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DECISION



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

FILE: B-220084 **DATE:** October 31, 1985
MATTER OF: Kiewit Western Co.

DIGEST:

1. The use of a commercial form bid bond instead of Standard Form 24 is not per se objectionable; rather, the question is whether the commercial form represents a significant departure from the rights and obligations of the parties set forth in the standard form.
2. A commercial form bid bond which limited the surety's obligation to only the difference between the protester's bid and the lowest amount at which the government might be able to award the contract was properly determined to be inadequate, thus requiring rejection of the protester's bid as non-responsive, since Standard Form 24 is reasonably read as allowing the government to recover "any cost" of procuring the work from another source, including the additional costs associated with a reprocurement.

Kiewit Western Co. protests the rejection of its apparent low bid as nonresponsive under invitation for bids (IFB) No. CO-MVNP 1-B(4), issued by the Department of Transportation, Federal Highway Administration (FHWA) for the construction of a retaining wall at the Colorado-Mesa Verde National Park. FHWA rejected the bid because it determined that Kiewit's bid bond was inadequate. Kiewit asserts that its bond is in fact sufficient to protect the government's interest, and accordingly urges that it is entitled to the award as the low, responsive bidder. We deny the protest.

At the outset, we note that we have granted Kiewit's request that the express option provision of our Bid Protest Regulations be invoked in this instance. Because of the nature of the issue involved, the case appeared

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suitable for our resolution within 45 calendar days, and FHWA also concurred in the request due to the extreme urgency of the project which is to prevent further landslides at the park. See 4 C.F.R. § 21.8 (1985).

Background

The IFB required the submission of a bid guarantee of not less than 20 percent of the amount of the bid in the form of a bid bond or other suitable instrument^{1/}, and bidders were cautioned that failure to furnish the bid guarantee with the bid might be cause for rejection.

Bids were opened on September 12, 1985, and Kiewit was the apparent low bidder with a bid of \$704,182.50. Nielson's Inc. was the apparent second low bidder with a bid of \$720,825.00. However, an examination of Kiewit's bid documents revealed that the firm had not submitted its bid bond on Standard Form 24 (SF-24), which had been included with all solicitation packages, but rather on a commercial form drafted by its surety. FHWA determined that the bond was unacceptable because it did not afford the government the same protection as that afforded by SF-24, and accordingly rejected Kiewit's bid as nonresponsive.

Kiewit urges to the contrary that its bond is sufficient to protect the government's interest. Although the bond was not on SF-24, Kiewit asserts that even if there is any greater limitation on its surety's obligation under the bond furnished, this is of no consequence because the stated penal sum far exceeds the difference between the firm's bid and Nielson's. In this regard, Kiewit refers to the Federal Acquisition Regulation (FAR), 48 C.F.R. § 28.101-4 (1984), which provides that noncompliance with a solicitation requirement for a bid guarantee requires rejection of the bid, except that the noncompliance shall be waived in certain stated situations, such as where the amount of the bid guarantee is less than that required but is equal to or greater than the difference between the bid price and the next higher acceptable bid. FAR, 48 C.F.R. § 28.101-4(b). Kiewit asserts that this situation is

^{1/}See the Federal Acquisition Regulation, 48 C.F.R. § 52.228-1 (1984), which provides that a bid guarantee is a firm commitment such as a bid bond, postal money order, certified check, cashier's check, irrevocable letter of credit or, under Treasury Department regulations, certain bonds or notes of the United States.

present here, and that FHWA, therefore, is required to waive the defect and accept the firm's bid. We do not agree with Kiewit's protest position.

Analysis

A bid bond (or other suitable type of bid guarantee) assures that the bidder will not withdraw its bid within the time specified for acceptance and, if required, will execute a written contract and furnish performance and payment bonds. The purpose of the bid bond is to secure the liability of a surety to the government if the bidder fails to fulfill these obligations. O.V. Campbell and Sons Industries, Inc., B-216699, Dec. 27, 1984, 85-1 CPD ¶ 1.

It has been our view that a bidder's use of a commercial form bid bond instead of SF-24 is not per se objectionable; rather, the question is whether use of the commercial form represents a significant departure from the rights and obligations of the parties set forth in SF-24. Perkin-Elmer, B-214040, Aug. 8, 1984, 84-2 CPD ¶ 158.

As we see it, the sole matter for resolution is whether Kiewit's surety bound itself to reimburse the government in the event of Kiewit's default^{2/} to the same extent that it would have been bound if the bond had been submitted on SF-24. SF-24 is reasonably read as providing that the surety is obligated to pay "any cost" of procuring the work from another source^{3/}, whereas Kiewit's bond specifically stated:

"The Surety shall in no event be liable for a greater amount hereunder than the difference between the amount of the Principal's bid or proposal, and the lowest amount in excess of said bid, or proposal, for which said Obligee may be able to award said contract within a reasonable time."

^{2/}"Default" as used here means the successful bidder's failure to execute any post-award contractual documents and furnish performance and payment bonds. Trans-Alaska Mechanical Contractors, B-204737, Sept. 29, 1981, 81-2 CPD ¶ 268.

^{3/} SF-24, FAR, 48 C.F.R. § 53.301-24, states that the surety's obligation becomes void when either the principal, upon acceptance of its bid within the specified period, executes further contractual documents and gives the required performance and payment bonds within the specified period after receipt of the bond forms, or, in the event of the principal's failure to fulfill these obligations, the principal pays the government for "any cost" of procuring the work which exceeds the amount of the bid.

Since this clause in Kiewit's bond limits the surety's liability only to the difference between Kiewit's bid and the amount of the contract which is ultimately awarded, and not to any other costs that might be incurred in making that award, we view this as a "significant departure" from the rights and obligations of the parties under SF-24. Perkin-Elmer, B-214040, supra.

As FHWA informs us, its experience has been that the majority of defaults occur after award when the successful bidder is unable to secure performance and payment bonds, and the other bids have usually expired. FHWA states that a total reprocurement is thus often necessary with the attendant costs of printing, mailing, publication, and the salaries of those personnel who prepare the reprocurement solicitations. In this regard, FHWA refers to the FAR, 48 C.F.R. § 52.228-1, supra n.1, as incorporated into the IFB, which provides that in the event the contract is terminated for default, the bidder is liable for "any cost" of acquiring the work that exceeds the amount of its bid, and the bid guarantee is available to offset the difference. Thus, FHWA believes that Kiewit's bond was materially defective because it did not afford the government the right to recover all reprocurement costs as would have been afforded if SF-24 had been used. We concur in that view.

We do not agree with Kiewit's assertion that the greater limitation on its surety's obligation is rendered immaterial by the fact that the penal sum of the bond exceeds the difference between Kiewit's bid and Nielson's bid. It is true that the FAR, 48 C.F.R. § 28.101-4(b), supra, provides for the acceptance of a bid guarantee which is deficient in amount but which nonetheless equals or exceeds the difference between the bid and the next higher acceptable bid. See AVS Inc., B-218205, Mar. 14, 1985, 85-1 CPD ¶ 328. The rationale for this provision is that the government is protected from excess costs if award to the next bidder becomes necessary. Young Patrol Service, Inc., B-210177, Feb. 3, 1983, 83-1 CPD ¶ 125. However, this provision is only an objective administrative standard for determining the sufficiency of a bid bond since it presumes that the government will not be faced with the necessity for a reprocurement action.

However, the sufficiency of Kiewit's bond in terms of any necessary award to the next bidder was never in question, since the penal sum amount is clearly adequate to protect the government in that situation. Rather it is the limitation on its surety's obligation to reimburse the government for all costs in the event of the firm's default

after the expiration of bids that is in question. Under Kiewit's bond the government would not be able to recover additional costs associated with any subsequent reprocurement because the surety's obligation was limited to only the difference between Kiewit's bid and the amount of the ultimate award. Therefore, we do not believe that the exception allowing for waiver under the FAR, 48 C.F.R. § 28.101-4(b), is applicable here because that provision only defines the sufficiency of a bid bond under the presumption that the award can be made to the next bidder, and not the full measure of damages otherwise available to the government.

We conclude that FHWA properly rejected Kiewit's bid as nonresponsive because of the inadequacy of the firm's commercial form bid bond. See Perkin-Elmer, B-214040, supra. Although this works an unfortunate result, the possibility of a monetary savings to the government does not outweigh the importance of maintaining the integrity of the sealed bidding system by rejecting a nonresponsive bid. Id. Moreover, the situation could easily have been avoided if Kiewit had used the SF-24 bid bond provided with the IFB.

The protest is denied.

Harry R. Van Cleve

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General Counsel