

GOVERNMENT OF THE DISTRICT OF COLUMBIA  
CONTRACT APPEALS BOARD

PROTEST OF:

A.L. EASTMOND AND SONS, INC.	)	
	)	CAB No. P-551
Under IFB No. DCPS-I-98063-OC	)	

For the Protester: Michael E. Geltner, Esq., Geltner & Associates, P.C. For the Government: Howard S. Schwartz, Esq., Warren J. Nash, Esq., and H. Christopher Malone, Esq., Assistants Corporation Counsel.

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

**OPINION**

A.L. Eastmond and Sons, Inc., protests the award of a contract to the high bidder, Kewanee Boiler Manufacturing Co., made because Eastmond and the second low bidder failed to include bid bonds in their bids. Eastmond argues that the solicitation's Amendment No. 1 which inserted a bid bond requirement was superseded by written responses to questions which indicated that a bid bond was not required. The District has moved to dismiss the protest on the ground that the District of Columbia Financial Responsibility and Management Assistance Authority ("Authority") executed the contract award on behalf of the District of Columbia Public Schools ("DCPS") thus rendering any protest beyond the reach of the Procurement Practices Act and our jurisdiction. We conclude that we properly exercise protest jurisdiction because the procurement was conducted by DCPS, the PPA and the solicitation made protests subject to Board jurisdiction, and the Authority did not amend the solicitation to alter the bidders' protest rights. On the merits, we conclude that DCPS did not violate law or regulation in rejecting the two low bids as nonresponsive for failing to include bid bonds. Accordingly, we deny the protest.

**FACTS**

On May 27, 1998, DCPS issued IFB No. DCPS-I-98063-OC, to procure boilers and boiler installation services for various schools located in the District of Columbia. (District's August 11, 1998 Submission (hereafter "District's Supplement")). DCPS also issued a companion solicitation, IFB No. DCPS-I-98064-OC, for the construction services needed to install the new boilers (being supplied under the 98063 solicitation) in the schools.

On the first page, the solicitation refers to the terms and conditions "by the District of Columbia Public Schools" and that award is to be completed by DCPS and executed by a contracting officer on behalf of DCPS. Section A.1 states that it "is the District of Columbia Public School's (DCPS) intent to procure boilers and boiler installation services and/or assign the contract in whole or in part to a District of Columbia Public Schools' construction contractor(s) to procure boilers and boiler installation." Section A.3 states that the contract will be managed as follows:

- a) The District of Columbia Public Schools (DCPS) is the Owner;
- b) The U.S. Army Corps of Engineers (COE) is the Contract Administrator; and
- c) Sverdrup Facilities, Inc. is the Construction Manager.

Sections E.2, F.2, and G.2 provide that DCPS was to be responsible for all aspects of contract administration, performance evaluation, inspection, and final acceptance of the work. Pursuant to Sections G.1 and G.2, DCPS was responsible for payment of invoices, including progress payments and final payment. Indemnity, warranty, and liquidated damages rights were to be exercised by DCPS pursuant to Section H. Section I.7 makes clear that the contract was to be funded by DCPS appropriated funds and that DCPS' "obligation under this contract is contingent upon the availability of appropriated funds from which payment for contract purposes can be made." DCPS was also the responsible District entity under the Suspension of Work, Changes, Default, Excusable Delays clauses. The Contract Disputes clause, Section I.15, provides that the DCPS CEO/Superintendent is responsible for issuing a final written decision on any dispute relating to a contract which is not resolved by informal discussions between the contracting officer and the contractor. The clause provides that the contractor may appeal the CEO/Superintendent's decision to the Contract Appeals Board.

Section L.1, entitled "Bid Submittal Instructions," stated that bids were to be submitted in two separate envelopes, one envelope containing submittal requirements of Sections J, K, and L, and another envelope containing, among other things, the bid's "Front page" and "your firm's bid guarantee."

The record indicates that a pre-bid conference was held on June 4, 1998.<sup>1</sup> Although Mr. Omor Igiehon, the manager responsible for preparing Eastmond's bid, was concerned "in the early stage of the procurement" about "whether bonds would be required" neither he nor anyone else raised the issue of the bid, payment, or performance bonds at the pre-bid conference.<sup>2</sup> (Eastmond Brief, filed August 12, 1998, Ex. 1, ¶ 3 (Aff. of Omor Igiehon)). Mr. Igiehon states that on one occasion he spoke with Mr. Terry Hernson, an employee of DCPS' capital projects office,

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<sup>1</sup> Although the document entitled "Answers to Questions [for] Pre-bid Conference June 4, 1998" identifies the 98064 solicitation by number, a copy of this document in the District August 11, 1998 Submission bears a hand correction indicating the 98063 solicitation. The content suggests that it refers to the 98063 solicitation.

<sup>2</sup> The record does not indicate whether a representative from Eastmond attended the pre-bid conference.

concerning bond requirements, and was told that the subject “would be addressed when DCPS sent out its amendment to the IFB and that DCPS was going to require a performance bond, but not a bid bond, from the boiler supplier.” (*Id.*).

In a June 8, 1998 letter to DCPS’ Mr. Hernson, Complete Boiler Systems (“CBS”), a prospective bidder, sought a number of clarifications regarding the 98063 solicitation. Concerning the construction contractor who ultimately would be successful under the 98064 solicitation, CBS asked whether the construction contractor would be “providing a materials bond covering the boilers assigned.” Concerning the 98063 solicitation, CBS asked: “What form of bid guarantee is required with this solicitation?” In a June 9, 1998 letter to the DCPS contracting officer, another prospective bidder under the 98063 solicitation, Union Boiler Works, Inc., stated:

Section L.1(b) refers to bid guarantee. We can find no requirement for a bid guarantee. We would not expect same inasmuch as this solicitation is under the Service Contract Act. Please clarify.

On June 15, 1998, DCPS issued Amendment No. 1 to the 98063 solicitation. Mr. Igiehon of Eastmond states that he received an envelope on June 18, 1998, which contained Amendment No. 1 (Protest, Ex. 2) and also written answers to questions submitted by potential bidders (Protest, Ex. 3). (Igiehon Aff. ¶ 5). Item 6 of the Amendment states: “Section J is changed to add the Performance Bond Form 0073 attached herein as Attachment J-13.” (Protest, Ex. 2). Item 19 states: “The contractor will be required to submit Performance Bonds and Payment Bonds as specified in the Notice to Proceed Letter.” Item 20 states:

Bid bond: (Applicable only if bid/contract is \$25,000.00 or greater). Each bidder shall submit with its bid a Bid Bond (DCPS FORM 0072) with good and sufficient surety or sureties acceptable to DCPS, or other security as provide[d] in FAR 52.0228-0001, Bid Guarantee, in the form of five percent (5%) of the bid price or acceptabilities of individuals proposed as sureties. One individual surety is adequate support for a bond, provided the unencumbered value of the assets pledged by the individual surety equal or exceed the amount of the bond. The contracting officer shall consider the number and amount of other bonds upon which a proposed individual surety is based, and the status of the contracts for which such bonds were furnished, in determining the acceptability of the individual surety. Instruction on the form DCPS FORM NO. 0072 shall be followed.

Item 21 replaced Section L.1.1 with the following: “Bids shall be submitted in one envelope.”

Item 16 changed Section I to incorporate by reference the “Rules of the District of Columbia Board of Education, Title 5, D.C. Municipal Regulations, Sections 3700 *et seq.*, ‘Procurement and Negotiated Service Contracts.’” (Protest, Ex. 2). Item 17 added to Section I a number of new clauses, including the following:

#### **PROTEST RESOLUTION BY THE PROCUREMENT OFFICER**

Complaint to Procurement Officer. Complainants should seek resolution of their

complaints initially with the Procurement Officer or the office that issued the solicitation. Such complaints may be made in writing.

Filing of Protest. Protests shall be made in writing to the Procurement Officer, and shall be filed in duplicate within ten (10) days after the protestor knew or should have known of the facts giving rise thereto. A protest is considered filed when received by the Procurement Officer. Protests filed after the ten (10) day period shall not be considered, except where a waiver has been granted the protester by the D.C. Public Schools due to extenuating circumstances.

The “Responses to Pre-Bid Questions” document, which Eastmond received in the same envelope with Amendment No. 1, is dated June 16, 1998. There is no language in the Amendment which incorporates the written responses to questions. The most that can be said is that the written responses clarify the original solicitation and direct the bidders to the Amendment for changes to the original solicitation. With regard to CBS’ question concerning construction contractor bonding, the written responses provide the following:

Each construction contractor will be responsible for 4 schools. Each construction contractor is responsible for providing a performance, payment and bid bond for the entire value of his/her bid price. The boiler supplier is responsible for providing a payment bond for the entire value of his/her bid price.

With regard to CBS’ question concerning a bid bond or bid guarantee for the boiler supplier, the document provides the following answer: “The Boiler supplier is responsible for a Performance bond. See Amendment for details.” With regard to Union Boiler Works’ question concerning a bid guarantee, the document provides the following answer: “Bid guarantee not required.” With regard to a performance bond, the document states: “A Performance Bond is required for this contract.”

Three bids were submitted under the 98063 solicitation and opened on June 19, 1998. Eastmond bid \$1,969,000, Rockmill Steel Products bid \$2,124,965, and Kewanee bid \$2,167,640. (District’s Supplement, Bid tab sheet). Eastmond and Rockmill did not include bid bonds with their bids while Kewanee included a bid bond on a commercial form. (*Id.*, Synopsis of Procurement dated July 10, 1998). The record indicates that Kewanee filed a protest with the contracting officer (Procurement Officer) challenging the bids of Eastmond and Rockmill for lack of bid bonds. The Corps of Engineers asked Eastmond to verify its bid on June 24, 1998. After reviewing Kewanee’s protest and receiving legal and contract advice from various government representatives, the contracting officer concluded that the lower bids of Eastmond and Rockmill were nonresponsive based on the lack of a bid bond and that Kewanee’s higher bid was nevertheless responsive and reasonably priced. In an amendment to the 98064 construction solicitation issued on July 8, 1998, by the Corps of Engineers on behalf of DCPS, prospective construction contract bidders were advised that Kewanee would be the boiler supplier under the 98063 solicitation. Eastmond learned of this amendment on July 10 and apparently filed a protest with the contracting officer challenging the presumed award to Kewanee and rejection of Eastmond’s bid for lack of a bid bond. On July 9, the contracting officer executed a determination finding Kewanee to be a responsible bidder, its bid to be responsive, and its bid price to be reasonable. (District’s Supplement, Determination of Responsibility/Responsiveness and Reasonableness of Price). On July 15, 1998, Eastmond filed its

protest with us.

On July 17, 1998, Mr. Richard P. Fite, the District's Chief Procurement Officer, executed a contract with Kewanee under the 98063 solicitation. (District's Supplement, Solicitation, Offer, and Award for Supplies and/or Services). In making the award, Mr. Fite used *inter alia* the bid cover page from Kewanee's bid and the revised pricing package from Amendment No. 1. Several changes were made to the bid cover page for the contract award. First, the heading "District of Columbia Public Schools" which appeared just above the title "Solicitation, Offer, and Award for Supplies and/or Services" on the original solicitation cover sheet, was crossed out. Second, the block on the form indicating that DCPS had issued the solicitation was modified by adding the following information:

Award Issued By:  
DC Financial Responsibility and Management  
Assistance Authority (DCFRA)  
One Thomas Circle, NW, Suite 900  
Washington, DC 20005

Third, the line at the bottom of the form which originally read "Award (To be completed by the District of Columbia Public Schools)" was annotated by replacing "District of Columbia Public Schools" with "DCFRA." Fourth, the contract number is stated as "DCFRA# 98-C-025." Fifth, the award amount was changed from \$2,167,640 to \$2,162,640. Finally, the contracting officer's signature block was changed by replacing the heading, "District of Columbia Public Schools," with "DC Financial Responsibility Authority."

On July 17, 1998, Mr. Fite (on behalf of the Authority) and Kewanee executed Modification 0001 to Contract No. DCFRA# 98-C-025. (District's Supplement, "Modification of Contract"). The modification states:

This contract is entered into by the District of Columbia Financial Responsibility and Management Assistance Authority ("Authority") on behalf of District of Columbia Public Schools. The Authority is authorized by Section 103 of Public Law 104-8, the District of Columbia Financial Responsibility and Management Assistance Act of 1995 (the "Act"), to enter into contracts for the purpose of carrying out its responsibilities, which include assisting the District Government in avoiding interruptions in the delivery of services. The Authority is not subject to the DC Procurement Practices Act, or any other laws or regulations governing procurement by the District Government. The Contractor will have a direct relationship with the District Government. The Authority may assign all rights and obligations under the contract to the District Government.

The modification deletes the Contract Disputes clause, Section I.15, with the following:

In the event of a disagreement or dispute regarding any matter covered by this Agreement, which is not disposed of by mutual agreement, the Contracting Officer shall, at either party's request, issue a Contracting Officer's decision on the matter,

which both parties shall comply with. If the Contractor does not comply with that decision, it may pursue whatever remedies it may have. In such event, each party shall be responsible for all costs it incurs as a result of such action.

The modification also states that “Notwithstanding any other provision in this contract, the Authority is not subject to the following laws: ‘Assignment of Claims Act,’ ‘Contract Disputes Act of 1978,’ ‘Prompt Payment Act.’” The modification adds that “[e]xcept as modified herein, all other terms and conditions of the above-numbered contract remain in full force and effect.”

On July 22, Eastmond moved the Board for an order, pursuant to the automatic stay provisions of the Procurement Practices Act, prohibiting the District from taking any procurement actions pending resolution of the protest. Only July 24, the District moved to dismiss the protest on the ground that the Authority, not the District government, is the contracting entity for the boiler supply and installation work. On August 5, the Board held a telephone conference with Eastmond and the District. Pursuant to that conference, the District filed documents but no brief on August 11 and Eastmond filed a brief on August 12.

## DISCUSSION

### A. Jurisdiction

The District argues that the Authority has taken over the boiler procurement and that it — not DCPS — awarded the contract to Kewanee. According to the District, because the Authority is the contracting agency, and the Board lacks authority to consider protests of awards by the Authority, the Board must dismiss the protest. Eastmond argues that the Authority’s power to enter into contracts pursuant to section 103 of Public Law No. 104-8 is not applicable to the DCPS solicitation here, where the solicitation was issued and conducted by and for DCPS, and contract performance will be administered and funded by DCPS.

The District correctly notes that Congress has delegated broad powers to the Authority and has exempted the Authority from review by the Mayor or the City Council and the District’s Procurement Practices Act. *See* Pub. L. No. 104-8, Apr. 17, 1995, §§ 102(c), 108. Section 103(g), entitled “Authority To Enter Into Contracts,” provides that the “Executive Director [of the Authority] may enter into such contracts as the Executive Director considers appropriate (subject to the approval of the Chair) to carry out the Authority’s responsibilities under this Act.” Regardless of whether the award made by the Authority to Kewanee comes within the terms of section 103(g), we conclude the Authority’s award action and bilateral modification affect resolution of contract performance disputes, not solicitation and award protests.

All aspects of the solicitation and procurement leading up to award were conducted by the DCPS contracting officer, known also as the DCPS Procurement Officer. At the time DCPS issued the solicitation, the Procurement Reform Amendment Act of 1996, D.C. Law 11-259, made DCPS procurements subject to the Procurement Practices Act, D.C. Code § 1-1181.4(a) (Supp. 1998), and protests of those procurements subject to Board jurisdiction, *id.* § 1-1189.3(a)-(b). Amendment No. 1, issued several days prior to bid opening, demonstrates that the solicitation and any award under the solicitation was subject to the Board’s protest jurisdiction. Amendment No. 1 incorporated the

protest procedures of 5 DCMR Chapter 37 which provide for filing of protests with the DCPS Procurement Officer, followed by CEO/Superintendent review, followed by Contract Appeals Board review.<sup>3</sup> Amendment No. 1 continues to show procurement authority being exercised by DCPS. At no time prior to award did the Authority issue a solicitation amendment taking control over the procurement or eliminating protest rights of bidders. Nor has the Authority suggested that it intended to deprive bidders of their protest rights when it executed the contract on behalf of DCPS. Therefore, based on the record presented to us, it is clear that Board protest jurisdiction was intended and never revoked. A reading of Modification 001 of the contract awarded to Kewanee indicates that the modification was directed to contract performance *disputes*, not solicitation or award *protests*.

## **B. Merits**

Eastmond argues that its bid should not have been deemed nonresponsive based on a failure to submit a bid bond with its bid. Although Eastmond's contracting official saw the bid bond requirement contained in Amendment No. 1, he concluded that a bid bond was not required because (1) DCPS had not supplied the bid bond form, DCPS Form No. 0072, with the Amendment, while it did supply the performance bond form, DCPS Form No. 0073; (2) DCPS would not have asked bidders (who were known to be out of town) to provide a bid bond on such short notice without including the form; (3) the written responses to the pre-bid questions, which specifically referenced Amendment No. 1 and post-dated it, constituted an amendment of the solicitation and made clear that DCPS did not want a bid bond, only a performance bond; and (4) the second low bidder also interpreted the solicitation as not requiring a bid bond.

Eastmond's strongest argument is that the written responses to the pre-bid questions constituted an amendment of the solicitation, and thus, effectively amended Amendment No. 1 by

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<sup>3</sup> By virtue of the revisions to the PPA effected by the Procurement Reform Amendment Act, the appeal and protest procedures set forth in the Board of Education regulations at 5 DCMR Chapter 37 no longer apply to DCPS procurements. There is no provision for agency-level protests in the PPA as amended. Although erroneous in some regards, the protest procedures incorporated by the solicitation correctly identify the Board as the protest forum.

eliminating the bid bond requirement. We conclude that the written responses did not constitute an amendment and therefore did not have the effect of eliminating the bid bond requirement clearly specified in Amendment No. 1. In the present case, the responses to the pre-bid questions were furnished to the bidders at the same time as Amendment No. 1. Amendment No. 1 cannot be read as incorporating by reference the written responses. Both the disclaimer at the beginning of the written responses and the repeated references in the written responses directing bidders to Amendment No. 1 demonstrate that the original solicitation and Amendment No. 1 were meant to be the official and controlling documents for defining the terms and conditions. The written responses to the pre-bid questions served at most as a clarification of technical requirements. It was also not reasonable to rely on the written responses as eliminating the bid bond requirement because of the ambiguities and inconsistencies in the responses themselves. For example, in response to CBS question 27, the document states that the construction contractor must provide a performance bond, a payment bond, and a bid bond and that the boiler supplier must provide a payment bond. Then, in response to CBS question 30, the document states that the boiler supplier is responsible for a performance bond and is directed to Amendment No. 1 for “details.” In response to Union Boiler’s question 8 which states that it can find no requirement for performance and payment bonds, the written response states that a performance bond is required. Thus, we do not find that it was reasonable to place any reliance on these responses or the “bid guarantee not required” response in the face of Amendment No. 1, which clearly requires a bid bond with the bid and performance and payment bonds as specified in the notice to proceed letter.

Eastmond’s other reasons for not submitting a bid bond do not add any material support to its position. That Amendment No. 1 did not include a copy of the bid bond form, while including the performance bond form, is not compelling. We do not see why a bidder could not obtain a copy of the bid bond form by facsimile or other timely means even one day before bid opening and have the surety properly execute the form in time for submission with its bid. Nor was it reasonable to rely on the oral indication from a DCPS representative who was not the contracting officer and given prior to Amendment No. 1. Moreover, the DCPS representative advised Eastmond’s representative that the subject of bonds would be addressed in a forthcoming DCPS amendment. Considering together all of Eastmond’s reasons for not submitting a bid bond, it was not reasonable to conclude that the bid bond requirement spelled out in Amendment No. 1 was either wrong or had been superseded.<sup>4</sup>

The GAO precedent cited by Eastmond does not compel a different conclusion. In *Essex Electro Engineers, Inc.*, B-232675, 89-1 CPD ¶ 44, the GAO concluded that a transcript of a pre-bid conference was part of an amendment where the transcript “was attached to, referenced in, and explicitly made a part of [the amendment].” In the present case, the written responses to the pre-bid

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<sup>4</sup> We also place no weight on the asserted comment by the CPO after Eastmond’s protest had been filed that a bid bond requirement was not intended. The intent of DCPS’ contracting officer here is most reliably gleaned from the written action of the contracting officer, namely Amendment No. 1.



questions were neither attached to, referenced in, or explicitly made a part of Amendment No. 1. As described above, the written responses indicated to bidders that they had to look to Amendment No. 1 and the original solicitation for the controlling terms and conditions. Because the written responses were sent out in the same envelope with Amendment No. 1, the contracting officer could have decided to expressly incorporate the written responses into the Amendment. He did not do so.

Alternatively, Eastmond argues that if the written responses did not amend the solicitation, they rendered it ambiguous. Eastmond cites, among others, *Phil Howry Co.*, B-245892, 92-1 CPD ¶ 137, for the proposition that specifications must be sufficiently definite and free from ambiguity as to permit competition on an equal basis and that an ambiguity exists if a solicitation requirement is subject to more than one reasonable interpretation when read in the context of the solicitation as a whole. We agree with that legal proposition. It does not apply here, however, because the original solicitation, as amended by Amendment No. 1, does not create an ambiguity concerning the requirement for a bid bond. To the contrary, Amendment No. 1 explicitly requires a bid bond requirement. *Phil Howry* and the other cases cited by Eastmond involved conflicting solicitation terms. In our case, a solicitation term found in Amendment No. 1 is in conflict with a written response to a pre-bid question, but that written response is not a part of the solicitation.

In our view, the fact that both the apparent low bidder and second low bidder failed to include bid bonds means only that both bidders mistakenly relied on an erroneous response to a bidder question. Undoubtedly, if DCPS had been more careful in reviewing the written responses to bidder questions prior to mailing them to bidders, and had removed the incorrect response indicating that a bid bond was not required, then Eastmond would have followed the direction given by Amendment No. 1 and supplied a bid bond. Even after receiving the protests, the contracting officer might have decided that it was in the government's best interest to cancel and reissue the solicitation under an expedited schedule. The contracting officer did not do so and we have no basis in the record for concluding that his exercise of discretion was unreasonable. *See Phil Howry Co.*, 92-1 CPD ¶ 137.

Finally, Eastmond argues that bid bond submitted by Kewanee did not comply with the solicitation requirements. We do not agree. Although Kewanee did not use DCPS Form No. 0072, its bid bond provided DCPS the same legal protection as the DCPS form in the event of default. Eastmond's argument that the bid bond is ineffective for lack of a power of attorney is without merit. The bond is executed by two persons on behalf of the surety and the signatures are supported by standing resolutions of the corporation and an incorporated power of attorney and certificate of authority.

## CONCLUSION

Eastmond's protest is denied.

DATED: September 9, 1998

/s/

JONATHAN D. ZISCHKAU  
Administrative Judge

CONCURRING:

/s/  
LORILYN E. SIMKINS  
Chief Administrative Judge

/s/  
PHYLLIS W. JACKSON  
Administrative Judge