

GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

PROTEST OF:

SOUTHERN MARYLAND RESTORATION, INC.

UNDER IFB No. 94-0081-AA-2-0-KA

CAB No. P-459

For the Protester: Leonard Sacks, Esq. For the Government: Howard Schwartz and Warren J. Nash, Assistants Corporation Counsel.

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

OPINION

Southern Maryland Restoration, Inc. ("Southern"), filed a protest regarding the rejection of its bid on IFB No. 94-0081-AA-2-0-KA ("IFB") by the District of Columbia Department of Public Works ("DPW"). The District argues that the Contracting Officer properly rejected Southern's bid as non-responsive, based on Southern's failure to acknowledge receipt of IFB Amendment No. 5 relating to a revised Davis-Bacon wage rate determination. Southern telephoned DPW prior to submission date to inquire if DPW had issued more than four amendments. Southern employees and District employees have submitted conflicting affidavits concerning whether DPW employees advised Southern about the amendment the day before and the day of the bid opening. Regardless of the conflicts among the affidavits, we conclude that the record demonstrates that DPW violated procurement law and regulations by failing to add Southern to the prospective bidder's list, which served as DPW's mailing list for the amendments to the IFB, and failed to mail Southern Amendment No. 5. DPW does not contest that it did not add Southern to the "Prospective Bidders List," even though DPW had furnished it with the IFB package, that it did not mail Amendment No. 5 to Southern, and that the "Prospective Bidders List" omits any mention of Amendment No. 5. The District violated its regulations governing the distribution of amendments to prospective bidders and in turn improperly excluded Southern from the competition. This exclusion stems from a clear violation of the Procurement Regulations and is also in contravention of D.C. Code 1-1181.1(b)(7), which establishes as one of the statutory purposes "the fair and equitable treatment of all persons who deal with the procurement system of the District government."

Accordingly, the Board sustains the protest.

FACTS

On April 2, 1996, DPW issued the above-captioned IFB in the open market for the Rehabilitation of New York Avenue, N.E., South Dakota Avenue to the D.C. Line, and the Rehabilitation and Widening of New York Avenue Bridges over South Dakota Avenue and the

Amtrak Railroad Tracks (Agency Report ("AR")). Bids were opened on June 5, 1996. (*Id.*) DPW received bids from seven companies: Southern Maryland Restoration, Inc., Flippo Construction Co., Inc. ("Flippo"), The Lane Construction Corporation, Cherry Hill Construction, Inc., Kiewit Construction Company, Facchina Construction Co., and Fort Myer Construction Corp. (*Id.*) Southern's bid was low at \$20,687,733.50 and Flippo's bid was second lowest at \$23,881,741. (*Id.*)

By letter dated July 11, 1996, DPW notified Southern that at the time of bid opening DPW had deemed Southern the low, responsive bidder, despite the fact that Southern had failed to acknowledge Addendum No. 5. (AR, Exhibit 4). However, DPW in the same letter also advised Southern: "Subsequent review of relevant case law dictate (*sic*) that we reconsider our original responsiveness determination. As a result, we have rejected your bid as non-responsive." (*Id.*).

Addendum No. 5 included a Davis-Bacon Act wage rate determination that increased the rate of pay for equipment operators and ironworkers. (AR, Exhibit 6.) The IFB contains a bid bond package which includes instructions setting forth the requirements for acknowledgement of all addenda. The instructions also warn that "[f]ailure to acknowledge receipt of all addenda may result in rejection of bid."

On July 11, 1996, DPW also notified Flippo that it had rejected Southern's bid as non-responsive, and determined Flippo's bid to be the low, responsive bid. (AR, Exhibit 5). Flippo had acknowledged receiving Addendum No. 5 on May 28, 1996, a week before bid opening. (AR, Exhibit 3). DPW has not awarded the contract to Flippo as yet.¹

On July 22, 1996, Southern filed the instant protest with the Board. The protester alleges that it received only four addenda for this IFB in the mail. Southern also asserts that one of its representatives contacted DPW by telephone on June 4, 1996, and asked if the bid on the referenced project was due the next day and whether there were only four addenda. Southern states that an unnamed DPW employee informed Southern's representative that the bids would be opened on June 5 and that there were only four addenda to the IFB. Southern alleges that

¹On June 17, 1996, Flippo filed a protest of the potential award to Southern based on Southern's failure to acknowledge Addendum 5 (CAB No. P-456). On July 25, 1996, DPW signed a Determination and Finding (D&F) for approval of award to other than low bidder and forwarded the D&F to the Department of Administrative Services (DAS). The Director of DAS has yet to sign the D&F. On August 7, 1996, after the District rejected Southern's bid, Flippo filed a motion to hold its protest in abeyance for sixty days to determine whether it would withdraw its protest. On August 9, 1996, the District moved the Board to find that Flippo's protest was moot. On August 21, 1996, the Board denied the District's motion to dismiss Flippo's protest as moot and granted Flippo's motion to have the matter held in abeyance for sixty days. On August 27, 1996, Flippo filed Comments on the Agency Report. Based on our rationale in this protest, the Board has dismissed Flippo's protest.

the same information was repeated in a telephone conversation the morning of June 5, 1996. Southern also alleges that it first discovered at bid opening that DPW had issued five addenda for this IFB. At the request of DPW, Southern acknowledged late receipt of addendum 5 and advised DPW that the addendum would have no cost impact on its bid. (Protest, Exhibit B)

In its Agency Report, filed on August 19, 1996, the District responded that contrary to the allegations contained in the protest, DPW employees informed Southern's representatives by telephone on June 5, 1996, that a fifth addendum had been issued for this IFB. (AR, Exhibit 7). Barbara Nealy, a DPW contract specialist, signed a notarized affidavit stating that she had spoken to a representative from Southern by telephone on June 5, prior to bid opening and advised that addendum no. 5 had been issued and was informed that a representative from Southern would pick up a copy of it. (*Id.*) The affidavit also states that before bid opening, Stephen Fye of Southern picked up a copy of addendum no. 5 of IFB 94-0081 from her as well as contract documents regarding another DPW solicitation. (AR, Exhibit 7). The District also submitted an affidavit of Betty Brooks, also a contract specialist with DPW, which stated that she saw Ms. Nealy give Mr. Fye a copy of an addendum (but not necessarily addendum no. 5 for IFB 94-0081) (*Id.*). Finally, the District submitted the affidavit of another DPW employee who stated that she talked to Mr. Fye about the missing addendum no. 5. (*Id.*)

On September 9, 1996, Southern filed a response to the agency report. In its response, Southern included DPW's Prospective Bidder's List for IFB 94-0081. (Response, Exhibit A4). The list includes the names and addresses of 30 companies, but not the name and address of the Protester, or of Kiewit Construction Company, one of the other seven bidders on this IFB. (*Id.*) We do not know whether Kiewit's bid acknowledged any of the amendments or not. All of the other companies which bid on this IFB are on the list. The list sets out April 2, 1996 as the date the IFB was advertised, and indicates that a non-refundable fee of \$150.00 was required. The bid opening date was typed in originally as 5/6/96, but two handwritten revised dates appear, which are crossed out and the final bid opening date of 6/05/96 is handwritten in on two of the sheets, but not on third sheet. The original typed date of 5/6/96 appears on the third sheet of the list. The list also includes an area to indicate when addenda were received (presumably by the contract specialist) and mailed. (*Id.*) The forms indicate that Addendum No. 1 was received and mailed on 4-8-96, that Addendum No. 2 was received and mailed on 4-26-96, that addendum No. 3 was received and mailed on 4-23-96, and addendum No. 4 was received and mailed on 5-16-96. (*Id.*) The Prospective Bidders List makes no mention of Addendum No. 5. The Board has no information to show that any firm other than Flippo received Addendum No. 5.

Protester's response to the District's Agency Report also includes the affidavits of Stephen Fye and Jennifer Carter, an administrator for Southern. (Response, Exhibits A and B, respectively). Mr. Fye states that Southern purchased a set of plans and specifications on or about April 22, 1996 for \$150. (Response, Exhibit A1) Attached to Mr. Fye's affidavit are the amendments that Southern received. (Response, Exhibit A2). According to the date-stamp that appears on the copies of the amendments included in Mr. Fye's affidavit, Southern received Amendments Nos. 1 and 2 on May 14, 1996 and Amendment Nos. 3 and 4 on May 21, 1996.

Mr. Fye states that Southern never received a copy of Addendum No. 5 prior to bid opening. Ms. Carter states on June 4 and on June 5, 1996 just prior to bid opening, a DPW employee confirmed that there were only four amendments to the IFB.

DISCUSSION

The Procurement Practices Act, D.C. Code 1-1181, *et seq.* requires the fair and equitable treatment of all persons who deal with procurement in the District. The PPA's implementing regulations require that contracts are awarded after full and open competition. Full and open competition is designed to ensure that procurements are open to all responsible sources and to provide the government with fair and reasonable prices. *Custom Environmental Services, Inc.*, 70 Comp. Gen., 91-1 CPD ¶ 578. In order to further these goals, a contracting agency has an affirmative obligation to use reasonable methods for the dissemination of solicitation documents, including amendments, to prospective competitors. *U.S. Pollution Control, Inc.*, B-248910, Oct. 8, 1992, 92-2 CPD ¶ 231, and *Electromagnetix Corp.*, B-249623, Oct. 29, 1992, 92-2 CPD ¶ 295.

The District's procurement regulations in Title 27 concerning solicitation mailing lists provide:

- 1510.3 All eligible concerns that have submitted solicitation mailing applications, or that the contracting officer considers capable of filling the requirements of a particular acquisition shall be placed on the appropriate solicitation mailing lists.
- 1510.4 Prospective bidders shall be notified that they have been added to solicitation mailing lists.
- 1510.5 An applicant shall be notified if it is not put on the list and of the reasons why the applicant was rejected.

In addition, the District's procurement regulations concerning distribution of amendments provide:

- 1517.4 The contracting officer shall send each amendment to all prospective bidders to which an IFB has been furnished.
- 1517.5 The contracting offer shall distribute each amendment within a reasonable time to allow all prospective bidders to consider the information in submitting or modifying their bids.

Prospective bidders also have a duty to avail themselves of every reasonable opportunity to obtain solicitation documents. *Republic Floors, Inc.*, 70 Comp. Gen. 567, 91-1 CPD ¶ 579. Normally, a prospective contractor bears the risk of not receiving a solicitation amendment,

Normally, a prospective contractor bears the risk of not receiving a solicitation amendment, unless it is shown that the contracting agency made a deliberate effort to prevent the firm from competing, or even if not deliberate there is evidence (other than non-receipt by the protester) that the agency failed to provide the amendment after the firm availed itself of every opportunity to obtain it. *Crown Management Services, Inc.*, B-232431, Ap. 20, 1989, 89-1 CPD ¶ 393. A prospective bidder's nonreceipt of a solicitation amendment, and subsequent elimination from the competition, will not justify disrupting a procurement, unless evidence exists that the agency failed to comply with the applicable regulations governing the distribution of amendments. *Irwin-Jurewicz Corporation*, B-249037, Oct. 20, 1992, 92-2 CPD ¶ 257 (emphasis added).

In this instance, Southern was not included on the mailing list in clear violation of 27 DCMR § 1517. It is therefore the agency that must bear the risk of non-receipt. Southern fulfilled its duty to avail itself of all reasonable opportunities to obtain the amendment.

We do not believe that Southern was obligated to affirmatively inquire as to the existence of additional amendments, although we believe that they pursued such a course. *See Republic Floor, Inc. supra*. Because DPW violated its regulations by failing to send Southern a copy of Addendum No. 5 and failing to properly add Southern to the solicitation mailing list, we resolve the conflicting evidence regarding nonreceipt against the agency.

Concerning the impact of the increased wage rate on the cost of contract performance, Southern argues that the wage rate increases for the equipment operators and the iron workers would have only a minor impact on the cost of the work, and that Southern confirmed in writing that the amendment had no cost impact on its bid. Southern would have the Board waive its failure to acknowledge Addendum 5. Southern cites 27 DCMR § 1535, which provides that minor informalities or irregularities in bids may be waived by the contracting officer, and in the instance of a bidder's failure to acknowledge receipt of an amendment to an IFB, the contracting officer may waive the acknowledgment if "[t]he amendment involves only a matter of form or has either no effect or merely a negligible effect on price, quantity, quality, or delivery of the item bid upon." 27 DCMR 1535.2(d)(2).

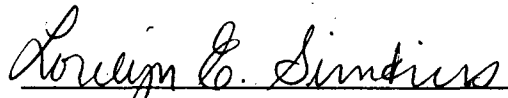
A bidder's failure to acknowledge a material amendment by bid opening renders the bid non-responsive, since absent such an acknowledgment, the government's acceptance of the bid would not legally obligate the bidder to meet the government's requirements as identified in the amendment. *USA Asbestos Removal*, B-252349, May 24, 1993, 93-1 CPD ¶ 410. An amendment is material where it imposes a legal obligation (here, an increased wage rate for equipment operators and ironworkers that the contractor would be obligated to pay) on the contractor that was not contained in the original IFB. The materiality of the amendment is not diminished by the fact that it may have little or no effect on the bid price or the work to be performed. (*Id.*) Moreover, a bid that is non-responsive may not be corrected after bid opening since this would give the non-responsive bidder the competitive advantage of being able to accept or reject the contract after bids are exposed simply by deciding to make it bid responsive or to allow its bid to remain non-responsive. (*Id.*)

In Davis-Bacon wage rate determinations, the contracting officer may not waive the failure to acknowledge the amendment, even if the price impact is de minimis. The Board follows the reasoning and logic of the Claims Court in *Grade-Way Construction v. United States*, 7 Cl.Ct. 263 (1985) which held that the failure of a bidder to acknowledge receipt of an amendment containing a revised Davis-Bacon Act wage rate determination could not be waived, irrespective of the price impact of the amendment. "Failure to acknowledge the amendment containing the modified schedules and rates can be treated as a minor formality only if the government can waive the provision. . . Here, the payment of specified rates. . . is mandated by the DBA and the government is powerless to waive such requirements." 7 Cl Ct. at 272. The revised wage rate clearly impacts on the wage rate which would be required to be paid to the equipment operators and iron workers under the contract, and there is no evidence that Southern's employees are covered under a collective bargaining agreement binding Southern to pay wages no less than those prescribed by the Secretary of Labor. *Weatherwax Electric*, B-249609, (Oct. 25, 1992) 92-2 CPD ¶ 281. Because the protester's bid is non-responsive, DPW may not award the contract to it.

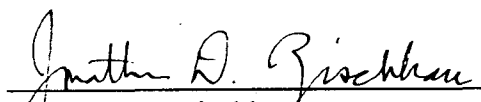
Finally, on September 18, 1996, during a telephone conference call with the parties, the Office of Corporation Counsel informed the Board that the U.S. Department of Transportation, Federal Highway Administration (FHWA) by letter dated August 20, 1996, to DPW, stated that they did not concur with the award of this contract to Flippo. FHWA had concurred originally when DPW intended to award the contract to Southern as the low bidder. They recounted that the District had found Southern's bid to be non-responsive based on the failure to acknowledge Addendum No. 5. FHWA also express concern that "DPW may not have records to substantiate that addendum 5 was provided to SMR by DPW, as it was to the other bidders." In that same letter, FHWA implied that federal funding of the project could be jeopardized and encouraged DPW to readvertise the project.

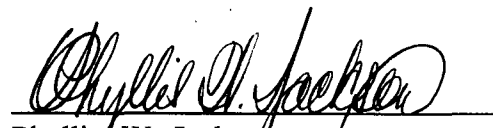
The Board believes that based on these facts that it is in the best interest of the District to cancel this solicitation and readvertise the project.

DATE: September 20, 1996


Lorilyn E. Simkins
Chief Administrative Judge

CONCURRING:


Jonathan D. Zischkau
Administrative Judge


Phyllis W. Jackson
Administrative Judge

Government of the District of Columbia
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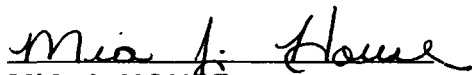
DATE: September 20, 1996

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SUBJECT: CAB No. P-459, Protest of Southern Maryland Restoration,
Inc.

Attached is a copy of the Board's opinion in the above-referenced matter.


MIA J. HOUSE
Clerical Assistant (Typist)

Attachment

cc: Joseph H. Kasimer, Esquire
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Total Number Of Page(s): 7

COMMENTS: CAB No. P-459, Opinion
