

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Smoke Blotter, Inc.) ASBCA No. 56933
)
Under Contract No. 000000-00-0-0000)

APPEARANCE FOR THE APPELLANT: Mr. A. F. Ted Siska
President

APPEARANCES FOR THE GOVERNMENT: Craig S. Clarke, Esq.
Army Chief Trial Attorney
LTC Dana J. Chase, JA
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE FREEMAN

Smoke Blotter, Inc. (SBI) appeals a contracting officer's decision denying SBI's agency protest of a delivery order award to a competitor. The government moves to dismiss for lack of jurisdiction over bid protests under the Contract Disputes Act of 1978 (CDA), 41 U.S.C. §§ 601-613. SBI opposes on the alleged ground that the Board has jurisdiction over disputes arising anywhere in the contracting process. Under well-settled law, the government is correct and we dismiss the appeal.

STATEMENT OF FACTS FOR PURPOSES OF THE MOTION

1. On 30 December 2008, the General Services Administration (GSA) awarded SBI Contract No. GS-30F-0004V under which SBI would "upload" its price list for various products it was offering the government on the GSA Advantage website for purchase by government agencies and other organizations authorized to use the GSA as a source of supply. SBI offered only one item which was its "Phantom Switch" diesel exhaust removal system. (Bd. ex. B-1)

2. On 26 June 2009, the Readiness Business Center at Fort Campbell, Kentucky, issued a Request for Quotations (RFQ) for diesel exhaust removal systems to be installed on seven emergency vehicles at the Fort Campbell Fire Department (gov't mot., ex. GE-2).

3. On 1 July 2009, SBI submitted a quote in the amount of \$56,035.98 in response to the Fort Campbell RFQ. A competitor submitted a quote in the amount of \$61,173.42. The SBI quote was initially determined to be late and award was made to the competitor

on 8 July 2009. On 27 July 2009, SBI submitted to the contracting officer a protest of the award. (Gov't mot., ex. GE-5 at 1-2)

4. SBI's protest demanded (i) cancellation of the award to the competitor, (ii) award of the order to SBI, or in the alternative payment of \$18,491.87 for its bid preparation costs and lost profit on the order, (iii) interest on any monetary award from date of protest, and (iv) post-bid administrative and legal costs "as may be incurred from date of protest" (gov't mot., ex. GE-3 at 6).

5. In preparing her response to the protest, the contracting officer determined that SBI's quote had in fact been timely. However, she also determined that (i) the quote did not include sufficient technical description of the offered item to evaluate compliance with the RFQ technical specifications, and (ii) the offered item as described on SBI's website did not in fact comply with the RFQ technical specifications. (Gov't mot., ex. GE-5 at 2-3)

6. By letter to SBI dated 19 August 2009, the contracting officer denied the protest on the above-stated grounds (gov't mot., ex. GE-4). This appeal followed.

DECISION

SBI's award protest alleges a government breach of an implied contract that its response to the Fort Campbell RFQ would be treated honestly and fairly.¹ Citing Section 3(a) of the CDA, 41 U.S.C. § 602(a), SBI argues that the CDA "gives the Board jurisdiction over disputes arising anywhere in the [contracting] process" (app. opp'n at 1). Section 3(a) of the CDA states in relevant part:

Unless otherwise specifically provided herein, this chapter applies to any express or implied contract...entered into by an executive agency for –

- (1) the procurement of property, other than real property in being;
- (2) the procurement of services;
- (3) the procurement of construction, alteration, repair or maintenance of real property; or,
- (4) the disposal of personal property.

41 U.S.C. § 602(a).

¹ SBI's Notice of Appeal cited the Delivery Order number of the award to its competitor as the contract under which it was bringing the appeal. SBI is not a party to that delivery order or to any other contract that is within our jurisdiction. We have captioned the appeal accordingly.

The Federal Circuit has held that Section 3(a) of the CDA precludes agency board of contract appeals jurisdiction over bid protests because the implied contract for fair and honest consideration of a bid is “preliminary and ancillary to any contract...for goods and services,” but is “not itself such a contract.” *Coastal Corp. v. United States*, 713 F.2d 728, 730 (Fed. Cir. 1983). Citing Section 8(d) of the CDA, 41 U.S.C. § 607(d), SBI contends that the Board has jurisdiction “to grant any relief that would be available to a litigant asserting a contract claim [i]n the United States Claims Court” (app. opp’n at 1). The Federal Circuit in *Coastal* rejected the same argument. It held that the cited provision “deals solely with the kind of relief a contract appeals board may give in a case within its jurisdiction” and that the cited provision “cannot properly be considered as expanding the jurisdiction that Section 3(a) gives the Board.” *Coastal Corp.*, 713 F.2d at 731.

SBI further argues that its claims “are not merely the claims of a disappointed random bidder. They are legitimate claims of a contractor citizen with a current valid government contract as an approved supplier of commercial items and services responding to a limited invitation to submit its offer for a delivery order for specific preapproved supplies and services with response due on or before a specific deadline.” (App opp’n at 2-3) To the extent SBI may wish to assert a claim under its GSA contract, in the absence of a delivery order issued to it by a contracting officer of components of the Department of Defense or NASA, this Board would not have jurisdiction. 41 U.S.C. § 607(d); FAR § 8.406-6.

Since appellant has not shown that its protest or any portion thereof is within our jurisdiction, the appeal is dismissed.

Dated: 7 January 2010

MONROE E. FREEMAN, JR.
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur

MARK N. STEMLER
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

EUNICE W. THOMAS
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 56933, Appeal of Smoke Blotter, Inc., rendered in conformance with the Board's Charter.

Dated:

CATHERINE A. STANTON
Recorder, Armed Services
Board of Contract Appeals