following asterisk note in its bid on the Schedule form:

Model number indicates 1/2" FNPT and carbon steel while written description shows 1/4" FNPT and stainless steel. Price based on Model MM4B-CS.

See Protest, unmarked exhibit and Memorandum in Support of District's Motion to Dismiss, Attachment 2 at 5.

The District correctly notes that FCI's bid shows a signature date of September 18, 1987,³ and argues that "[t]he notation indicates that [FCI] was aware of the discrepancy between the specifications for the model number listed in the IFB and the salient characteristics listed in the IFB for that model no later than September 18, 1987. . . ." See Memorandum in Support of the District's Motion to Dismiss a 5. The District contends, "[u]sing September 18, 1987, as the latest date upon which [FCI] became aware of the facts and circumstances surrounding the protest, [FCI] should have filed the protest no later than October 2, 1987." Id. at 5 and 6. The protest, as we mentioned earlier, was filed on February 12, 1988.

There is no dispute that the specifications for Item No. 2 were seriously defective in that they set forth two different measurements and types of metal for the FNPT. Consequently, when FCI became knowledgeable of this defect, under the provisions of D.C. Procurement Practices Act of 1985 (PPA), D.C. Code, sec. 1-1189.8(b) (1987 Replacement), the ten-working day period for filing a protest with this Board on the basis of

³It appears from the initial page of the IFB that bid opening was on October 5, 1987.

the defect began to run at that time.⁴ It is clear from the signature date and the previously quoted notation on FCI's bid that it was at least aware of the defective specifications on September 18, 1987. Inasmuch as FCI's protest was filed on February 12, 1988, considerably more than ten working days after it knew of the protest ground, the protest is untimely.⁵ This conclusion, however, does not end our discussion.

We view the notation on FCI's bid as a double-edged sword which cuts two ways in this matter. Just as the notation evidences that FCI knew of the defect in the FNPT specifications when it signed its bid, the notation also evidences that the District knew or should have known of the defective specifications at the time it conducted its responsiveness

⁴In the circumstances of this case we need not seek to determine whether FCI should have known of the defect at an earlier time; and the District, apparently for the same reason, does not argue that it should have.

⁵Once FCI recognized the conflict in the specifications, it should have had a definite doubt as to which of the two conflicting specifications established the FNPT requirement. It therefore should have sought to resolve this doubt before submitting its bid rather than submitting a bid for whatever reason on the risky assumption that one specification had precedence over the other or was controlling. As it was stated in Datacom Systems Corporation at 19 and 20 (D.C. CAB Jan. 11, 1988), there are several options to a prospective bidder for dealing with a situation like the one FCI was in. "One approach would be for the party to initially submit its complaint to the procuring officials, and if a satisfactory resolution does not appear to be shortly forthcoming, file a protective protest with the Board before the ten-working day period expires. Another approach would be for the party to proceed to file a protest at the outset with the Board and either contemporaneously or thereafter pursue resolution of its complaint directly with the procuring officials while the protest is pending."

review of FCI's bid. For it was the discovery of the notation that caused the District to find FCI's bid to be nonresponsive. The District, therefore, had an ample opportunity and indeed a clear duty to issue an amendment to the IFB which resolved the conflict between the FNPT specifications before awarding the contract. Instead of issuing a clarifying amendment, the District proceeded to award the contract to Mays.⁶ It then sought to take corrective action by deleting Item No. 2 from the contract. This action was belated and most importantly, insufficient in terms of affording FCI a fair opportunity to bid on an equal footing. It is also noted that if the District had taken timely corrective action, it might not have had to enter into a more costly contract with Mays. For sure, if the District had taken timely corrective action, it would not be exposed to certain equitable adjustment costs which it may well incur as a result of the partial convenience termination of Mays' contract.

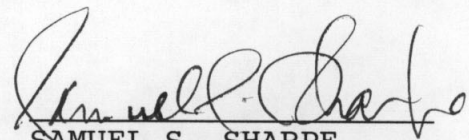
Although we find fault with the District in not timely disclosing the conflict between the FNPT specifications, we cannot disregard the fact that the protest was untimely filed and that under sec. 1-1189.8(b), this fact renders the Board without jurisdiction to consider the protest on the merits.

⁶In the absence of any information in the record to the contrary, we presume that Mays submitted an unqualified bid. Nonetheless, in awarding the contract to Mays, we are unable to understand how the District could either overlook or ignore the conflict between the item description specification and model number specification or determine that the former specification had precedence over the latter specification.


See MTI Construction Company, Inc., 1 P.D. 66, 70 (D.C. CAB 1987) ("Because the timeliness standard for filing a protest is imposed by the [PPA], it must be and is strictly construed by this Board. . . . For the same reason, compliance with the timeliness standard is viewed as a prerequisite to the Board having jurisdiction to hear and decide the merits of a protest.") (Citations omitted.) Having concluded that the protest is untimely, we need not address the remaining ground of the District's Motion (the protest is moot). Accordingly, it is

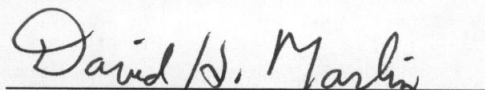
ORDERED that the District's motion to dismiss as to untimeliness is GRANTED, and the protest is dismissed with prejudice.

DATE: December 16, 1988


SAMUEL S. SHARPE
Administrative Judge

CONCUR:


CLAUDIA D. BOOKER
Administrative Judge


DAVID L. MARLIN
Administrative Judge