



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Summit Construction Co.
File: B-227491.2
Date: September 14, 1987

DIGEST

1. Bid for renovation work including asbestos removal was properly rejected as nonresponsive where bid bond included with bid disclaimed responsibility for damages, expenses or costs resulting from the performance of asbestos work required by the solicitation.
2. Protester's allegation that Buy American Act evaluation differential should have been applied to awardee's bid is denied where awardee's bid contained certification that contractor would supply domestic construction material and other than protester's speculation that awardee would not meet this contractual obligation, record provides no basis to question the certification.
3. Allegation that contractor may be unable to complete work on time because of delays in awarding the contract involves question of contract administration, which General Accounting Office does not review.

DECISION

Summit Construction Company protests the termination of its contract by the United States Army Corps of Engineers and the Corps' proposed award of the contract to Konoike Construction Co., Ltd. under invitation for bids (IFB) No. DACA85-87-B-0014. We deny the protest in part and dismiss it in part.

The solicitation is for the renovation of barracks at Fort Wainwright, Alaska. One of the bid items included in the IFB is for the removal of various types of asbestos.

Prior to bid opening, Summit notified the Corps of its concern that the IFB did not require bidders to show that their asbestos-removal subcontractors would carry adequate amounts of insurance. Summit proposed a number of modifications to the IFB, including a requirement that bidders submit a certificate of insurance with no exclusion for asbestos, an asbestos removal indemnification agreement, and a bid bond from a qualified asbestos-removal subcontractor

for all asbestos-removal work under the contract. The Corps reviewed Summit's recommendation and determined not to change the IFB.

Summit submitted the apparent low bid, with a price of \$13,357,000; Konoike's bid of \$13,521,000 was second low. Summit's bid was accompanied by a bid bond which contained language that the bid bond and any performance and payment bonds subsequently executed would exclude liability from asbestos related claims.^{1/} The language provided, in pertinent part, as follows:

" . . . it is understood and agreed that neither the principal nor the surety shall be liable under this bond for any loss, cost, damage, or expense . . . which result directly or indirectly from exposure to or existence of asbestos . . . regardless of whether the claim for such loss, cost, damage or expense . . . is brought . . . pursuant to any provision of the contract.

"NOTE: If contractor is awarded contract, Performance and Payment Bonds will include the above language." (Emphasis added.)

The Corps initially concluded that the qualification expressed in this clause was limited to the bid bond (as distinguished from the payment and performance bonds, which would be furnished after award), and that the qualifying language did not render Summit's bid nonresponsive to the terms of the IFB. The Corps awarded the contract to Summit but advised the firm that the same qualification would be unacceptable in the performance and payment bonds. Summit then provided these bonds with no such conditions.

Konoike protested to our Office that the award to Summit was improper because Summit's bid allegedly was materially qualified by the language in its bid bond. The contracting officer reconsidered his award decision and determined that the conditional wording did, in fact, render Summit's bid nonresponsive. Summit's contract was terminated for the convenience of the Government, and award to Konoike was proposed. Summit thereupon protested both the termination of its contract and the proposed award to Konoike.

^{1/} A performance bond secures performance and fulfillment of the contractor's obligations under the contract. See Express Signs International, B-225738, June 2, 1987, 87-1 CPD ¶ 562.

The question of responsiveness of a bid concerns whether a bidder has offered unequivocally to provide the requested items in total conformance with the specification requirements of the invitation. Spectrum Communications, B-220805 Jan. 15, 1986, 86-1 CPD ¶ 49; Champion Road Machinery International Corp., B-216167, Mar. 1, 1985, 85-1 CPD ¶ 253. For this reason, a bidder's exception to or qualification of an IFB's material requirements renders its bid nonresponsive and the defect cannot be waived as a minor informality. Genesis General Contracting Inc., B-225794, June 1, 1987, 87-1 CPD ¶ 550; California Mobile Communications, B-223137, Aug. 20, 1986, 86-2 CPD ¶ 203. Furthermore, a bidder's intention to be bound by the solicitation requirements and provide the requested items must be determined from the bid itself at the time of bid opening. See Franklin Instrument Co., Inc., B-204311, Feb. 8, 1982, 82-1 CPD ¶ 105. A bid bond is part of the bid package for purposes of determining the bid's responsiveness. See Free-Flow Packaging Corp., B-204482, Feb. 23, 1982, 82-1 CPD ¶ 162.

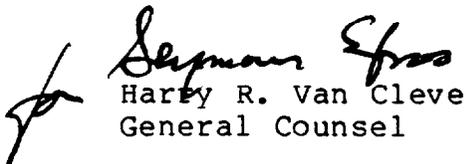
In our view, the agency properly rejected Summit's bid as nonresponsive since the language contained in the bid bond took exception to the required performance guarantee. The language, which was part of Summit's bid, clearly showed the firm's (and its surety's) intent to disclaim responsibility for damages, expenses or costs resulting from performance of the asbestos related work required by the IFB. This was inconsistent with the solicitation requirement that the contractor provide an unqualified guarantee of performance. Accordingly, the agency properly concluded that Summit's bid was nonresponsive. Cf. Washington Printing Supplies Inc., B-227048, July 10, 1987, 87-2 CPD ¶ 34; Genesis General Contracting, Inc., B-225794, June 1, 1987, 87-1 CPD ¶ 550. Furthermore, the determination as to whether a bid is acceptable must be based solely on the bid documents themselves as they appear at the time of bid opening. See Allen County Builders Supply, 64 Comp. Gen. 505 (1985), 85-CPD ¶ 507. Thus, Summit could not cure the defect after bid opening by submitting an unqualified performance bond. Accordingly, this portion of the protest is denied.

Summit also notes that the Buy American Act, 10 U.S.C. §§ 10a-10d (1982), applies to this contract. The protester alleges, "on information and belief," that because Konoike is a Japanese construction firm, "it is highly likely that Konoike will use foreign materials in performing portions of the contract." The protester contends the Buy American Act evaluation differential should have been applied to Konoike's bid, and that application of the differential might have altered the bidders' standing for award.

The solicitation contained a clause by which the contractor agrees that only domestic construction material will be used by the contractor. Federal Acquisition Regulation, 48 C.F.R. § 52.225-5 (1985). Thus, Konoike was obligated under the contract to use domestic materials. Other than the protester's speculation, there is no basis in the record to question Konoike's certification and we conclude the contracting officer acted reasonably in accepting the certification. See Deere & Co., B-224275, Oct. 31, 1986, 86-2 CPD ¶ 504.

Finally, Summit notes that bids were opened in May 1987 with the expectation that work would begin in May or June. The protester argues that weather conditions in Fairbanks, Alaska, result in an unusually short construction season, and that the delays in performance during the pendency of this protest will result in significant additional costs to the government. Summit argues that Konoike may not be able to perform the contract at its bid price and asserts that the Corps should resolicit the work. However, whether the awardee actually performs according to the solicitation's requirements (i.e., within the allotted timeframe and for the agreed-upon price) is a matter of contract administration, which is the responsibility of the contracting agency and is not reviewable under our Bid Protest Regulations. 4 C.F.R. § 21.3(f)(1) (1987); Satellite Services, Inc., B-219679, Aug. 23, 1985, 85-2 CPD ¶ 224.

The protest is denied in part and dismissed in part.


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General Counsel