

## DISTRICT OF COLUMBIA CONTRACT APPEALS BOARD

PROTEST OF:

GOEL SERVICES, INC. )  
 ) CAB No. P-0862  
 )  
Solicitation No: DCEB-DMPED-10-I-0012 )

For the Protester: Paul V. Waters, Esq., Erin A. Behbehani, Esq. For the District of Columbia Government: Talia Sassoon Cohen, Esq., Assistant Attorney General.

Opinion by Administrative Judge Warren J. Nash, with Chief Administrative Judge Marc D. Loud, Sr., concurring.

### OPINION

*Filing ID 38185928*

Goel Services, Inc. (“Goel”) protests the award of a contract for the demolition of the D.C. General Hospital’s former pediatric unit (hereafter “Hill East Building 10”) to Keystone Plus Construction. Goel challenges the award on the grounds that the contracting officer’s nonresponsibility determination erred in concluding that Goel could not meet the detailed schedule of performance required by the solicitation, submitted an unrealistically low bid price, and failed to submit evidence of the categorized project cost breakdown. Goel also contends that the Contracting Officer’s award to Keystone was a sham, noting that the Determination and Finding (“D&F”) to award the contract to Keystone was completed before obtaining responsibility information from the protester (the apparent low bidder). After carefully reviewing the entire record herein, we conclude that the contracting officer did not violate law, regulation, or the terms of the solicitation in determining Goel to be nonresponsible. Accordingly, we deny the protest.

### BACKGROUND

On June 23, 2010, the Office of the Deputy Mayor for Planning and Economic Development (“DMPED”) issued IFB No. DCEB-DMPED-10-I-0012 (“IFB”) in the open market. (Agency Report (“AR”); AR Ex. 1 and 7). The IFB was for a contractor to provide all labor, materials and equipment to fully execute the requirements to demolish the existing building, including removing all site furnishings and appurtenances and cutting or abandoning site utilities at Hill East Building 10, located at 1900 Massachusetts Avenue, SE, Washington D.C., in accordance with the scope of work. (AR Ex. 1).

The bid opening date was June 30, 2010. (AR Ex. 1). By 2:00 p.m. on June 30, 2010, the following three bidders submitted lump sum bids:

Bidder	Total Price	Total Evaluated Bid
Horton & Barber	\$3,250,000.00	\$2,860,000.00
Goel	\$3,985,000.00	\$3,985,000.00
Keystone Plus Construction	\$4,398,000.00	\$4,090,140.00

(AR Ex. 5)

The Contracting Officer determined that Horton & Barber was the apparent low bidder. The Contracting Officer also determined that Horton & Barber's bid was nonresponsive since Horton & Barber failed to submit a bid bond with their bid. (AR Ex. 7).

Further, by a Determination and Findings for Contractor Nonresponsibility ("D&F for Nonresponsibility") dated July 14, 2010, the Contracting Officer determined Goel nonresponsive. (AR Ex. 6). By a Determination and Findings for Award to Other Than Low Bidder dated June 30, 2010, the District recommended award to Keystone Plus Construction ("Keystone") as it met all the requirements of the solicitation. (AR Ex. 6).

The District awarded Contract No. DCEB-DMPED-10-C-0012 ("contract") dated August 11, 2010, to Keystone. On August 20, 2010, Goel filed the instant protest challenging the District's determination of nonresponsibility. On August 24, 2010, the District issued to Keystone a Notice to Cease Performance. By a Determination and Findings to Proceed with Contract Performance after Receipt of a Protest dated August 24, 2010, OCP determined that it was in the best interest of the District to proceed with contract performance while the protest is pending. On August 25, 2010, pursuant to the Determination and Findings to Proceed with Contract Performance after Receipt of a Protest, the District issued to Keystone a Notice to Resume Performance. (AR Ex. 11). On August 31, 2010, Goel filed a Motion Challenging the District's Determination and Findings to Proceed with Contract Performance after Receipt of a Protest ("Motion to Challenge"). On September 2, 2010, the District filed its Response to the Protester's Motion to Challenge. On September 24, 2010, the Board sustained the Chief Procurement Officer's written determination to proceed with contract performance.

Goel challenges the Contracting Officer's determination of nonresponsibility regarding Goel's bid. The District responds that the District properly determined Goel nonresponsive.

## **DISCUSSION**

Goel alleged in its protest that the Contracting Officer erred when he found Goel nonresponsive. Goel expanded its argument when it filed the Challenge to the D&F to proceed with contract performance. In the challenge to the D&F, Goel sets forth its version of a telephone conversation of June 30, 2010, between Mr. P.J. Goel and the Contracting Officer regarding Goel's ability to perform the contract. (Ex. 2, Challenge to D&F, Declaration of Piyush J. Goel). Mr. Goel further asserts that the Contracting Officer did not contact the protester on any other occasion to discuss the bid, and that the Contracting Officer did not request any other information or documents from Goel.

The Contracting Officer prepared a D&F for Contractor Nonresponsibility on July 14, 2010. (AR Ex. 6). In that D&F, the Contracting Officer set forth his reasons for finding Goel nonresponsible.

The Procurement Regulations set forth the District's rules regarding responsibility. 27 DCMR § 2200.4 states that "[t]o be determined responsible, a prospective contractor shall meet all of the following requirements:

- (a) Financial resources adequate to perform the contract, or the ability to obtain them;
- (b) Ability to comply with the required or proposed delivery or performance schedule, taking into consideration all existing commercial and governmental business commitments;
- (c) A satisfactory performance record;
- (d) A satisfactory record of integrity and business ethics;
- (e) The necessary organization, experience, accounting and operational controls, and technical skills, or the ability to obtain them;
- (f) Compliance with the applicable District licensing and tax laws and regulations;
- (g) The necessary production, construction, and technical equipment and facilities, or the ability to obtain them; and
- (h) Other qualifications and eligibility criteria necessary to receive an award under applicable laws and regulations."

Moreover, 27 DCMR § 2200.5 provides as follows:

If the contracting officer determines that the price bid or offered by a prospective contractor is so low as to appear unreasonable or unrealistic, the contracting officer may determine the prospective contractor to be nonresponsible.

As indicated in the D & F for Nonresponsibility, on July 2, 2010, the Contracting Officer contacted Goel and spoke with Goel about whether Goel could meet the performance schedule. According to the Contracting Officer, Goel indicated that it would perform the project within the time stated in the IFB but failed to provide any further details. Additionally, the Contracting Officer determined that Goel's bid was unrealistically low. Goel failed to provide the District with evidence of the project cost breakdown, as required by Section B.7 (E) of the IFB. When asked by the Contracting Officer to explain their costs to knock down a building, Goel responded "that they knock down buildings all the time." (AR Ex. 6). Goel submitted a price for removal of contaminated soil at \$25.00 per ton. The Contracting Officer determined that a realistic estimate is \$50.00 to \$95.00 per ton.

In addition, the Contracting Officer determined that Goel submitted unrealistically low amounts for cutting and patching existing fixtures, and for the demolition of the building. Goel submitted a price of \$10,000 for cutting and patching fixtures whereas the Contracting Officer determined that a realistic estimate is \$75,000 to \$100,000. Goel submitted a price of \$600,000 for building demolition whereas the Contracting Officer determined that a realistic price for that work would be \$900,000.

This Board has consistently held “that the determination of a prospective contractor’s responsibility is the duty of the contracting officer and that that official is vested with wide discretion and business judgment.” *Protest of: Kidd International Home Care Services, Inc., No. P-547, Sept. 15, 1998, 45 D.C. Reg. 8835; Protest of: Aceco, LLC., CAB No. P-486, July 23, 1997, 44 D.C. Reg. 6852; Protest of: Central Armature/Fort Myer, CAB No. P-478, June 6, 1997, 44 D.C. Reg. 6823; Protest of: Ideal Electrical Supply Corporation, CAB No. P-372, Aug. 13, 1993, 41 D.C. Reg. 3603. See 27 DCMR §§ 2200, 2204.* Therefore, in reviewing a determination concerning general standards of responsibility, we will not overturn a finding of responsibility or nonresponsibility unless the protestor shows bad faith on the part of the agency or that the determination lacks any reasonable basis. *Protest of: Ideal Electrical Supply Corporation, supra. See also Protest of: Alexandria Scale t/a Bay Scale, Inc., CAB No. P-361, 1993 DCBCA Lexis 277, (March 25, 1993).*

In the *Protest of: Group Insurance Administration, Inc., CAB No. P-309-B, Sept. 2, 1992 40 D.C. Reg. 4485 (aff’d, No. 92-12406 Super. Ct. Apr. 25, 1994)* this Board expressed its standard of review as follows:

This Board will not reverse an affirmative determination of responsibility, which is largely a business judgment, unless the protestor shows possible fraud or bad faith on the part of procurement officials, or that the solicitation contains definitive responsibility criteria which have not been met. 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 officials had a specific, malicious intent to harm the protestor.

This Board will not reverse an affirmative determination of responsibility or non-responsibility unless there is evidence of bad faith on the part of the District. In this regard, the protestor provides no evidence of bad faith. In papers filed by the protestor after its initial response to the agency report, the protestor alleged bad faith on the part of the District regarding the Contracting Officer’s determination of nonresponsibility. It appears that the protestor forwarded the allegations to the Inspector General in August of 2010. However, the protestor provided no further information regarding the alleged bad faith of any District officials.

Any discussion of bad faith by government officials must begin with an analysis of the conduct that constitutes the bad faith. *Kalvar Corporation, Inc. v. United States*, 211 Ct.Cl. 192, 543 F.2d 1298 (1976), involved a claim contending that the Government had shown bad faith or clear abuse of discretion in determining that films requested by one agency were beyond the scope of the primary source contract and that plaintiff had incurred costs that were recoverable under the termination for convenience clause of contract. In analyzing the proof needed to prove bad faith, the court stated:

Any analysis of a question of Governmental bad faith must begin with the presumption that public officials act conscientiously in the discharge of their duties”. *Librach v. United States*, 147 Ct.Cl. 605, 612 (1959). The court has always been ‘loath to find to the contrary,’ and it requires ‘well-nigh irrefragable proof’ to induce the court to abandon the presumption of good faith dealing. *Knotts v. United States*, 121 F.Supp. 630, 631, 128 Ct.Cl. 489, 492 (1954).

In the cases where the court has considered allegations of bad faith, the necessary ‘irrefragable proof’ has been equated with evidence of some specific intent to injure the plaintiff. Thus, in *Gadsden v. United States*, 78 F.Supp. 126, 127; 111 Ct.Cl. 487, 489-90 (1948), the court compared bad faith to actions which are ‘motivated alone by malice.’ In *Knotts, supra*, at 128 Ct.Cl. 500, 121 F.Supp. 636, the court found bad faith in a civilian pay suit only in view of a proven ‘conspiracy \* \* \* to get rid of plaintiff.’ Similarly, the court in *Struck Constr. Co. v. United States*, 96 Ct.Cl. 186, 222 (1942) found bad faith when confronted by a course of Governmental conduct which was ‘designedly oppressive.’ But in *Librach, supra*, at 147 Ct.Cl. 614, the court found no bad faith because the officials involved were not ‘actuated by animus toward the plaintiff.’

Bad faith cannot consist solely of mistakes, but it must also include some specific intent to injure the plaintiff. After reviewing the record in this procurement, we have determined that the Contracting Officer acted appropriately in finding Goel nonresponsible. Goel failed to detail how it would meet the project’s performance schedule, and submitted unrealistically low bids for removal of contaminated soil, cutting and patching existing fixtures, and building demolition. Additionally, we see no evidence of any bad faith committed by any District official toward the protester.

## CONCLUSION

For the reasons discussed above, we dismiss Goel’s protest to the award of the contract.

## SO ORDERED.

DATED: June 16, 2011

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

CONCURRING:

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

Electronic Service:

Paul V. Waters, Esq.  
Erin Behbehani, Esq.  
The Waters Law Firm, PLLC  
8737 Colesville Road, Suite 308  
Silver Spring, MD 20910

Talia Sassoon Cohen, Esq.  
Howard Schwartz, Esq.  
Assistant Attorney Generals  
Office of the Attorney General  
441 4th Street, N.W., 7th Floor South  
Washington, D.C. 20001