

094-807

DECISION



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

Protest of Bid Rejection as Nonresponsive 740953

FILE: B-181154

DATE: July 17, 1974

MATTER OF: Thorpe's Mowing D. 3703

DIGEST: Failure to provide bid bond, as required in IFB, is a material omission rendering bid nonresponsive.

2. Invitation for bids (IFB) No. DAKF44-74-B-0048 was issued by the Purchasing and Contracting Office of Indiantown Gap Military Reservation on March 26, 1974. The IFB sought bids for the furnishing of all labor, supplies and equipment necessary to mow approximately 3,300 acres of grass at the reservation. 37-2

Paragraph C.23 of the IFB's "Additional Solicitation Instructions and Conditions" contains the bid guarantee clause prescribed by Armed Services Procurement Regulation (ASPR) 10-102.4(a), which provides in pertinent part:

"Where a bid guarantee is required by the Invitation For Bids, failure to furnish a bid guarantee in the proper form and amount, by the time set for opening of bids, may be cause for rejection of the bid."

Section C.24(a) of the "Additional Solicitation Instructions and Conditions" states:

"a. Bid Bond. The bidder shall furnish with his bid a bid guarantee in an amount equal to 20% of his bid; failure to submit the guarantee on time will be cause for rejection of the bid."

Thorpe's Mowing was the aggregate low bidder with a bid of \$9.90 and \$11.50 per acre for field and lawn mowing, respectively. However, Thorpe's bid, as well as those of four of the other five bidders, was rejected as nonresponsive because of its failure to submit a bid bond with its bid. Consequently, the contract was awarded to the only conforming bidder, who had complied with the requirement of paragraph C.24(a) by submitting a bid bond with its bid, at a price of \$10.25 and \$15.50 per acre for field and lawn mowing, respectively.

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Thorpe's Mowing protests the award of the contract on the basis that the IFB wording was so unclear as to leave doubt whether bonding was required, as illustrated by the fact that the majority of the bidders did not submit bid bonds. Furthermore, the protester questions the awarding of a contract to a bidder whose unit price is "substantially higher than all other bidders."

We have held that the furnishing of a bid bond is reasonably related to the purposes of procurement and that it is within the proper exercise of administrative judgment whether or not bid bonds are needed in a particular case. 38 Comp. Gen. 532 (1959). Administrative agencies may impose upon bidders "any reasonable condition relating to eligibility for award." B-167787, November 4, 1969.

We do not agree that the IFB failed to adequately notify bidders that a bid bond was necessary. Paragraph C.23 of the IFB states that failure to furnish a required bid guarantee "*** may be cause for rejection of the bid." Our Office has held that the statement in the bid bond requirement that failure to comply "may be cause for rejection" is just as compelling and material as if more positive language were employed. B-160507, December 27, 1966. Additionally, paragraph C.24(a) of the IFB obviously requires a bid bond since it is worded, "The bidder shall furnish with his bid a bid guarantee ***." (Emphasis added.)

Beginning with our decision which is reported at 38 Comp. Gen. 532 (1959), we have consistently held that the bid bond requirement is a material part of the invitation and that the contracting officer cannot generally waive the failure to comply but must reject as nonresponsive a bid not accompanied by the required bond. See, e.g., B-160507, December 27, 1966. We have held that even where the failure to furnish a bid bond is due to inadvertence, mistake or otherwise, the bid must still be rejected. B-167787, November 4, 1969. The basis for the rule that a bid guarantee requirement is material and cannot be waived by the contracting officer is that such waiver:

"*** would have a tendency to compromise the integrity of the competitive bid system by (1) making it possible for a bidder to decide after opening whether or not to try to have his bid rejected, (2) causing undue delay in effecting procurements, and (3) creating, by the necessary subjective determinations by different contracting officers, inconsistencies in the treatment of bidders. ***" 38 Comp. Gen. at 536

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Furthermore, it must be noted that waiver of the bid bond requirement would violate ASPR section 2-404.2(h) which provides as follows:

"When a bid guarantee is required and a bidder fails to furnish it in accordance with the requirements of the invitation for bids, the bid shall be rejected except as otherwise provided in 10-102.5" (Emphasis added.)

None of the exceptions enumerated in ASPR 10-102.5 is applicable to the instant case. Therefore, the contracting officer was required to reject the bid of Thorpe's Mowing as nonresponsive.

The argument that the Government is obligated to pay a price which is "substantially higher" than the lowest bid is not persuasive. We note that this aspect of Thorpe's protest was based upon the erroneous assumption that the successful bidder was also the highest priced bidder with a unit price of \$22.50 per acre, when in reality, the contract was awarded to the fourth highest bidder since it was the only bidder which submitted a bid bond. The procuring activity regards the contract price as reasonable and we do not find any evidence in the record to show that the contract price is so high as to be unreasonable. In this connection, we have held that contracting officers are not to be permitted to accept bids not complying in substance with the advertised specifications, nor are they to permit bidders to vary their proposals after bids have been opened, because the strict policy in favor of maintaining open competitive bidding is "infinitely more in the public interest than obtaining an apparently pecuniary advantage in a particular case * * *." 17 Comp. Gen. 554, 558-59 (1938).

For the foregoing reasons, the protest is denied.


Deputy Comptroller General
of the United States