

DECISION



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

Whipman
PL-II

B-217443

FILE:

DATE: June 14, 1985

Marine Industrial Insulators

MATTER OF:

DIGEST:

1. Agency properly canceled an IFB after bid opening when both of the two bids received were nonresponsive.
2. Protest that the bidding period was too short for the protester to secure required bond, so that the firm's bid, which was not low, admittedly included neither bond nor the premium for obtaining it is dismissed as academic since the bid would have been even higher if the premium had been included.
3. An irrevocable letter of credit from a bona fide financial institution satisfies a solicitation requirement for a bid bond, and the absence of corporate seal is a minor informality which may be corrected after bid opening.
4. The government is not required to equalize one bidder's competitive advantage where such advantage does not result from preference or unfair action by the government.

Marine and Industrial Insulators (MII) protests the cancellation of invitation for bids (IFB) No. DACA56-85-B-0010, issued by the Tulsa District of the United States Army Corps of Engineers for the removal of asbestos insulation from approximately 17 acres of roofing in connection with the repair of fire damage to a building used for the overhaul of aircraft. MII also protests the award to Mooring International, Inc. (Mooring), of a contract under IFB No. DACA56-85-B-0011, issued to replace the canceled IFB. MII requests that it be reimbursed its bid preparation costs.

We dismiss the protest in part and deny it in part, and we deny the claim.

IFB No. -0010 was issued on Wednesday, December 12, 1984, with bid opening scheduled for December 14 because of the urgent need for the services. Bids were received from

032300

MII and from Mooring in the amounts of \$4,370,000 and \$1,030,000, respectively. The government's estimate was \$1,790,000. The Mooring bid was found to be nonresponsive because it was not accompanied by a required bid bond, and MII's bid was initially rejected as unreasonable in price, but was subsequently determined also to be nonresponsive because the IFB number, the job description and two dates on the bond had been whited out and changed. Both bids therefore were rejected and the IFB was canceled.

IFB No. -0011 was issued in replacement on Saturday, December 15, with bid opening scheduled for December 17, the following Monday. Again, the only two bidders were MII and Mooring. With its bid MII also submitted an envelope containing a letter of complaint about the short time allowed for bidding. MII wrote that it was unable to secure the required bonds in that timeframe and, thus, was constrained to submit its bid "with the cost of bid bonds deducted from the price in its proposal at \$300,000." The firm requested that the bid opening be extended 24 hours and stated that otherwise it would protest to our Office.

The Corps nevertheless proceeded to open the two bids received. MII this time bid \$3,203,000 (unaccompanied by a bid bond); Mooring bid \$1,975,000 and accompanied the bid two irrevocable letters of credit totaling \$395,000, which equaled the necessary 20 percent of the bid price. The government estimate was unchanged.

The contracting officer treated MII's letter as a protest and, by decision of December 20, denied it as untimely since it was not actually filed before bid opening.^{1/} The Corps awarded the contract to Mooring on the same date.

MII contends, first, that award should have been made to MII on IFB -0010 as the low responsive, responsible bidder after rejection of Mooring's bid as nonresponsive.

^{1/} To be timely, a protest alleging a solicitation impropriety must be filed independently before bid opening, not with the bid. See Avitech Inc., B-214749, Sept. 17, 1984, 84-2 C.P.D. ¶ 297.

The Federal Acquisition Regulation (FAR), 48 C.F.R. § 14.404-1 (1984), provides that after bids have been opened, award must be made to the responsible bidder that submitted the lowest responsive bid unless there is a compelling reason to reject all bids and cancel the IFB. Among the compelling reasons for cancellation specified is that all otherwise acceptable bids are at unreasonable prices.

Here, Mooring's bid was found nonresponsive for failure to furnish a bid bond, and MII's bid, although originally rejected as unreasonable, was also found nonresponsive because the IFB number, the job description and the bidding and bond execution dates had been changed. We have no reason to question the Corps' view that MII's bid price of \$4,370,000 was unreasonable, in light of a government estimate of \$1,790,000, or the agency's finding that MII's bid was nonresponsive. In this last regard, under surety law no one incurs a liability to pay a debt or to perform a duty for another unless expressly agreeing to be bound. 44 Comp. Gen. 495 (1965). Thus, material alterations to a bid bond without evidence at bid opening that the surety agreed to them renders the bond defective because they raise the question whether the surety has any obligation under the bond. See Ameron, Inc., B-218262, Apr. 29, 1985, 85-1 C.P.D. ¶ 485.

Since no acceptable bids were received, the contracting officer properly canceled the solicitation. We deny this basis of protest.

MII also complains that it had only a short time to prepare its bid under the resolicitation. While the Corps, as stated above, dismissed the firm's protest on the matter as untimely because it was filed with the bid, albeit by separate letter, MII contends that it actually delivered the letter, and requested that it be read, before bid opening.

Even if the protest on this issue was timely, however, we dismiss it as academic.^{2/} The letter MII gave the Corps

^{2/} Our Office will not consider a protest on an issue that was untimely raised at the contracting agency level. 4 C.F.R. § 21.2 (1985).

at bid opening, by advising that MII did not include in its bid a bond premium of \$300,000, in essence was an admission that the firm would have bid \$300,000 more than it actually did if the Corps had given it adequate time to secure the required bond. Since its bid of \$3,203,000 was significantly higher than Mooring's anyway, MII was not prejudiced in the bidding by the alleged insufficiency of the bidding period.

MII alleges that Mooring's bid on the second IFB was defective because the bid guarantee consisted only of handwritten letters from other than a qualified bonding company, and lacked corporate seals.

There is no merit to MII's position. Mooring's bid was accompanied by irrevocable letters of credit from the Citizens State Bank of Dickson, Texas in the amount of \$75,000, and from the Financial Center Bank of San Francisco, California, in the amount of \$320,000. An irrevocable letter of credit from a financial institution securing the bidder's performance satisfies an IFB requirement for a bid bond. Shockley Construction Co., B-200125, Nov. 10, 1980, 80-2 C.P.D. ¶ 352. Moreover, the failure to fix corporate seals to a bond is a minor informality which does not render the bond invalid, and may be corrected after bid opening. Siska Construction Co., Inc.--Request for Reconsideration, B-218208.2, Mar. 21, 1985, 64 Comp. Gen. ___, 85-1 C.P.D. ¶ 331.

Finally, MII complains that Mooring had an advantage in costing the work in part because it already was on the premises as a subcontractor on another contract. However, an agency is not required to equalize a bidder's competitive advantage if it does not result from preference or unfair action by the government. Integrity Management International, Inc., B-213574, Apr. 19, 1984, 84-1 C.P.D. ¶ 449.

The protest is dismissed in part and denied in part. MII's claim for bid preparation costs is denied. Jarrett S. Blankenship Co., B-213473, June 25, 1984, 84-1 C.P.D. ¶ 662.

for *Stephen E. Egan*
Harry R. Van Cleave
General Counsel