

GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

PROTEST OF:

M & M WELDING AND FABRICATORS, INC.)
) CAB No. P-542
 Under Solicitation No. CMHS-98-B-0002-LS)

For the Protester: J. Scott Hommer, III, Esq., Venable, Baetjer and Howard, LLP. For the Intervenor: Krista L. Pages, Esq., Smith, Pachter, McWhorter & D'Ambrosio. For the District: Howard 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.¹

OPINION

M & M Welding and Fabricators, Inc. (“M&M”) protests emergency IFB No. CMHS-98-B-0002-LS for containing unduly restrictive specifications which required that the solicited centrifugal water chillers be manufactured on or after June 1993. In a supplemental protest, M&M challenges an award made to American Combustion Industries, Inc. (“ACI”), the low bidder. Although it now appears that the manufacturing date requirement was unduly restrictive, we conclude that the agency committed no legal error because the requirement was reasonably based on information the procuring agency obtained shortly before IFB issuance from six potential contractors, including M&M. We also conclude that the agency did not violate law or regulation in proceeding with an award to ACI rather than resoliciting, in view of the emergency conditions presented here. Accordingly, we deny the protest and supplemental protest.

BACKGROUND

On May 21, 1998, the District's Department of Human Services, Commission on Mental Health Services ("CMHS"), issued emergency Solicitation No. CMHS-98-B-0002-LS, for the provision and installation of two 1,000-ton centrifugal water chillers and associated equipment for the central air conditioning plant at St. Elizabeth's Hospital. (Agency Report ("AR") Ex. 1). Chillers are critically important to the operation of St. Elizabeth's Hospital during the air conditioning season which starts on May 15. The chillers are used for cooling the St. Elizabeth's Hospital, ensuring a healthy and therapeutic environment for patients and a proper temperature necessary for preserving critical medical supplies. (AR Ex. 2). The record discloses that an emergency procurement was required because CMHS's Chief Contracting Officer, Mr. Sidney Wise, had directed the previous rental supplier of chillers (M&M) to remove its existing chillers by May 27, 1998. M&M promptly removed the chillers, thus leaving CMHS

¹ Judge Booker, originally assigned as the presiding judge, resigned from the Board prior to the disposition of this case.

with no chillers on the premises for the air conditioning season which had already begun.

The IFB specification provision challenged by M&M, Section C.3.1, required bidders to provide chillers which were not manufactured before June 1993:

The offeror shall provide chillers as specified below in paragraph "a" which were not manufactured before June 1993. The chillers shall contain the manufacturer's original serial number, model number, and any other manufacture's equipment identification numbers which will assist the Commission on Mental Health Services in determining the year the chillers were manufactured.

(AR Ex. 1).

Shortly before the time for bid opening on June 1, 1998, M&M filed its protest, alleging that Section C.3.1 was unreasonable and unduly restrictive. M&M states in its protest that on May 28, 1998, it first learned that there was only one supplier who could provide chillers meeting the June 1993 manufacturing requirement.

Mr. John H. Haizlip, responsible for defining the chiller requirements used in the solicitation, states in an affidavit that CMHS had a problem with the used chillers that had previously been installed by M&M in 1997. Those chillers were manufactured in approximately 1982 and they used type R-11 refrigerant that was being phased out by the EPA. (Haizlip Aff. ¶ 2, District's Response to M&M's Comments, filed July 27, 1998). Thus, CMHS decided it would be best to purchase new chillers having a long useful life and which would use a newer type of refrigerant not subject to early EPA phase-out. (*Id.*). However, Mr. Haizlip discovered that newly manufactured chillers were not readily available for CMHS's emergency and immediate needs for chillers because it takes approximately 22 weeks to manufacture a chiller.

Knowing that the useful life of a centrifugal water chiller is approximately 20 to 30 years, Mr. Haizlip concluded that CMHS should procure chillers that were no older than 5 years so that they would have a useful life of 15 to 25 years. Moreover, Mr. Haizlip believed that a chiller manufactured after June 1993 would use newer refrigerant types which would allow the chillers to operate more efficiently and which would not be subject to early phase-out by EPA. (Haizlip Aff. ¶ 3). Mr. Haizlip then decided to survey potential vendors to determine the availability of chillers manufactured in the past five years. On or about May 13, 1998, Mr. Haizlip surveyed six companies (M&M, ACI, NuTemp, Hurley Co., In Deck Power Equipment Co., and Precision Mechanical Services, Ltd.) and representatives from all six companies, including Messrs. Oden and Mullican of M&M, informed Mr. Haizlip that they could provide chillers five years old or newer. (Haizlip Aff. ¶¶ 4-8). Based on the results of his survey, Mr. Haizlip and CMHS determined that chillers manufactured within the last five years were readily available for lease or purchase. (*Id.* ¶ 9; Burnette Aff. ¶ 4). There is no specific reason why Mr. Haizlip chose the month of June in 1993 other than the fact that 5 years subtracted from the anticipated June 1998 procurement date yields June 1993.

CMHS's solicitation requested that bidders submit separate bid price schedules for a 120-day lease and for a option to purchase the chillers. CMHS received bids from M&M, ACI, and American Mechanical Services. No bidder took exception to the June 1993 chiller requirement in its bid. ACI was the apparent low bidder:

<u>Bidder</u>	<u>120 day lease</u>	<u>Purchase Price Option</u>	<u>Total Cost Lease & Purchase</u>
ACI	\$487,424	\$460,000	\$ 947,424
American Mechanical Services	\$397,540	\$567,270	\$ 964,810
M&M	\$434,062	\$607,762	\$1,041,824

(AR Ex. 3). At the time of contract award, CMHS decided to exercise the option to purchase the chillers. On June 5, 1998, CMHS executed a contract with ACI to purchase the chillers. The first chiller was delivered approximately one week later and the second chiller arrived the following week.

On June 5, 1998, the Chief Procurement Officer filed a determination to proceed with award and contract performance during the pendency of the protest, based upon a finding of the District's urgent and compelling need to provide chillers in order to cool St. Elizabeth's Hospital during the summer season. On June 12, 1998, M&M filed a motion challenging the determination. Although M&M does not seriously dispute the critical need for the chillers, it points out that CMHS created the emergency condition when it removed the existing chillers before it had procured their replacement. Although we agree with M&M that the emergency condition was created by CMHS's poor planning and questionable decision to remove the existing chillers before replacements could be delivered, we saw no reason to disturb the CPO's determination to proceed because the immediate need for chillers at St. Elizabeth's Hospital was obvious.

On June 19, 1998, M&M filed a supplemental protest challenging the award of the contract to ACI. M&M argues ACI's bid was nonresponsive because the two boilers ACI installed were manufactured by York International Corporation before June 1993, and therefore did not comply with the specifications.

CMHS states that it inspected the chillers shortly after ACI had installed them and discovered that both were manufactured before June 1993. On June 23, 1998, CMHS issued a notice to ACI to cure the deficiency within 10 days. In its response to the cure notice, ACI stated that it had relied on the representation of its supplier, NuTemp, that the chillers met the specified June 1993 manufacture date. NuTemp states that the chillers were delivered from the manufacturing plant in April 1993, and that final testing, start-up, and acceptance occurred on June 8, 1993. Thus, according to ACI and NuTemp, the chillers meet the June 1993 "manufacture date" where "manufacture date" refers to when the units were first put into operation. ACI also states that only York made the centrifugal type chiller required by the specification, that no other York chillers were available from any source except the two York chillers from

NuTemp, and that all three bidders had planned on installing the same two York chillers.² (District's July 27, 1998 Response, Ex. 5, at 2).

In a written determination not to default terminate ACI, CMHS's contracting officer found that the York chillers were shipped from the factory on March 26, 1993, and both chillers were placed into initial operation on June 8, 1993. Although finding the chillers noncompliant with the manufacture date requirement, the contracting officer concluded that termination was not warranted based on other factors such as the unavailability of the chillers from other sources and the urgent need for the chillers. Instead of a termination, the contracting officer and ACI negotiated a modification of the contract from a purchase to a 120-day lease with a reduction in price to \$432,000. CHMS also decided to issue a new solicitation for the purchase of chillers. On December 3, 1998, CMHS issued a new solicitation for the purchase and installation of two new centrifugal chillers and accompanying equipment.

DISCUSSION

There is no dispute concerning our jurisdiction over M&M's protest of the solicitation pursuant to D.C. Code § 1-1189.3(a)(1) (Supp. 1998). However, the District contends that the Board lacks jurisdiction over M&M's supplemental protest of the award to ACI because whether ACI's chillers as delivered comply with the specifications is a matter of contract administration.³ The District cites our decision in *Shane Meat Co.*, CAB Nos. P-339, *et al.*, Jan. 8, 1993, 40 D.C. Reg. 4885, where we stated that a protester's argument that an agency improperly relaxed specification requirements after award is "based on contract performance and thus is not a proper ground for a protest." 40 D.C. Reg. at 4899. Although *Shane Meat* states the general rule correctly, we, like the GAO, recognize exceptions such as where the protest alleges that a contract modification or relaxation of the specifications after award have prejudiced the original competition for the contract. For example, M&M cites *Falcon Carriers, Inc.*, 68 Comp. Gen. 206 (1989), 89-1 CPD ¶ 96, *reconsid. on other grounds sub nom. Military Sealift Command*, B-232562, June 12, 1989, 89-1 CPD ¶ 550, where the GAO sustained a protest because a material term of the solicitation was modified at the time of award and the protester had been competitively prejudiced because the competition for the contract as modified could have been materially different from the competition originally obtained. The GAO stated:

If the integrity of the competitive bidding system is to be maintained, agencies may not award contracts with the intention of significantly modifying them after award; rather, an award must be based on the requirements stated in the solicitation. . . . If we find that the competition for the contract as modified would be materially different from the competition

² Although in its latest brief M&M weakly disputes the claim that there was only one source, it admitted as much in its protest in order to show that the manufacturing date requirement was overly restrictive of competition.

³ The District also argues that the supplemental protest was not timely filed. That argument is without merit.

originally obtained, then we generally will conclude that the award was improper and recommend resolicitation under revised specifications.

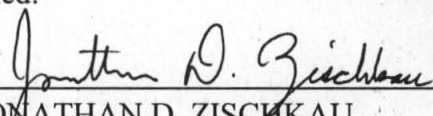
68 Comp. Gen. at 209. Where it is alleged that a proposed contract modification will be outside the scope of the original contract, the question is whether the original purpose or nature of the contract would be so substantially changed by the modification that the original contract and the modified contract would be essentially different and the field of competition materially changed. See, e.g., *Avtron Mfg., Inc.*, 67 Comp. Gen. 404, 406-07 (1988), 88-1 CPD ¶ 458, *reconsid. sub nom. Defense Technology Corp.*, 67 Comp. Gen. 614 (1988), 88-2 CPD ¶ 273; *Marvin J. Perry & Assocs.*, B-277684, Nov. 4, 1997, 97-2 CPD ¶ 128; *American Air Filter Co.*, 57 Comp. Gen. 567 (1978), 78-1 CPD ¶ 443.

In the present case, M&M filed a solicitation protest challenging the restrictive nature of a specification provision requiring a June 1993 chiller manufacturing date, which is precisely the contract term involved in M&M's supplemental protest challenging the award to ACI on the ground that the chillers actually delivered by ACI did not meet that requirement. Clearly, both law and logic compel us to consider both protest grounds together. On the merits of M&M's solicitation challenge, the District argues that the June 1993 manufacturing date requirement was not unduly restrictive and met the District's minimum needs. With regard to ACI's delivery of apparently non-compliant chillers, the District states that CMHS has not waived or modified that contract term but has elected not to terminate ACI's contract for default after weighing factors such as the unavailability of compliant chillers and the urgent need to keep the chillers in operation without disruption.

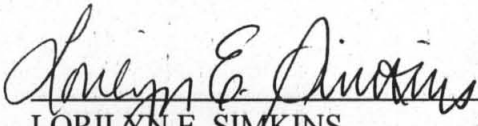
We believe that the record adequately shows that the June 1993 chiller manufacturing date restricted competition to a single supplier, NuTemp, and that the June 1993 date was not essential for CMHS acquiring the type of chillers that it desired. However, we are unable to sustain M&M's protest of the solicitation because M&M itself, as well as the other prospective bidders, advised CMHS shortly before the solicitation was issued that it could obtain chillers 5 years old or newer. It was based on the vendor survey information that Mr. Haizlip and CMHS determined that chillers manufactured within the last five years were readily available for lease or purchase. In light of the emergency conditions and immediate need for the chillers, and the receipt of three unqualified bids (including one from M&M), it was not unreasonable for the contracting officer to proceed with an award to ACI rather than resolicit under revised specifications. In our view, CMHS effectively modified the manufacturing date requirement when it renegotiated the terms and price of the contract with ACI, but we do not find that action unreasonable under the emergency conditions facing CMHS at the time. We presume that this fact pattern will not be repeated in future CMHS procurements.

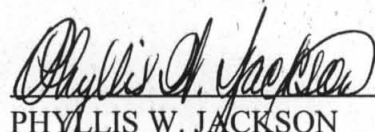
Accordingly, the protest and supplemental protest are denied. M&M's request for its discovery costs, bid preparation costs, and legal costs is also denied.

DATED: March 15, 1999


JONATHAN D. ZISCHKAU
Administrative Judge

CONCURRING:


LORILYN E. SIMKINS
Chief Administrative Judge


PHYLLIS W. JACKSON
Administrative Judge