

12670 TRANS

DECISION



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

FILE: B-196451

DATE: January 29, 1980

MATTER OF: Liberty Asphalt Corporation

DIGEST:

[Contract Award Protest]

Bid bond requirement may be waived pursuant to FPR 1-10.103-4(a) where all other bids have been rejected as nonresponsive.

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00816- Liberty Asphalt Corporation (Liberty), a large business, protests the award of Project No. 556-NC-79-010 for road repairs at the Veterans Administration (VA) Medical Center to Kovilic Construction Company (Kovilic), the only other bidder under the solicitation. Since the project was a 100 percent small business set-aside, Liberty's bid was found to be nonresponsive. 3753

As its basis for protest, Liberty asserts that Kovilic's failure to provide a bid guarantee with its bid rendered the bid nonresponsive which could not be waived under Federal Procurement Regulations (FPR) § 1-10.103-4(a) (1964 ed.).

This Office has held and the parties do not dispute that a bid guarantee requirement is a material part of an IFB, and that except as otherwise provided in applicable regulations, a procuring activity must reject as nonresponsive a bid that does not conform with that requirement. FPR § 1-2.404-2(f); Klean-Vu Maintenance, Inc., B-194054, February 22, 1979, 79-1 CPD 126.

Liberty thus believes that even though its bid was admittedly nonresponsive, two bids were nonetheless received under the solicitation. Consequently it asserts the single bid exception cannot be applied for the purpose of waiving the nonresponsiveness of an equally defective bid.

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FPR § 1-10.103.4(a) provides that:

"Where an invitation for bids requires that a bid be supported by a bid guarantee and noncompliance occurs, the bid shall be rejected, except in the following situations when the noncompliance shall be waived unless there are compelling reasons contrary:

"(a) Where only a single bid is received. In such cases, however, the Government may or may not require the furnishing of the bid guarantee before award."

The source of the foregoing FPR provision was our decision, 38 Comp. Gen. 532 (1959), wherein we stated:

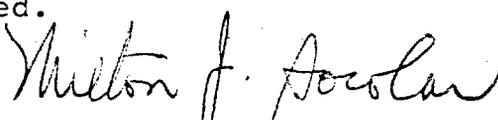
"[W]e now feel that adherence to the rule permitting waiver of a bid bond requirement stated in an invitation for bids would have a tendency to compromise the integrity of the competitive bid system by (1) making it possible for a bidder to decide after opening whether or not to try to have his bid rejected, (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. The net effect of the foregoing would be detrimental to fully responsive and responsible bidders, and could tend to drive them out of competition * * * This result could hardly be said to serve the best interests of the United States." [citation omitted, emphasis added]

In 39 Comp. Gen. 796 (1960) we explained that:

"The primary purpose of a bid bond * * * is to protect the Government against irresponsible or improvident bidders. * * * Where * * * there is no other acceptable bid, there is no question of discrimination [against other bidders]; if it is in the interest of the Government to waive the deficiency, the acceptance of the bid will bind the bidder whether or not he offers to correct the deficiency of security; and the reasons for the deficiency are of no materiality. The interest of the Government is the only factor left for consideration, and if it be administratively considered that acceptance of the bid will best serve that interest the defect * * * may properly be waived."

We believe that in instances where only one bid remains eligible for award except for a defect in the security required by an invitation to assure that the bidder will accept the award, such defect may be waived without any resulting prejudice to other nonresponsive bidders, since no "acceptable" bids will be discarded in the process. See, Hudgins and Company, Inc., 56 Comp. Gen. 43 (1976), 76-2 CPD 368. We think the single bid exception is particularly cogent in a case where the only other bidder is ineligible for award under any circumstance because of its status as a large business in a total small business set-aside.

The protest is denied.


For the Comptroller General
of the United States