



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Curry Environmental Services, Inc.
File: B-228214
Date: December 9, 1987

DIGEST

1. A rider to a bid bond, whose conditions limit the liability of the surety and bidder, and which may be inferred to apply to required performance and payment bonds in the event of award, renders bid nonresponsive.
2. Since a bid guarantee provision in an invitation for bids is a material requirement which must be met at the time of bid opening, a bid which is nonresponsive, due to a rider to the bid bond, cannot be made responsive by the surety's post-bid-opening offer to remove the rider.

DECISION

Curry Environmental Services, Inc. (CESI), protests the rejection of its low bid as nonresponsive under invitation for bids (IFB) No. DAAA08-87-B-0150, issued by the Department of the Army for removal of asbestos from a building at the Rock Island Arsenal, Illinois.

We deny the protest.

The IFB required that all bidders submit a bid guarantee. When bids were opened on August 24, 1987, the Army discovered that the apparent low bidder, CESI, and the second low bidder, Technical Asbestos, both had attached to their bid bonds a "Rider to Bond Involving Toxic Material." Both bids were determined to be nonresponsive because their bonds did not evidence a firm commitment by the surety. The remaining bid was considered unreasonably high and rejected. The solicitation was canceled and the requirement was to be resolicited.

The rider, prepared by CESI's surety is attached to standard form 24 bid bond. The rider states that the bond is "subject to the following express conditions which shall survive the release and discharge Surety from any further liability of its performance and payment obligations under

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its bond." (Emphasis supplied.) There follow four conditions providing first, that the bond was not to be considered insurance; second, for time limits for suits against CESI and the surety under the bond; third, that any right of action was restricted to the obligee (the government); and fourth, that the surety would not be liable for any negligence of CESI and its agents resulting in personal injuries or property damage.

The Army interprets the rider, especially the statement quoted above, as limiting the surety's liability under the bid bond in such a manner that the bond does not satisfy the requirement for an unrestricted bid guarantee.

CESI acknowledges that the rider's conditions provide that the bond is not an insurance substitute; restrict the time during which suit may be filed; and limit its surety's obligations solely to the government. According to CESI, however, none of the provisions of the rider materially affects the surety's obligations under its bid bond. CESI also observes that the rider refers to "toxic" material while asbestos is designated as a "hazardous" material under regulations of the Environmental Protection Agency (EPA). It further notes that it submitted the low bid and that it offered to remove the rider, after bid opening.

A bid guarantee assures that the bidder will not withdraw its bid within the time specified for acceptance and, if required, will execute any post-award contractual documents and furnish performance and payment bonds. IMPISA International Inc., B-221903, June 2, 1986, 86-1 C.P.D. ¶ 506. 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 C.P.D. ¶ 1. When required, a bid guarantee is a material part of the bid and by its terms must clearly establish the requisite liability of the surety or the bid must be rejected as nonresponsive. See Tom Mistick & Sons Inc., B-222326, Apr. 3, 1986, 86-1 C.P.D. ¶ 323.

A bidder's exception to or qualification of an IFB's material requirements renders its bid nonresponsive, Genesis General Contracting Inc., B-225794, June 1, 1987, 87-1 C.P.D. ¶ 550; California Mobile Communications, B-223137, Aug. 20, 1986, 86-2 C.P.D. ¶ 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 Allen County Builders Supply, 64 Comp. Gen. 505 (1985), 85-1 C.P.D. ¶ 507; Franklin Instrument Co., Inc., B-204311, Feb. 8, 1982, 82-1 C.P.D. ¶ 105.

In our view, the Army properly rejected CESI's bid as nonresponsive. The conditions, while described as basically harmless by CESI, as a whole, evince an intent to materially limit the liability of CESI and its surety under the bid bond and, inferably, under the performance and payment bonds in the event of award. From CESI's perspective, the rider's language is meaningless in the context of a bid bond under which the only performance required is the bidder's agreement to execute contract documents and required bonds.

From our perspective, however, the rider's language also applies to the performance and payment bonds. By stating its conditions in terms of survival of release and discharge of the surety, and its repeated references to performances and payments obligations, the rider indicates an intent to apply its conditions on future bonds. This indication is supported by CESI's prior use of the same rider on performance and payment bonds furnished under a contract with another agency. When CESI applied the rider in that instances, the government required CESI to remove it before allowing performance to proceed.

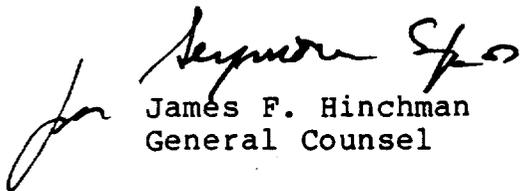
We addressed a situation similar to that in the instant case in Summit Construction Co., B-227491.2, Sept. 14, 1987, 87-2 C.P.D. ¶ 244. In Summit, the protester attached restrictive conditions to its bid bond which had no material effect on that bond. However, the protester expressly stated in its bid that it intended to apply the same conditions to its performance and payment bonds if it received the award. As such, it sought at the outset, to disclaim responsibility for certain damages, expenses, or costs associated with performance of the contract, which was inconsistent with the solicitation requirement that the contractor provide an unqualified guarantee of performance. Although here CESI did not explicitly state its intent to use this rider on future bonds, the language of the rider and CESI's prior history indicate that very intent. We note that the incorporation of the rider into the bid was quite deliberate; and the rider was designated by the surety as "Page 1 of 2" and the bid bond as "Page 2 of 2." Both documents and the accompanying Power of Attorney bear the same serial number affixed by the surety. We are not persuaded that this was a meaningless exercise when the rider makes sense in the context of and, reasonably read, can only foreshadow the application of the identical conditions to the payment and performance bonds later to be provided in the event of an award to the protester. It was not unreasonable of the Army to reject the bid as nonresponsive under these circumstances.

We also disagree with CESI's contentions regarding the distinction between "toxic" and "hazardous" material, the relevance of its offer to remove the rider, and the significance of its low bid.

The status of asbestos as hazardous, and not toxic, material is a distinction without a difference. Notwithstanding the EPA denomination of asbestos as hazardous, it is clear from the attachment of the rider to the bid bond that CESI and its surety considered asbestos a dangerous substance and that the rider would limit their liability in accordance with its listed conditions. As to CESI's apparent belief that removal of the rider, after bid opening, could cure any responsiveness problems, 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. at 506; Franklin Instrument Co., Inc., B-204322, both supra. Thus, the offer to remove the rider after bid opening could not cure the defect.

Finally, to the extent CESI contends that its submission of the low bid is a basis for acceptance notwithstanding the rider, the public interest in strictly maintaining the sealed bidding procedures required by law outweighs any monetary advantage which the government might gain in a particular case by a violation of those procedures. See Building Systems Contractors, Inc., B-219416, July 9, 1985, 85-2 C.P.D. ¶ 36.

The protest is denied.


James F. Hinchman
General Counsel