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The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: D.B. Johnson Construction Co., Inc.

File: B-224390

Date: September 10, 1986

DIGEST

A commercial bid bond form that limits the surety's obligation to the difference between the amount of the awardee's bid and the amount of a reprocurement contract materially differs from the standard form government bid bond and thus renders a bid nonresponsive.

DECISION

D.B. Johnson Construction Co., Inc., protests the rejection of its apparent low bid as nonresponsive under invitation for bids (IFB) No. DACW62-86-B-0041. The U.S. Army Corps of Engineers, Nashville District, issued the solicitation on April 15, 1986 as a small business set-aside. It covers the construction of comfort stations with utilities, clearing, and grading, as required, at the site of the Bay Springs Dam on the Tennessee-Tombigbee Waterway. The Corps rejected the bid because it determined that Johnson's bid bond was deficient. Johnson disagrees and urges that it be awarded the contract as the low responsive, responsible bidder.

We deny the protest.

The solicitation required the submission of a bid guarantee of not less than 20 percent of the amount of a bid. Bidders were advised to use Standard Form 24 (SF-24)[1/] for bid bonds or to provide other firm commitments such as certified or cashiers checks or irrevocable letters of credit. The IFB cautioned that failure to furnish a bid guarantee in the proper form and amount might be cause for rejection of the bid.

[1/] Federal Acquisition Regulation, 48 C.F.R. § 53.301-24 (1985).

When the Corps opened the six bids submitted on May 20, Johnson was the apparent low bidder at $204,555. R.D. Vaughn Construction Co. was second-low bidder at $223,323. An examination of Johnson's bid package revealed that the firm had not submitted its bid bond on SF-24, a copy of which had been included in all solicitation packages, but rather on a commercial form drafted by its surety.

The Corps determined that this bond was unacceptable because it did not afford the government the same protection as that afforded by the standard form in two material respects. First, Johnson's bid bond limited the government's recovery in the event of default[2/] to the difference between the amount of Johnson's bid and the amount for which the government legally contracted with another firm to perform the same work, whereas SF-24 permits the government to recover "any cost of procuring the work which exceeds the amount of the bid." Second, the Corps determined that Johnson's bid bond covered only the bidder's failure to enter into a formal contract and to provide a performance bond, whereas SF-24 covers "the bond(s) required by the . . . bid," which in this case also included a payment bond.

A 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. When the guarantee is in the form of a bid bond, it secures the liability of a surety to the government if the holder of the bond fails to fulfill these obligations. O.V. Campbell and Sons Industries, Inc., B-216699, Dec. 27, 1984, 85-1 CPD ¶ 1. The guarantee also is available to offset the cost of reprocurement of the goods or services in question. See Kiewit Western Co., 65 Comp. Gen. 54 (1985), 85-2 CPD ¶ 497. A bidder's use of a commercial bid bond form, rather than SF-24, is not per se objectionable, since the sufficiency of the bond does not depend on its form, but on whether it represents a significant departure from the rights and obligations of the parties as set forth in SF-24. Perkin-Elmer, 63 Comp. Gen. 529 (1984), 84-2 CPD ¶ 158.

Johnson states that its commercial bid bond, given a fair and reasonable interpretation, implies an obligation consistent with that of SF-24 and, as such, affords the goverment the

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2/ Default in this context means the successful bidder's failure to execute any post-award contractual documents and furnish payment and performance bonds. Trans Alaska Mechanical Contractors, B-204737, Sept. 29, 1981, 81-2 CPD ¶ 268.

requisite protections. The protester maintains that the Corps construed its bid in an unfair and unreasonable manner by dissecting and analyzing each word and phrase of the bid bond. Citing 41 Comp. Gen. 585 (1962), Johnson further argues that bid bonds are acceptable even if they do not expressly state the same obligations as the standard form if these obligations are set forth in the solicitation itself and are incorporated by reference into the bid bond. This solicitation, the protester states, set forth the bidder's liability for all costs of reprocurement in the event of default and the requirement to furnish a payment bond. The protester concludes that since its bid bond referenced the solicitation in question, its surety assumed the same obligations as those set forth in SF 24.

We find that the Corps properly rejected the commercial bid bond submitted by Johnson. First, the bond, by its express terms, limits the recovery of the government in case of default to the difference between the amount of the protester's bid and the amount of a replacement contract, provided that such difference does not exceed the penal sum. The surety's liability, as set forth in this bond, thus significantly differs from the rights afforded the government under SF-24, which we have interpreted as allowing the government to recoup "all costs" directly attributable to the default of an awardee, for example, administrative costs or the cost of performing in-house. See Kiewit Western Co., supra.

In our opinion, this alone is sufficient to find the commercial bond defective, and we need not decide whether its promise to "give good and sufficient bond to secure the terms and conditions of the contract" is identical to SF-24's promise to "give bond(s) required by the terms of the bid as accepted," so that both payment and performance bonds would be secured.

We reject Johnson's contention that by referencing the solicitation in its commercial bond, the surety agreed to its terms notwithstanding the lack of inclusion of these terms in the bond itself. Here, unlike the surety in 41 Comp. Gen. 585, the surety did not agree to indemnify the government against Johnson's failure to enter into a contract "in accordance with its bid." Instead, the commercial bond merely identified the construction project by solicitation number and name, but expressly limited the surety's liability for reprocurement costs in a manner that, as discussed above, materially differed from that set forth in the standard bid bond.

We therefore find that Johnson's bid was nonresponsive. The protest is denied.

for Seymour Efros
Harry R. Van Cleve
General Counsel