

DISTRICT OF COLUMBIA CONTRACT APPEALS BOARD

PROTEST OF:

C & D Tree Service, Inc.)	
)	CAB No. P-0799
Under IFB No. DCKA-2008-B-0050)	

For the Protester: Richard L. Moorhouse, Esq., Greenberg Traurig, LLP. For the District of Columbia Government: Alton E. Woods, Esq., Assistant Attorney General.

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

OPINION

Filing ID 25967143

C&D Tree Service, Inc. has protested the contracting officer's decision to award multiple IDIQ contracts even though the solicitation states that the District intended to make multiple awards. While C&D's protest comes over six months after bid opening, it states that it is not challenging the solicitation terms as such but rather the decision to make awards to other contractors. We conclude that the protest was untimely filed because C&D is really challenging the terms of the solicitation despite its protestations to the contrary. Accordingly, we dismiss the protest.

BACKGROUND

The District's Department of Transportation ("DDOT"), Urban Forestry Administration ("UFA") had a requirement for a contractor to provide tree pruning services. The Office of Contracting and Procurement ("OCP") advertised the indefinite delivery indefinite quantity ("IDIQ") fixed unit price Invitation for Bids ("IFB") in the Washington Times on June 27, 2008. It was posted on OCP's website the same day. There were eight amendments to the IFB, none of which changed the procurement strategy or the statement of work. Amendments 1-6 each extended the bid opening date. Amendment No. 7 revised the price schedule and required bidders to submit two sets of unit prices, one set based on a minimum quantity and one set based on a maximum quantity. Amendment No. 8 extended the bid opening to August 18, 2008. Section B.1.1 of the IFB stated: "The District Government contemplates award of four Indefinite Delivery- Indefinite Quantity (IDIQ) contracts for the services specified with payment based on firm fixed unit prices as set forth in the schedule." Section B.1.2 of the IFB provided that: "It is the District's intent to award four (4) contracts, one contract per contractor." (AR Ex. 1, Protest Ex. A).

Bids were opened on August 18, 2008. Eight firms submitted bids in order from low to high: Heavy Equipment Training Academy, minimum amount \$2,900, maximum amount \$365,625; C&D Tree Service, minimum amount \$2,700, maximum amount \$367,500; Adirondack Tree Experts, minimum amount \$3,660, maximum amount \$438,125; Community Bridge, Inc., minimum amount \$3,590, maximum amount \$451,000; Kennedy Development, LLC, minimum amount \$3,333, maximum amount \$522,250; Arbor Care, minimum amount

\$7,385, maximum amount \$897,500; The Care of Trees, minimum amount \$10,395, maximum amount \$1,246,500; and Excel Tree Experts Co., Inc. (AR at 3; Protest, Ex. B). Heavy Equipment Training Academy was the apparent low bidder, but the firm was determined nonresponsive by the contracting officer on February 11, 2009. The bid submitted by Arbor Care was determined non-responsive because it did not adhere to Amendment No. 7 which amended the pricing schedule. The bid submitted by Excel was submitted on August 25, 2008, and was rejected as late. On October 9, 2008, in CAB No. P-0787, Excel protested the rejection of its bid and OCP's failure to issue a contract in accordance with the IFB. On October 28, 2008, the District filed a motion to dismiss asserting that the protest was untimely. On January 16, 2009, the Board dismissed Excel's protest as untimely.

On February 11, 2009, the District awarded two of the pruning contracts to C&D and Adirondack. John Thomas, UFA's Administrator, and Kathy Hatcher, the contracting officer, met with C&D on March 3, 2009 and with Adirondack on March 4, 2009, to discuss the contract requirements, and other post-award logistical issues. (AR at 4). During the March 3 meeting, C&D asked the District why it was awarding more than one contract. Mr. Nelson, C&D's representative, stressed the fact that because of the variance in prices the District would pay more for the services. Mr. Thomas emphasized that the District needed to award at least four contracts in order to quickly respond to new service requests and to catch up on the large backlog of service requests. During the discussion, Mr. Thomas and Ms. Hatcher expressed UFA's desire to have multiple contractors working throughout the city at the same time. Mr. Thomas stated that four contractors would allow UFA to respond more quickly to requests from the Mayor, the Council, and the public. (AR at 4-5; AR Ex. 6).

Before the District could award a contract to Kennedy Development, LLC, and make a fourth award, C&D filed this protest on March 6, 2009, challenging the District's decision to make multiple awards under the IFB, arguing that such a decision is too expensive. The District filed a Motion to Dismiss and Agency Report on March 20, 2009, and C&D filed its opposition on April 3, 2009.

DISCUSSION

We exercise jurisdiction over this protest pursuant to D.C. Code § 2-309.03 (a)(1).

C&D argues that it is improper and unreasonable for the District to award contracts to Adirondack and Kennedy under the IFB when the total cost to the District exceeds the cost of a single contract with C&D. Citing 27 DCMR § 1541 and FAR § 14.103-2, C&D argues that the District may award multiple awards under an IFB only if doing so is "economically advantageous to the Government" and results in the "lowest aggregate cost to the Government." Thus, C&D contends that the District is prohibited from making multiple awards that would result in a higher overall cost. A higher overall cost resulting from multiple awards is implicit in the solicitation. Sections B.1.1 and B.1.2 indicate the District's intent to award four IDIQ contracts. Clearly, the IFB anticipates a cost exceeding the cost of a single contract awarded to the lowest bidder, however, the extent of the costs to the District cannot be determined until all task orders are issued under the contracts. If C&D wished to challenge multiple awards, it had to do so by bid opening. Because it waited more than six months after bid opening to file its challenge, we dismiss its protest as untimely.

CONCLUSION

The solicitation clearly stated the District's intent to make multiple IDIQ awards. C&D had to file a protest of the solicitation provisions providing for multiple awards by bid opening on August 18, 2008. Its protest, filed more than six months after bid opening, is thus untimely. Accordingly, we dismiss the protest.

SO ORDERED.

DATED: July 6, 2009

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

CONCURRING:

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