

**DISTRICT OF COLUMBIA  
CONTRACT APPEALS BOARD**

PROTEST OF:

AMI Risk Consultants , Inc.	)	
	)	CAB No. P-0900
	)	
Under Solicitation No. DCRK-2011-R-0219	)	

For the Protestor: Aguedo Ingco, *pro se*. For the District of Columbia: Robert Schildkraut, Assistant Attorney General, Office of the Attorney General.

Opinion by Administrative Judge Maxine E. McBean with Chief Administrative Judge Marc D. Loud, Sr., and Administrative Judge Monica C. Parchment concurring.

**OPINION**

*Filing ID 44476514*

AMI Risk Consultants, Inc. (“AMI” or “protester”) has filed a protest challenging the District’s decision to award a contract to PRM Consulting (“PRM”) under solicitation number DCRK-2011-R-0219. The protester challenges the award on the grounds that (a) the District improperly disqualified AMI’s proposal due to AMI’s failure to obtain a District of Columbia business license; and (b) PRM is not qualified to perform the work under the contract. The District contends that (a) the protester was correctly determined by the Contracting Officer (“CO”) to be nonresponsible, and (b) as a nonresponsible offeror, the protester lacks standing to challenge the validity of the award.

Having reviewed the record, we conclude that the CO did not violate procurement law, regulation, or the terms of the solicitation in determining AMI to be nonresponsible. We deny the protester’s challenge to the CO’s determination of nonresponsibility and, furthermore, dismiss the remaining grounds for lack of standing.

**BACKGROUND**

On September 1, 2011, the District’s Office of Contracting and Procurement (“OCP”) issued a small purchase Request for Proposals for Solicitation No. DCRK-2011-R-0219 (“RFP”) on behalf of the Office of Risk Management (“ORM”). (*See* AR at Exs. 1, 2, 6.) The RFP sought the “services of qualified actuary [sic] to develop and compile . . . data . . . and . . . produce an actuarial study valuation of the [District’s] workers’ compensation and tort liability” under a labor hour contract. (AR at Ex. 2, §§ B.1, B.2.) The RFP was amended twice prior to the deadline for receipt of proposals on September 15, 2011. (AR at Ex. 1.) The amendments were as follows: (i) on September 12, 2011, (Amendment No. 0001), potential offerors’ questions were responded to and the responses were incorporated into the RFP; and (ii) on September 15,

2011, (Amendment 0002), additional questions were responded to and amendments were made to certain sections of the RFP. (AR at Ex. 3.)

### ***Terms of the RFP***

The terms of the RFP set out ORM's requirements for contract performance including the expectation that "the period of performance for each contract term (base year and each action year if exercised) will begin October 1<sup>st</sup> and end March 31<sup>st</sup>," giving an awardee only 6 months to complete all performance requirements of the anticipated contract. (AR at Ex. 2, § F.1.2.) Deliverables under the contract included three drafts of reports, the first due by mid-November, and bi-weekly status calls. (AR at Ex. 2, § F.3.) The District was required to award the contract to "the responsible offeror whose offer is most advantageous to the District, based upon the evaluation criteria specified." (AR at Ex. 2a, § M.1.)

The District reserved its right to "reject as non-responsive any bid that fails to conform in any material respect to the RFP." (AR at Ex. 2a, § L.2.4.) Furthermore, the RFP clearly stated that bidders were "expected to read and understand fully all information and requirements contained in the solicitation; failure to do so will be at bidders risk," (AR at Ex. 2a, § L.5) and "thoroughly familiarize themselves with the terms and conditions of this solicitation, acquainting themselves with all available information regarding difficulties which may be encountered," (AR at Ex. 2a, § L.3).

Under Section L.13 entitled "General Standards of Responsibility," the RFP further detailed that:

The prospective contractor must demonstrate *to the satisfaction of the District* its capability in all respects to perform fully the contract requirements; therefore, the prospective contractor must submit the documentation listed below, within five (5) days of the request by the District.

\* \* \*

§ L.13.4      Evidence of compliance with the applicable District licensing and tax laws and regulations.

\* \* \*

§ L.13.8      If the prospective contractor fails to supply the information requested, the CO shall make the determination of responsibility or nonresponsibility based upon available information. If the available information is insufficient to make a determination of responsibility, the CO shall determine the prospective contractor to be nonresponsive.

(AR at Ex. 2a (emphasis added).)

The solicitation included additional requirements regarding an offeror's license to do business with the District of Columbia. The RFP stated that compliant proposals would include in Section 4 of their respective proposals certain "Additional Documents," including a "[c]opy of valid business license [sic] if currently conducting business in the District of Columbia." (AR at Ex. 2a, § L.2.1.5(d); *see also id.* at § L.2.1.1.) Under Section L.12, entitled "Legal Status of Bidder," the RFP stated that offerors were required to provide in their bids the following:

§ L.12.2      A copy of each District of Columbia license, registration, or certification that the bidder is required by law to obtain. . . . If the bidder is a corporation or partnership and does not provide a copy of its license, registration or certification to transact business in the District of Columbia, the bid shall certify its intent to obtain the necessary license, registration or certification prior to contract award or its exemption from such requirements.

(AR at Ex. 2a.)

### ***Evaluation of Proposals & Contract Award Decision***

The RFP closed on September 15, 2011. (AR at Ex. 1.) Two offerors, AMI and PRM timely submitted proposals. (*Id.*) An evaluation panel "met to evaluate the technical proposals" of both offerors and submitted its report "including consensus scores, as well as a listing of strengths and weaknesses for each offeror." (AR at Ex. 5.) On October 3, 2011, the CO requested Best and Final Offers ("BAFOs") from AMI and PRM. (AR at Exs. 1, 7.)

On the same day, the Contract Specialist, Anthony Berry, sent a separate email to AMI which stated:

Due to operational needs, the District anticipates the subject solicitation no later than close of business, October 5, 2011. In order for your firm to be eligible for award, you are required to provide the necessary District license for business activities by 12:00 noon, October 5, 2011.

It is imperative that you contact Ms. Donise Peace, of the DC Department of Consumer and Regulatory Affairs, to work responsively and expeditiously to resolve this licensure matter.

(AR at Ex. 4, at 5.)

On October 4, 2011, AMI responded to the Contract Specialist's email stating that it had "learned that the only way to expedite the application for a business license is to do a walk-in application. Inasmuch as we are based in Miami, Florida, it would be improbable for us to obtain a District Business License by 12:00 noon tomorrow." (*Id.*)

Through a series of emails, the District attempted to work with the DC Department of Consumer and Regulatory Affairs (“DCRA”) and AMI to resolve the licensure issue. (*See* AR at Ex. 4.) At 7:36 p.m. on October 5, 2011, AMI sent an email to the Contract Specialist stating:

Upon reading more thoroughly the requirements for District Business License, I have concluded that since our principals hold professional licenses as a [sic] Fellows of the Casualty Actuarial Society and the American Academy of Actuaries, our company does not have to register for a business license.

‘The General Business License applies to all businesses doing business in the District of Columbia who do not fall under an already specified category or are not professional [sic] licensed’

‘If a business entity is comprised of principals who are required to maintain licenses granted or regulated by local, state, or national certification board or body, the entity and its principals shall not be required to obtain a General Business License.’

\* \* \*

We have also mailed the application for Certificate of Authority with DC.

(AR at Ex. 4, at 3-4.)

The Contract Specialist then worked with DCRA and AMI to clarify whether AMI’s “specific business activity . . . require[d] a business license.” (AR at Ex. 4, at 1-3.) Concurrent to this series of email exchanges, which spanned from October 3, 2011, to October 7, 2011, the District continued to evaluate the offeror proposals. On October 5, 2011, BAFOs were submitted by both AMI and PRM. (AR at Ex. 1.) On October 7, 2011, Donise Peace clarified with both the Contract Specialist and AMI that AMI was required to have a General Business License to do business in the District of Columbia. (*See* AR at Ex. 4, at 1.)

On October 13, 2011, the CO prepared and issued the Small Purchase Procurement Summary in which he stated:

AMI Risk Consultant is deemed non-responsible due to its failure to obtain a license to conduct business in the District as required in Sections L.2.1.5(d) and L.12.2 prior to contract award.

(AR at Ex. 6.)

On October 13, 2011, the District awarded the contract to PRM (AR at Ex. 1) and submitted to the Board a Determination and Findings to Proceed with Contract Award While a

Protest is Pending (AR at Ex. 5). The District forwarded the notice of contract award to AMI on October 20, 2011. (AR at Ex. 1.) On November 2, 2011, AMI filed its protest of award with the Board.

## DISCUSSION

The protester has argued that the District improperly determined AMI to be nonresponsible and, furthermore, that “the District demonstrated bad faith when dealing with AMI Risk Consultants, Inc.” (AMI Resp. to Mot. to Dismiss 1, Dec. 2, 2011.) At issue is whether the District properly determined that AMI was a nonresponsible bidder. If the Board finds that the determination was proper, then AMI lacks standing to raise other challenges with respect to the award. *See Heller Elec. Co.*, CAB No. P-0444, 44 D.C. Reg. 6784, 6787 (Jan. 22, 1997).

### I. CO’S DETERMINATION OF AMI NONRESPONSIBILITY

Bidder responsibility is a prerequisite to contract award. D.C. Code § 2-353.01(a) (2011). Procurement regulations require that the contracting officer make awards only to responsible contractors, and that the contracting officer make a written determination of whether a prospective contractor is responsible prior to any award. D.C. Mun. Reg. tit. 27, § 2200.1-.2 (2002); *see also Kidd Int’l Home Care Servs.*, CAB No. P-0547, 45 D.C. Reg. 8835, 8839 (Sept. 15, 1998). Furthermore, “[t]he regulations place the burden on the prospective contractor to demonstrate its responsibility.” *Grp. Ins. Admin., Inc.*, CAB No. P-0309-B, 40 D.C. Reg. 4485, 4517 (Sept. 2, 1992). The general standards of responsibility are set forth in D.C. Mun. Reg. tit. 27, § 2200.4 (2002) and in Section L.13 of the solicitation. (AR at Ex. 2.)

Before making a responsibility determination, “the contracting officer shall possess or obtain information sufficient to satisfy the contracting officer that a prospective contractor currently meets the applicable standards and requirements for responsibility.” D.C. Mun. Reg. tit. 27, § 2204.1 (2002). “Besides obtaining information from the prospective contractor, the contracting officer should also obtain information on responsibility from other sources as appropriate under the circumstances.” *Children, Children, Children, Inc.*, CAB No. P-0858, 2011 WL 489700 (Jan. 7, 2011). “[I]n the absence of information clearly indicating that the contractor is responsible, the contracting officer shall determine the contractor to be nonresponsible.” *Id.*; *see also* D.C. Mun. Reg. tit. 27, § 2200.3 (2002).

This Board has consistently held that a contracting officer has a duty to determine the prospective contractor’s responsibility and, as such, the contracting officer is vested with wide discretion and business judgment. *See, Goel Servs., Inc.*, CAB No. P-0862, 2011 WL 7402962 (June 16, 2011); *see also, e.g., Children, Children, Children, Inc.*, 2011 WL 489700; *Cent. Armature/Fort Meyer Joint Venture*, CAB No. P-0478, 44 D.C. Reg. 6823, 6828 (June 6, 1997). Therefore, “the Board will not overturn a finding of responsibility or nonresponsibility unless the protester shows bad faith on the part of the contracting agency or that the contracting officer’s determination lacks any reasonable basis.” *Lorenz Lawn & Landscape, Inc.*, CAB No. P-0869, 2011 WL 7402964 (Sept. 29, 2011).

### ***Bad Faith***

The protester has alleged bad faith on the part of the District regarding the CO's determination of nonresponsibility. However, "[a]ny discussion of bad faith by government officials must begin with an analysis of the conduct that constitutes bad faith." *Goel Servs., Inc.*, 2011 WL 7402962 (citing *Kalvar Corp., Inc. v. United States*, 211 Ct. Cl. 192 (1976)). "It is well-established that procurement officials are presumed to act in good faith; and in order for this Board to conclude otherwise, the record must show that the procuring official had a specific, malicious intent to harm the protestor." *Grp. Ins. Admin., Inc.*, CAB No. P-0309, 40 D.C. Reg. at 4518. Evidence sufficient to sustain a claim of bad faith must rise to the level of 'irrefragable proof' showing bad faith "actuated by animus toward the plaintiff." *Librach v. United States*, 147 Ct. Cl. 605, 614 (1959), *adopted in Goel Servs., Inc.*, 2011 WL 7402962.

In this case, protester's bad faith allegation stems from the terms of the RFP. The protester claims:

[I]t is in bad faith for the District to suggest that intent to get a license is sufficient to satisfy the RFP and then to disqualify the proposer for not having a business license at the time of award – knowing full well that the District cannot process the license application by the time of award.

(AMI Resp. to Mot. to Dismiss 1.)

However, the protester has not proffered the evidence necessary to demonstrate a specific malicious intent on the part of the CO in order to establish bad faith. To the contrary, a review of the record shows that OCP took many actions to aid the protester in resolving its licensing issues. The Contract Specialist spoke with DCRA on many occasions on behalf of protester.<sup>1</sup> (*See* AR at Ex. 4.) Furthermore, the record evidences that OCP seriously considered the protester's claim that it was exempt from the requirement of having a business license. Specifically, the Contract Specialist contacted DCRA and asked a representative to analyze whether the protester needed a business license. (*See* AR at Ex. 4, at 1.) Therefore, the record does not support an allegation that the terms of the RFP were written by OCP with the specific intent of injuring protester. Accordingly, there is no evidence that the determination of nonresponsibility with respect to the protester was made in bad faith.

### ***Reasonable Basis***

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<sup>1</sup> The District provides for expedited license processing with a walk-in application. (*See* AR at Ex. 4, at 5.) Since protester is based in the state of Florida (AR at Ex. 4, at 12), that process may have been inconvenient. However, under the terms of the solicitation, it was incumbent on potential offerors to "read and understand fully all information and requirements contained in the solicitation," (AR at Ex. 2a, § L.5) and "thoroughly familiarize themselves with the terms and conditions of this solicitation, acquainting themselves with all available information regarding difficulties which may be encountered," (AR at Ex. 2a, § L.3). Therefore, it was solely protester's responsibility to research and comply with the business licensing requirements in the District of Columbia.

Additionally, it was reasonable for the CO to determine that AMI was a nonresponsible offeror. The General Standards of Responsibility clearly stated that it was incumbent upon the prospective contractor to “demonstrate to the satisfaction of the District its capability in all respects to perform fully the contract requirements,” including “[e]vidence of compliance with the applicable District licensing and tax laws and regulations.”<sup>[2]</sup> (AR at Ex. 2a, §§ L.13, L.13.4.) Notably, by the time that the contracting officer was required to make the determination of responsibility:

- (1) AMI had claimed that it was exempt from the requirement of Business License; (AR at Ex. 4, at 3-4)
- (2) DCRA determined that AMI was required to have a General Business License in order to do business in the District of Columbia; (AR at Ex. 4, at 1)
- (3) AMI was unable or unwilling to take advantage of the District’s expedited application process; (AR at Ex. 4, at 5)
- (4) The term of the contract was relatively short, all performance was to be completed in six months, and required the awardee to start performing immediately; (*See* AR at Ex. 2, § F.1.2) and
- (5) The General Standards of Responsibility required prospective contractors to be in compliance with applicable District licensing laws, (AR at Ex. 2a, § L.13.4).

In light of this record, the Board has no reason to overturn the CO’s determination that the protester was a nonresponsible bidder. Given the expedited nature of the contract, requiring performance to be completed within a short period of time, the CO was justifiably concerned about the status of protester’s business license. Furthermore, procurement regulations state that if there is an absence of information “clearly indicating that the prospective contractor is responsible, the contracting officer shall make a determination of nonresponsibility.” D.C. Mun. Regs. tit. 27, § 2200.3 (2002).

## II. PRM’S QUALIFICATION

The Board finds that the protester was properly determined to be nonresponsible and, therefore, lacks standing to challenge PRM’s qualification to perform the contract. As a result of its status as a nonresponsible bidder, protester would not be next in line for award even if this Board were to determine that PRM was not qualified to perform the contract. “A protester lacks standing where it would not be in line for award even if its protest were upheld.” *C.P.F. Corp.*, CAB No. P-0521, 45 D.C. Reg. 8697, 8699 (Jan. 12, 1998) (citing *Am. Combustion Indus.*, CAB No. P-0499, 44 D.C. Reg. 6896 (Aug. 14, 1997); *see also Unfoldment, Inc.*, CAB No. P-0358, 41 D.C. Reg. 3666 (Sept. 17, 1993). Accordingly, the CO is legally barred from awarding the contract to protester as a nonresponsible offeror. *See* D.C. Code § 2-353.01(a).

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<sup>2</sup> This Board has held that “these very types of registrations, licenses and certification requirements . . . may be met by a bidder after bid opening and even after contract award.” *Lorenz Lawn & Landscape, Inc.*, CAB No. P-0869, 2011 WL 7402964 (citing *C & D Tree Servs., Inc.*, D.C. CAB No. P-0440, 44 D.C. Reg. 6426, 6433-6439 (Mar. 11, 1996) (discussing solicitation requirements concerning the “District of Columbia license, registration or certification that the bidder is required by law to obtain” and other language that closely parallels the requirements of the present solicitation)). However, there was a short timeframe for contract performance and we have also established that these registrations are “matters of responsibility.” *Id.*

## CONCLUSION

For the reasons discussed herein, we sustain the CO's nonresponsibility determination, deny AMI's protest in part and dismiss the protest in part.

## SO ORDERED:

DATED: May 25, 2012

/s/ Maxine E. McBean  
MAXINE E. MCBEAN  
Administrative Judge

## CONCURRING:

/s/ Marc D. Loud, Sr.  
MARC D. LOUD, SR.  
Chief Administrative Judge

/s/ Monica C. Parchment  
MONICA C. PARCHMENT  
Administrative Judge

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