

**DECISION**



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

14150

FILE: B-198095

DATE: June 27, 1980

MATTER OF: United States Contracting Corporation

**DIGEST:**

1. Protest based upon argument that Miller Act amendment invalidated IFB provision requiring bid bond is untimely and will not be considered on merits, since bid bond requirement was apparent from face of IFB but protest was not filed until after bid opening. 4 C.F.R. § 20.2(b)(1) (1980).
2. Bid guarantee is material part of IFB. Therefore, failure to provide bid bond where solicitation required one renders bid nonresponsive and agency action in rejecting bid was proper. Protest is denied.

*[Protest]* United States Contracting Corporation protests against <sup>Contract</sup> award of a contract to Foster Electric Company, Inc., for the complete electrical rewiring of a building at the Subtropical Horticulture Research Unit, Science and Education Administration, Department of Agriculture, pursuant to invitation for bids (IFB) No. 7-S-SEA-80. United States Contracting Corporation protests that its bid was improperly rejected as nonresponsive for failure to provide a bid bond as required by the IFB.

The protest is denied.

The IFB required that a bid bond in the amount of 20 percent of the total bid price must accompany each bid and stated that, "Failure to submit bid security before the time set for bid opening may cause rejection of the bid as being nonresponsive \* \* \*." When bids were opened on March 3, 1980, the only timely bids submitted were those of United States Contracting Corporation, in

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the amount of \$23,950, and Foster Electric Company, in the amount of \$26,865. The contracting officer determined that United States Contracting Corporation's bid was nonresponsive since it was not accompanied by the required bid bond. Award was made to Foster Electric Company, the only remaining responsive and responsible bidder, on March 6, 1980.

On March 13, 1980, United States Contracting Corporation filed a protest in our Office contending that, since its bid price was less than \$25,000, no bid bond was required in accordance with the Miller Act, 40 U.S.C. § 270a, et seq. (1976), as amended by Pub. L. No. 95-585, 92 Stat. 2484 (November 2, 1978). United States Contracting Corporation contends that the IFB should not have required bid bonds where the bid price offered was less than \$25,000, since Pub. L. No. 95-585 amended the Miller Act to require performance and payment bonds for any contract exceeding \$25,000 in amount for the construction, alteration, or repair of a public building. Accordingly, United States Contracting Corporation contends the IFB's bid bond requirement was invalid and its bid should not have been rejected as nonresponsive.

Although the Miller Act deals with performance and payment bonds rather than bid bonds, amendments to the Miller Act have a direct effect on bid bond provisions. This is so because section 1-10.103-1(a) of the Federal Procurement Regulations (FPR) (1964 ed. amend. 200) states that, "The use of bid guarantees is required when a performance bond or a performance and payment bond is required." Therefore, the Miller Act amendment requiring performance and payment bonds for construction contracts amounting to more than \$25,000 has the effect of making bid bonds mandatory for such contracts.

Under our Bid Protest Procedures, a protest based upon alleged improprieties in a solicitation which are apparent prior to bid opening must be filed prior to bid opening in order to be considered. 4 C.F.R. § 20.2(b)(1) (1980). United States Contracting Corporation's protest essentially is based upon the fact that the bid bond provision in the solicitation was improper in light of

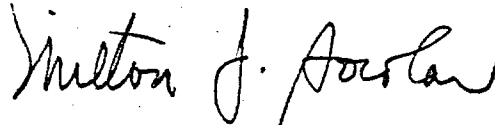
the Miller Act amendment. Since the bid bond requirement was apparent from the face of the IFB, but United States Contracting Corporation did not protest this alleged impropriety to either the contracting activity or our Office until after bid opening, its protest against the bid bond provision is untimely filed and will not be considered on the merits. Elevator Sales & Service, Inc., B-193519, February 13, 1979, 79-1 CPD 102.

The next issue for consideration is whether United States Contracting Corporation's bid should have been rejected as nonresponsive for failure to provide a bid bond given the bid bond requirement as originally stated in the solicitation. We have held that a bid guarantee requirement is a material part of an IFB, and that, except as provided in applicable regulations, a procuring activity must reject as nonresponsive a bid that does not conform with that requirement. Edward D. Griffith, B-188978, August 29, 1977, 77-2 CPD 155. As noted above, the IFB required a bid guarantee and warned that bids could be rejected as nonresponsive if not accompanied by a bid bond. Section 1-10.103-4 of the FPR (1964 ed. amend. 200) provides that noncompliance with an IFB's bid bond requirement shall be cause for rejection of a bid, except in certain circumstances not applicable in the present case. See Elevator Sales & Service, Inc., supra. Thus, the contracting officer properly rejected United States Contracting Corporation's bid.

Finally, United States Contracting Corporation urges that it could not have protested the alleged solicitation impropriety before bid opening as required by our Bid Protest Procedures without prejudicing itself in the competition. United States Contracting Corporation believes that, if it filed a timely protest before bid opening, its competitors would have been put on notice that United States Contracting Corporation's bid was going to be under \$25,000. While there is that possibility, our Bid Protest Procedures requirement is necessary because it permits the invitation to be corrected before bid prices are made public and thereby insures that bidders

are competing on a common basis. See United States v. Brookridge Farm, 111 F.2d 461, 463.

In any event, to preclude a recurrence of the immediate situation, we are recommending in a separate letter of today to the Secretary of Agriculture that consideration be given to including in future solicitations a proviso to the bond requirement stating that bonds need not be furnished where the bid does not exceed \$25,000.

A handwritten signature in dark ink, appearing to read "Milton J. Aorlan". The signature is fluid and cursive, with the first name "Milton" being more prominent than the last name "Aorlan".

Acting Comptroller General  
of the United States