



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Electrical Systems Engineering Company

File: B-223199

Date: September 4, 1986

DIGEST

Bid is properly rejected where the solicitation required a bid bond of 20 percent of the total bid and the bid bond was substantially below that amount and was not equal to or greater than the difference between the price stated in the bid and the next higher acceptable bid, notwithstanding that the deficiency may have resulted from the bidder's good faith reliance on its erroneous understanding of the bonding requirement.

DECISION

Electrical Systems Engineering Co. (ESEC) protests the rejection of its bid as nonresponsive under invitation for bids (IFB) No. N62578-86-B-6008, issued by the Navy for electrical substations.

We deny the protest.

The IFB contained the following clause:

"Bonds (APR 1984) - FAR 28-100

(a) A Bid Bond in the sum of twenty percent of the bid shall be forwarded with the bid. The successful bidder will be required to furnish a performance bond, in quadruplicate, in the sum of 100 percent of the contract price within ten (10) days after receipt of award or other notice to proceed."

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Subsequently, an amendment reduced the amount of the required performance bond from the "sum of 100 percent of the contract price" to the "sum of 100 percent of the contract price of one (1) each of line item 0001 and the entire quantity of line items 0004AA through 0004AJ." The amendment did not change the first sentence of the clause regarding the bid bond.

The Navy rejected ESEC's bid of \$3,707,716.00 for a total of 17 substations as nonresponsive because its bid bond contained a penal sum of \$54,669.60, substantially below the required 20 percent of the bid (\$741,543).^{1/} No award has been made.

ESEC contends that the solicitation was ambiguous with respect to the bonding requirement and that the firm reasonably concluded that the amended solicitation required a bid bond of only 20 percent of the amount of the performance bond. The protester argues that generally bid bonds are required to be only 20 percent of a performance bond so that when the Navy issued an amendment which reduced the performance bond, ESEC assumed that the bid bond amount also was reduced.

ESEC further contends that the Navy improperly rejected its bid since the solicitation clause requiring the bonds did not inform bidders that an insufficient bid bond would be cause for rejection of a bid. In this respect, the protester notes that there was no regulatory requirement for bid or performance bonds under this nonconstruction solicitation and argues that since the solicitation did not specifically state that bids would be rejected because of an inadequate bid bond, its bid should not have been rejected as nonresponsive.

The protester also says that its failure to meet the bid bond requirement had no effect on price, quantity, quality or delivery so that the deficiency should be waived as a minor informality, or corrected as a mistake in bid since award to any other firm will result in a higher price.

^{1/} The solicitation called for a base quantity of 10 substations plus additive line items for up to 7 substations depending on the available funding.

We disagree with ESEC's view that the amended solicitation was ambiguous as to the required amount of the bid bond. The solicitation as originally issued stated in a note on the bid schedule and in section L-9 that a bid bond in the amount of 20 percent of the "total bid price" was required. The amendment which the protester contends rendered the solicitation ambiguous added nothing to the bid bond requirement but only changed the amount of the performance bond required by section L-9.^{2/}

We also believe that it was clear from the face of the solicitation that an insufficient bid bond was the cause for rejection of a bid. As the protester points out, the solicitation did not include the standard clause regarding bid bonds. Nonetheless, the solicitation clause requiring the bonds cited the Federal Acquisition Regulation (FAR), 48 C.F.R. Subpart 28.1 (1985), which at 48 C.F.R. § 28.101-4 says that except in circumstances that do not exist in this case, failure to comply with a solicitation requirement for a bid guarantee requires rejection of the bid. In any event, we have long held that ordinarily a bid bond requirement involves a matter of responsiveness, Design Engineers, B-214658, Apr. 10, 1984, 84-1 CPD ¶ 408, and that the contracting officer is required to reject any bid that does not provide a sufficient bid bond. H.C. Transportation Co., Inc., B-219600, Aug. 21, 1985, 85-2 CPD ¶ 207.

Although ESEC may have offered an insufficient bid bond in good faith reliance on its interpretation of the solicitation as with other matters relating to the responsiveness of a bid the determination as to whether a bid bond is acceptable must be based solely on the bid documents themselves as they appear at bid opening. Hydro-Dredge Corp., B-214408, Apr. 9, 1984, 84-1 CPD ¶ 400. A nonresponsive bid may not be corrected, and it does not matter whether the failure to comply with the requirements of the solicitation was due to inadvertance, mistake or otherwise. Desert Dry Waterproofing Contractors, B-219996, Sept. 4, 1985, 85-2 CPD ¶ 268.

^{2/} Although the protester maintains that bid bonds are usually only 20 percent of the required performance bond, the regulation cited by the protester, Federal Acquisition Regulation, 48 C.F.R. § 28.101-2 (1985), in fact states that a bid guarantee should be at least 20 percent of the bid price.

Further, it does not matter that acceptance of ESEC's bid would save money, since the public interest in strictly maintaining the competitive sealed bidding procedures outweighs any pecuniary advantage which the government might gain in a particular case by a violation of those procedures. AVS Inc., B-218205, Mar. 14, 1985, 85-1 CPD ¶ 328.

ESEC's noncompliance with the bid bond requirement cannot be waived, except under the procedure set out in FAR, 48 C.F.R. 28.101-4(b), which permits waiver of a noncompliant bid bond if the amount of the bond is less than required but equal to or greater than the difference between the bid price and the next higher acceptable bid. ESEC's bid was \$3,707,716. The next highest bid was \$160,504 more. Since ESEC's bid bond was only \$54,669.60, it did not qualify for a waiver.^{3/}

Finally, since we have found no violation of applicable statutes or regulations, the protester is not entitled to its bid preparation costs or the cost of pursuing a protest with this Office. DSP Technology, Inc., B-220593, Jan. 28, 1986, 86-1 CPD ¶ 96.

The protest is denied.

for 
Harry R. Van Cleve
General Counsel

^{3/} The difference between the bids is based on the bid prices for 17 substations. If, however, fewer than 17 substations are awarded and the difference between the bid prices becomes less than \$54,669.60, the agency must consider waiving the noncompliant bond.