



The Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

Matter of: LTT Constructors, Inc.

File: B-229062

Date: November 13, 1987

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### DIGEST

The failure to furnish a required bid guarantee renders the bid nonresponsive, and may not be waived.

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### DECISION

LTT Constructors, Inc., the low bidder, protests the rejection of its bid of \$20,752 as nonresponsive for failure to submit a bid guarantee under invitation for bids (IFB) No. DLA-003-87-B-0049, issued by the Defense Logistics Agency (DLA) for the replacement of hydraulic ramps at the Defense Depot in Ogden, Utah.

We deny the protest.

The IFB had four provisions relating to the bid guarantee: block 13.B stated that a guarantee was required; section H.6 stated that for contracts "expected to exceed" \$25,000, bid guarantees were required; the Federal Acquisition Regulation (FAR) clause at 48 C.F.R. § 52.228-1 (1986), incorporated by reference, stated that the failure to furnish a bid guarantee in the proper form and amount, by the time set for bid opening, may result in the rejection of the bid; and section L.5 stated that the estimated magnitude of the construction was between \$25,000 and \$100,000.

LTT, in contending that its bid should not have been rejected, notes that the Miller Act, 40 U.S.C. § 270a, as implemented by the FAR, 48 C.F.R. § 28.102-1, only requires performance and payment bonds for construction contracts that exceed \$25,000, and that under the FAR, 48 C.F.R. § 28.101-1(a), a bid bond may be required only when a performance or payment bond is mandated. LTT argues that in view of those provisions, and because the IFB stated the bid bond requirement applied only where the contract was "expected to exceed" \$25,000, a bid bond did not have to accompany a bid of less than that amount. At best, LTT argues, the invitation was unclear as to whether a bid bond was necessary for a bid of less than \$25,000.

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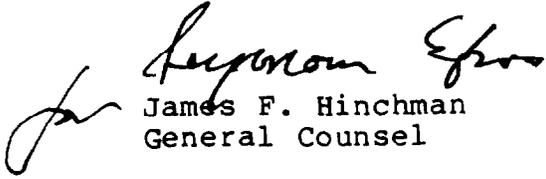
DLA responds that while the cited Miller Act and FAR provisions specifically require performance and payment bonds, and thus permit a requirement for accompanying bid bonds, for construction contracts exceeding \$25,000, they do not prohibit requiring bonds for contracts of less than \$25,000. DLA further states that, in any event, when all of the solicitation provisions relating to the bid guarantee are considered, it is clear that a bid guarantee was required here, no matter what price a bidder actually submitted, because the contract was expected to exceed \$25,000.

There is no legal merit to the protest. Initially, we point out that because a bid guarantee is a creature of the procurement regulations and is not a bond mandated by statute, the contracting officer's authority to require a bid bond is not dependent on the Miller Act, and he therefore may require one for contracts of less than \$25,000. Pine Street Corp., 62 Comp. Gen. 210 (1983), 83-1 C.P.D. ¶ 168. In fact, even the Miller Act and its implementing regulations do not prohibit a contracting officer from requiring performance and payment bonds for contracts of less than \$25,000. Id.

We think the IFB clearly required a bid guarantee. First, block 13.B specifically mandated one. Second, while section H.6 stated that a bid guarantee was required for contracts "expected to exceed" \$25,000, that section must be read in conjunction both with the advice in section L.5 that the estimated magnitude of construction was between \$25,000 and \$100,000, and with block 13.B. In our view, it should have been clear that it was the government's expectation with regard to the contract amount as reflected in section L.5, not the bidder's, on which a bid bond submission depended. Finally, it is inconsistent for LTT to suggest that in not submitting a bid bond it relied on the view that the Miller Act bonds, and thus bid bonds, cannot be required for contracts of less than \$25,000, since section H.7 of the IFB in fact mandated performance and payment bonds.

LTT further contends that its initial failure to provide a bond should be waived under the FAR late bid provisions, because its bid guarantee, submitted after bid opening, constituted a late modification of an otherwise successful bid, and would result in a benefit to the government. Where an IFB requires a bid guarantee, however, the requirement is material and the failure to furnish a bond conforming to the solicitation, by the time of bid opening, renders the bid nonresponsive. Nova Group, Inc., B-220626, Jan. 23, 1986, 86-1 C.P.D. ¶ 80. The FAR does not allow a bidder to cure a nonresponsive bid by a submission after bid opening.

In view of the above, the contracting officer properly rejected LTT's bid as nonresponsive. The protest is denied.

James F. Hinchman  
General Counsel