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DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548**

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FILE: B-180955

DATE: July 25, 1974

MATTER OF: ¹ The Display House, Incorporated P. 3751
~~Solicitation No. WS-74-774~~

DIGEST:

1. Since bid guarantee requirement is material and has application in negotiated procurement, offeror's failure to comply therewith required rejection of its offer. 38 Comp. Gen. 532 (1959) and FPR 1-10.101.

2. Where protester failed to furnish bid guarantee with bid submitted in formally advertised procurement and upon subsequent negotiations for same requirement repeatedly failed to furnish satisfactory guarantee and was also unsuccessful in obtaining assistance from the SBA, ample opportunity was provided to permit protester to obtain bid guarantee.

3. Complaint regarding restrictive and discriminatory nature of bid guarantee requirement is untimely since it is raised for the first time in protest to GAO after bid opening date and closing dates established for receipt of proposals. 4 CFR 20.2(a).

4. Fact that protester was not furnished preaward notice as to rejection of its offer notwithstanding request therefor provides no basis for protest since there is no FPR requirement that such advance notice be given. FPR 1-3.103(b).

Protest Against Bid

This matter concerns ~~the~~ rejection of the proposal submitted by The Display House, Incorporated, for its failure to satisfy the bid guarantee requirements of the solicitation. Display, a small business concern, contends that the bid guarantee requirement of the solicitation is restrictive and discriminatory and the firm questions whether the Government properly awarded the contract without permitting it to exhaust its efforts to secure bonding.

3 The Atomic Energy Commission sought to procure two exhibits for display at the new American Museum of Atomic Energy now under construction. The proposed contract contemplated the final design, manufacture and installation of some fifty separate displays constituting two continuous, integrated exhibit sets.

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The contracting officer determined that a bid guarantee and a performance bond were necessary to protect the Government's interests because of "the nature of the work, the size of the exhibit procurement, the desired completion dates, the availability of substantial progress payments" and the incorporation of items of historic value associated with the development of atomic energy which were to be furnished by the Commission. It is reported that this determination was made pursuant to Federal Procurement Regulations 1-10.103-1 and 1-10.104-2 which deal, respectively, with the use of bid guarantees and performance bonds.

The Commission initially formally advertised for bids on February 4, 1974, and bids were opened on March 12, 1974. Display's bid was the lowest received for all of the required work but its bid was rejected, as indicated, for failure to submit the required bid guarantee. All other bids were rejected as either nonresponsive to the terms and conditions of the solicitation or unreasonable as to price. On March 15, 1974, the contracting officer advised Display of the reason for bid rejection and invited the firm along with others to submit by March 21, 1974, a written offer for all the work originally solicited. The offerors were advised that "all other terms and conditions including bond requirements remain essentially the same."

With regard to a bid guarantee the solicitation required that it "be in the form of a firm commitment, such as a bid bond, postal money order, certified check, cashier's check, irrevocable letter of credit or, in accordance with Treasury Department regulations, certain bonds or notes of the United States." Display submitted an offer dated March 20, 1974, and while it stated therein that a bid bond accompanied the offer, such was not the case. Its offer was accompanied only by a bank letter indicating its satisfactory credit accommodations with Display, its status as a satisfactory depositor with the bank and its average deposit balances. The contracting officer questioned this and in a telephone inquiry on March 21 with the bank he was advised that the bank would not give Display an irrevocable letter of credit.

Thereafter, negotiations were conducted and the date of March 25, 1974 was established for concluding negotiations. Display furnished financial statements, including a new commitment from its bank to extend "working capital loans" up to \$250,000 upon the assignment of all contract proceeds. Upon inquiry, the bank advised that its letter was not an irrevocable letter of credit and the Commission thereafter concluded that it did not constitute a bid guarantee as defined in the solicitation.

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The Commission further reports that Display learned about the Small Business Administration's (SBA) bond guarantee program (13 C.F.R. 115 et seq.) and on March 25, 1974, the firm requested an extension of time to pursue this possibility. A decision as to the acceptability of Display's proposal was deferred until March 28, 1974, to allow the firm additional time to obtain a bid guarantee either through SBA or from other sources. In this regard, we have been informally advised by SBA that an inquiry was made to it by a surety for Display concerning the availability of bond guarantee assistance and that SBA advised the surety that it would not approve an application for such assistance. Display's proposal was rejected and on March 28 a contract was awarded to the lowest acceptable offeror.

Beginning with the decision in 38 Comp. Gen. 532 (1959), this Office has consistently held that a solicitation requirement for a bid guarantee is material. Moreover, FPR 1-10.101 provides that the bid guarantee and bond provisions are applicable both to negotiated and formally advertised procurements.

In our opinion, the facts stated above indicate that ample opportunity was provided to permit Display to obtain the required bid guarantee. In view of the materiality of the requirement we must conclude that in the circumstances, Display's offer was properly rejected as unacceptable.

As to Display's complaint regarding the restrictive and discriminatory nature of the bid guarantee requirement, it appears that the issue was first raised in its protest filed with this Office on March 29, 1974. Section 20.2(a) of our Interim Bid Protest Procedures and Standards, 4 C.F.R. 20.2(a), requires, in part, that protests based upon alleged improprieties in any type of solicitation which are apparent prior to bid opening or the closing date for receipt of proposals shall be filed prior to bid opening or the closing date for receipt of proposals. Since the issue was apparent prior to bid opening or any of the closing dates established in the negotiated procurement it is untimely raised and we will not give further consideration to the matter.

Finally, the protester has complained that it was not provided preaward notice as to the rejection of its offer notwithstanding its request for such notice. In this connection FPR 1-3.103(h) provides for the furnishing of award notice to unsuccessful offerors promptly after award is made. There is no requirement in the FPR that such advance notice be given and in view of our position as to the merits of Display's substantive protest the post award notice did not prejudice its situation.

For the above reasons, Display's protest is denied.

R. F. Kellum
Deputy Comptroller General
of the United States