



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: MZP, Inc.
File: B-224838
Date: February 11, 1987

DIGEST

Where agency concedes low bidder was responsible and therefore should have been awarded a contract prior to loss of fiscal year funds, bidder is entitled to bid preparation and protest costs if it does not ultimately receive the award.

DECISION

MZP, Inc. protests the rejection of its bid submitted in response to invitation for bids (IFB) No. DAHA-86-B-0030, issued on July 14, 1986, by the National Guard Bureau, United States Property and Fiscal Officer, California, for the installation of fencing at the Army National Guard Training Center, Camp Roberts, California.

We sustain the protest.

The IFB required bidders to submit a bid guarantee in the amount of 20 percent of the bid price. MZP complied with this requirement, submitting a bid bond listing two individual sureties. The National Guard, by letter dated September 24, rejected MZP's bid, explaining that individual sureties were not acceptable. MZP protested the rejection of its bid to our Office. In the report submitted in response to the protest, the National Guard recognized that under the Federal Acquisition Regulation (FAR), 48 C.F.R. § 28.201(a) (1986), a bid bond can be supported by individual sureties. In this case, however, the individual sureties were unacceptable to the National Guard because the affidavits of individual surety included financial statements dated October 15 and November 5, 1985. The contracting officer stated that he did not wish to rely on such noncurrent data and therefore he concluded that the bid should be rejected.

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The cover letter to the agency report, submitted by the Department of the Army's Office of the Judge Advocate General, disagreed with the National Guard's position, stating that it would have been proper for the contracting officer to contact the bidder to obtain more current financial information from the sureties. The Army concluded that the protest should be sustained.

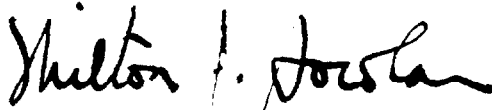
Subsequently, by letter dated November 4, the National Guard informed MZP that it now believes that MZP submitted the low responsive bid. The National Guard continued that it cannot make award to MZP ". . . because the project was approved for fiscal year 1986 funding. Adequate funding may not be available in fiscal year 1987."

It appears that the contracting agency has belatedly recognized that the rejection of MZP's bid was improper. It is unclear from the National Guard's November 4 letter, however, whether MZP will be awarded the contract under the subject IFB because the agency may lack sufficient funding. If in fact the National Guard lacks the necessary funds, it has the right to cancel the solicitation. Cellular Product Service, Inc., B-222614, July 3, 1986, 86-2 CPD ¶ 32. Nevertheless, we have been informed that MZP will likely get the award.

Under the circumstances, we sustain the protest. If award is made to MZP, no further action is necessary. If award is not made to MZP, then MZP, which was entitled to award prior to the loss of fiscal year 1986 funds, should be paid its bid preparation costs and the cost of pursuing this protest.^{1/}

^{1/} In so determining, we are mindful of our position that a protester is not entitled to costs when an agency, in response to a protest, takes the corrective action sought by the protester and thereby renders the protest academic. See Monarch Painting Corp., B-220666.3, Apr. 23, 1986, 86-1 CPD ¶ 396, where the agency eliminated solicitation ambiguities complained of by the protester and thereby provided the protester with an opportunity to compete under a clear statement of requirements. Here, while the agency concedes that the protester's bid should be viewed as eligible for acceptance, it also states that it might not be able to make the award that the protester was entitled to receive. In that case, the protester would be deprived of a contract that it properly should have received.

See Consolidated Bell, Inc., B-220425.2, Aug. 18, 1986, 86
CPD ¶ 195; 4 C.F.R. § 21.6(e) (1986).

for 
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