

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

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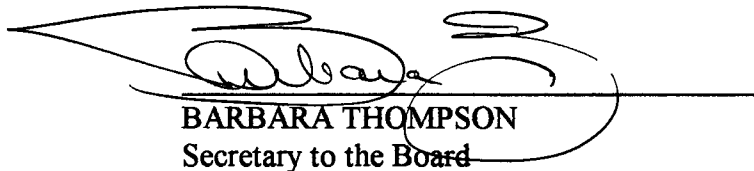
February 3, 1999

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SUBJECT: CAB Nos. **P-557**, (Protests Of: **H. R. General Maintenance Corporation**)

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



BARBARA THOMPSON
Secretary to the Board

GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

PROTEST OF:)	
)	
H.R. General Maintenance Corp.)	CAB No. P-557
)	
Under IFB No. 98-0053-AA-4-0-CC)	

For the Protester: Keith C. Phillips, Esq, Watt, Tieder, Hoffar & Fitzgerald, L.L.P. For the Government: Warren J. Nash and Chris Malone, Assistants Corporation Counsel, D.C.

Opinion by Lorilyn E. Simkins, Chief Administrative Judge with Administrative Judges Jonathan D. Zischkau and Phyllis W. Jackson, concurring.

OPINION

H. R. General Maintenance Corporation ("HR") protests the proposed award of Contract No. 98-0053-AA-4-0-CC for Masonry and Other Repairs at ten libraries in the District of Columbia to the apparent low bidder, OMF Contractors, Inc. ("OMF"). H.R. claims that OMF is not a responsible contractor for the performance of this work, and that OMF's bid bond is defective, rendering OMF's bid non-responsive. The protest is without merit.

BACKGROUND

The District of Columbia Department of Public Works, Division of Facilities Management Services ("DPW") issued IFB No. 98-0053-AA-4-0-CC ("IFB") on July 31, 1998, seeking bids for masonry and other repair work at ten public library buildings throughout the District.¹ Addendum No. 1, which provided revised Technical Specifications for the work, was issued on August 21, 1998. Bid opening occurred on August 31, 1998. DPW received seven (7) bids with OMF's being the apparent lowest at \$199,000. The second low bidder was HR with a bid of \$298,440. The other bids ranged from \$437,000 to \$549,000.

On September 11, 1998, HR filed a timely protest, challenging OMF's ability to perform the work, and the validity of OMF's bid bond. Based on a Dun & Bradstreet Report ("D&B Report") received on September 8, 1998, HR claimed that OMF is primarily a painting and ceramic tile contractor, not a masonry contractor and does not possess the requisite experience or responsibility to perform the contract. The D&B Report contains information, dated March 24, 1998, that OMF specializes in painting, carpentry

¹The Martin Luther King Library and the following branch libraries are slated for repair: Benning, Southeast, Anacostia, Cleveland Park, Tenley-Friendship, Northeast, Woodridge, Takoma Park and Petworth.

and concrete work. (D&B Report, at 4, Attachment to Protest). As further evidence of OMF's non-responsibility, HR claims that OMF's bid price, which is almost \$100,000 lower than HR's and \$157,000 lower than the government cost estimate (\$356,100) demonstrates that OMF does not understand the requirements of the IFB and cannot perform the work as bid. On October 1, 1998, the District filed its Agency Report ("AR") informing the Board that DPW was investigating OMF's responsibility and requesting that the Board defer action on the protest, because the issue of responsibility was not ripe for review. On November 3, 1998, the District faxed to the Board a letter, dated September 14, 1998, in which OMF confirmed that it could perform according to the specifications of the contract for the proposed sum of \$199,000. (See Report on Telephone Conference, Nov. 3, 1998).

The District did not permit HR to see OMF's bid at the bid opening. Thus, HR alleged, upon information and belief, that OMF's corporate secretary had not certified the signature of OMF's President on the bid bond form and that OMF had failed to affix its corporate seal to the bid bond, rendering OMF's bid non-responsive. HR saw OMF's bid bond for the first time on October 1, 1998, the date that the District filed its Agency Report (Agency Report "AR"). OMF's corporate seal is affixed to the bid bond (although undecipherable on the Board's copy). However, no portion of the "Certificate of Corporation" is filled in. After reviewing a copy of OMF's bid bond, HR identified other errors, which HR raised as additional grounds of protest.² OMF listed "MD" (Maryland) as the "State of Incorporation" in its bid bond, while it states in its Bid Form that it is incorporated in the District. OMF also listed the date of bid opening as "11/31/98", although the actual bid opening date was August 31, 1998. HR argues that cumulatively, these defects render OMF's bid bond non-responsive. With respect to the bid bond issues, the District argues that the defects in the bid bond are minor defects, which the contracting officer may properly waive. The District states that it "will receive the full and complete protection it contemplated in the event OMF fails to execute the required contract documents and deliver the required performance and payment bonds." (AR, at 4).

On January 5, 1999, the District filed a "Determination and Finding for Contractor's Responsibility and Competitive Sealed Bid Award ("Responsibility D&F") which the Contracting Officer signed on November 16, 1998. The Contracting Officer found that OMF had previously performed satisfactory work for DPW, was financially sound, and had the requisite financial assets to perform the work and to acquire the necessary payment and performance bonds. The Responsibility D&F also states that OMF provided several references who vouched for the quality of its work, workmanship, timeliness of

²The District never rebutted HR's assertion, or explained why HR, an interested party, was not permitted to examine OMF's bid at the time of bid opening in accordance with 27 DCMR § 1527.4: "Examination of bids by interested persons shall be permitted if it does not interfere unduly with the conduct of District business. . . ." Therefore, we find that the new grounds of protest are timely filed within 10 days of HR's receipt of the Agency Report, when the basis of the new grounds of protest were known. (Board Rule 302.2(b), 45 D.C. Reg. 1415 (Mar. 13, 1998)).

performance, resources, including skilled manpower, tools and equipment, responsiveness and contract compliance. The references also confirmed that OMF had the requisite skills and experience to perform the contract work. In sum, the Contracting Officer reports:

The contractor's past and current performance records of integrity and business ethics, sound financial capability and work experience are indicative of the contractor's qualifications and we have found them to be responsible.

On January 12, 1999, HR challenged the Responsibility D&F arguing that it did not comply with 27 DCMR § 2200.5, which permits the contracting officer to find a prospective bidder nonresponsible if its bid is so low as to appear unrealistic. HR also argues that the Responsibility D&F did not address the following regulatory requirements:

(b) Ability to comply with the required or proposed delivery or performance schedule, taking into consideration all existing commercial and governmental business commitments;

(e) The necessary organization, experience, accounting and operational controls, and technical skills, or the ability to obtain them;

(g) The necessary production, construction and technical equipment and facilities, or the ability to obtain them.

27 DCMR § 2200.4. Moreover, HR questions why the District did not provide a statement from OMF regarding the firm's organization, experience and technical skills or the ability to obtain them. (Protester's Comments on the District's Responsibility D&F, at 4). On January 27, 1999, the District responded that DPW had complied with all necessary procurement regulations. Attached to its response is a copy of OMF's Financial Statement and an Affidavit of the DPW employee who actually prepared the Responsibility D&F. (Response to the Protester's Comments on the District's D&F for Contractor's Responsibility, Exhibits 2 and 3).

DECISION

We exercise protest jurisdiction pursuant to D.C. Code § 1-1189.3 (Supp. 1998).

We have stated on many occasions that, while there is no presumption of agency correctness under our *de novo* standard of review, we accord contracting officers broad discretion in the exercise of their duty to determine whether a prospective contractor is responsible. *See e.g. Kidd International Home Care Services, Inc.*, CAB No. P-547, Sept. 15, 1998, 45 D. C. Reg. 8835; *Central Armature/Fort Myer*, CAB No. P-478, Jun. 6, 1997, 44 D. C. Reg. 6823; *Aceco, LLC*, CAB No. P-486, July 23,

1997, 44 D.C. Reg. 6852; *Dixon Pest Control Services, Inc.*, CAB No. P-410, Apr.6, 1994, 42 D.C. Reg. 4528; *C.P.F. Corp.*, CAB No. P-413, Nov.18, 1994, 42 D.C. Reg. 4902 . Since the contracting officer must bear the brunt of any difficulties in obtaining the required performance, we will not disturb an affirmative responsibility determination unless the protester demonstrates fraud or bad faith on the part of the contracting officials, a failure by a prospective contractor to adhere to definitive responsibility criteria, or that the responsibility determination lacks any reasonable basis. *Id at Central Armature/Fort Nyer*. HR has not alleged that this matter involves definitive responsibility criteria, fraud or bad faith. Instead, HR appears to challenge the documentation of the District's Responsibility D&F. While the contracting officer's judgment must be documented in sufficient detail to show that there is a reasonable basis for it, failure of a determination and findings to discuss every detail of a contractor's responsibility does not affect the validity of the determination if the record shows that the decision is reasonable.

Upon careful review of the record, we find sufficient documentation to support the affirmative responsibility determination made by DPW's contracting officer. In particular, we find that the information about OMF's past timely and satisfactory performance of significant contract work for the District and other governmental and private entities, which included masonry work similar to what is required in this contract, was information upon which the contracting officer could reasonably determine that OMF was responsible. In particular, it was reasonable for the contracting officer to find that OMF, a company that has successfully operated for nine years, "had the ability to comply with the required or proposed delivery or performance schedule" [27 DCMR 2200.4(b)]; "[t]he necessary organization, experience, accounting and operational controls and technical skills [27 DCMR § 2200.4(e)]; and [t]he necessary production, construction, and technical equipment and facilities. . . ." In addition, OMF's financial statement as well as the D&B Report indicates an adequate financial position supporting the view that OMF would have the ability to obtain any of the technical skills or equipment necessary to successfully complete this contract.

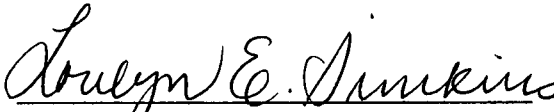
HR's allegation that OMF's bid price is unrealistically low concerns OMF's ability to perform the contract at its proposed price, a matter of affirmative responsibility. A responsible bidder for a fixed price contract may offer below-cost pricing, as the submission of a below cost offer is not illegal. *D&L Construction Co. Inc.*, B-279132, May 11, 1998, 98-1 CPD ¶ 136; *Hellenic Technodomiki, S.A.*, B-265931, Jan. 18, 1996, 96-1 CPD ¶ 91. OMF, whose bid was substantially below the District's estimate and HR's bid, confirmed its bid price on September 14, 1998. (Response to Protester's Comments on the District's D&F for Contractor's Responsibility, Exh.1). OMF has accepted the risk and responsibility of any potential loss. The contracting officer properly exercised his discretion by not rejecting OMF's bid as unrealistically low. Again, these contracting officer emphasizes that OMF understands the scope of work, has the expertise to perform the work and "the assets required to provide the required performance and payment bonds which assures that the District will be provided satisfactory completion of the work." (Responsibility D&F).

We now address the issues raised about OMF's bid bond. A bid bond is a written instrument executed by a bidder and a surety to guarantee the fulfillment of the contractor's obligation to the government. The bid bond secures the surety's liability to the government to pay the excess costs of awarding the contract to the next eligible bidder in the event that the awardee fails to fulfill its obligation to execute a written contract. If a bidder submits a defective bid bond, the bid itself is rendered defective and the bid must be rejected. *H.R. General Maintenance Corp.*, CAB No. P-545, Oct. 9, 1998, 10 P.D. 7611; *Ft. Myer Construction Corp.*, CAB No. P-452, July 23, 1996, 44 D.C. Reg. 6476. (Citations omitted). When a bid is alleged to be defective, the determinative issue is whether the surety has sufficiently manifested an intention to be bound so that the bond would be enforceable. *Id.* We think that OMF's bid bond binds the surety to the bid obligation, notwithstanding the technical deficiencies which may be corrected after the bid opening or waived. The important facts are that OMF's bid bond identifies the correct penal amount, is signed by its President, with a corporate seal affixed, identifies the correct invitation number, and the surety has expressed its intention to be bound.

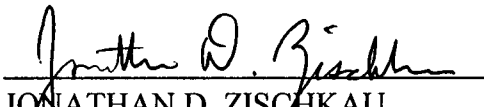
On the first page of DPW's Bid Bond Form, under the "**BID IDENTIFICATION**" area, there are two blocks to fill out: one for the "**BID OPENING DATE**" under which OMF incorrectly wrote "11/31/98"; and one for the "**INVITATION NO.**" under which OMF correctly wrote the IFB number. In addition, at the top of the form, bidders are instructed to fill out a block entitled "**DATE BOND EXECUTED (Must not be Later Than Bid Opening Date)**". In this area, OMF correctly recorded the date of bid opening as August 31, 1998. There is clear indicia on the face of the bond to identify the correct date and the solicitation to which the bond applies, notwithstanding this apparent typographical error. The incorrect bid opening date does not affect the enforceability of the bond and may be waived as a minor irregularity. *See Kirila Constructors, Inc.*, 67 Comp. Gen. 455, 88-1 CPD ¶ 554 (holding that an incorrect solicitation number is merely a technical error). The failure to fill in the "Certificate of Corporation" in this bond is also a minor deficiency. The signature of the President of OMF was attested to and OMF's corporate seal affixed. The corporate seal establishes prima facie that an instrument is the duly authorized act of the corporation and is not easily overcome. *See Daley Corporation-California Commercial Asphalt*, B-274203, Dec. 9, 1996, 96-2 CPD ¶ 217, citing *Fletcher Cyc. Corp.*, §§ 2470-2473 (Perm. Ed.); *18A Am. Jur. 2d 214*, Corporations Sec. 304. Even though the instructions require the corporate secretary to fill in and sign the "Certificate of Corporation", we do not regard the signature or the information as a material requirement with which the bidder must comply in order to be responsive where, as here, the bond is signed, sealed, and submitted with a signed bid. Finally, the discrepancy between the Bid Form and the bid bond regarding the place of incorporation is a technical deficiency which does not call into question whether the surety was actually bound. Moreover, examination of the corporate seal will reveal the actual state of incorporation. The errors to which HR directs our attention are only technical deficiencies which do not affect the liability of the surety. DPW was not required to reject OMF's bid as nonresponsive on these grounds.

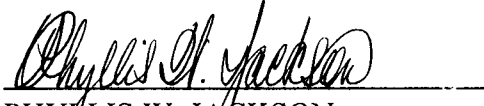
The protest is therefore denied.

DATE: February 2, 1999


LORILYN E. SIMKINS
Chief Administrative Judge

Concurring:


JONATHAN D. ZISCHKAU
Administrative Judge


PHYLLIS W. JACKSON
Administrative Judge