



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Kirila Contractors, Inc.

File: B-230731

Date: June 10, 1988

DIGEST

Protest that agency unreasonably rejected protester's bid as nonresponsive is sustained where sole defect was a typographical error in solicitation number on bid bond, bond contained correct bid opening date and there was no other ongoing procurement with which bond could otherwise be confused.

DECISION

Kirila Contractors, Inc. protests the rejection of its bid and the award of a contract to Devore Construction, Inc. under invitation for bids (IFB) No. DACA31-88-B-0001, issued by the United States Army Corps of Engineers for construction of the Army Reserve Keystone Training Area in Geneva, Pennsylvania. Kirila's bid was rejected because the accompanying bid bond contained an erroneous solicitation number. We sustain the protest.

The IFB required the submission of a bid bond or other suitable bid guarantee in the amount of 20 percent of the bid. Kirila was the apparent low bidder on the amended bid opening date of February 9, 1988. The bid bond submitted with Kirila's bid referenced another solicitation under the heading "Bid Identification" on the bond form; specifically, the bond cited IFB No. DACW31-88-B-0001 (IFB-DACW) instead of the correct IFB No. DACA31-88-B-0001 (IFB-DACA). The bond correctly identified the bid opening date as February 9 and the solicitation as involving construction work. Because of the erroneous solicitation number, however, the Corps determined the bid bond was defective and unenforceable, and rejected Kirila's low bid as nonresponsive.

The Corps rejected Kirila's bid based on its conclusion that the bond would not be enforceable because the reference to another solicitation number made it unclear as to whether the bond was intended to pertain to the solicitation under

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which it was submitted. In this regard, the Corps noted that there were a number of similarities between the solicitation identified on the bond and that under which it was submitted. Both solicitations (IFB-DACW and IFB-DACA) were set aside for small businesses, both were construction projects requiring bonds with a penal sum of 20 percent and both had the same original bid opening date. The Corps also was concerned that there was another bid opening on the same day, albeit for a solicitation other than IFB-DACW.

Kirila argues that the Corps' doubts about the enforceability of the bond are unreasonable because bids under IFB-DACW were in fact opened on November 24, 1987, as scheduled, and a contract awarded on January 20, 1988, approximately 3 weeks before the February 9 amended bid opening date for IFB-DACA. Thus, at the time Kirila submitted its bid, IFB-DACW was not a pending procurement. Furthermore, Kirila argues it did not submit a bid on IFB-DACW or on the other solicitation opened by the Corps on February 9, nor did its surety issue any other bid bonds for Corps procurements for which bids were due on that date.

The submission of a required bid bond is a material condition of responsiveness with which a bid must comply at the time of bid opening. Baucom Janitorial Service, Inc., B-206353, Apr. 19, 1982, 82-1 CPD ¶ 356. When a bond is alleged to be defective, the determinative question is whether the bond is enforceable by the government against the surety notwithstanding the defect. See J.W. Bateson Co., Inc., B-189848, Dec. 16, 1977, 77-2 CPD ¶ 472. If uncertainty exists at the time of bid opening that the bidder has furnished a legally binding bond, the bond is unacceptable and the bid, therefore, must be rejected as nonresponsive. See A & A Roofing Co., Inc., B-219645, Oct. 25, 1985, 85-2 CPD ¶ 463.

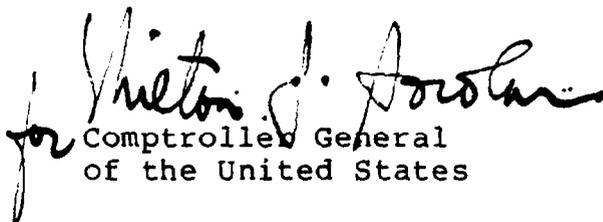
Whether a bid bond is acceptable even if it cites an incorrect solicitation number depends upon the circumstances. Where there are clear indicia on the face of the bond to identify it with the correct solicitation, the bond is acceptable. In such cases, the incorrect solicitation number is merely a technical defect which does not affect the enforceability of the bond. See Instruments & Controls Service Co., B-224293.2, Feb. 17, 1987, 87-1 CPD ¶ 170; Custodial Guidance Systems, Inc., B-192750, Nov. 21, 1978, 78-2 CPD ¶ 355. On the other hand, an incorrect solicitation number may make a bid bond defective where there is another ongoing solicitation to which the incorrect number could refer and, as a result, reasonable doubt exists as to whether the government could enforce the bond.

See Fitzgerald & Co., Inc.--Request for Reconsideration, B-223594.2, Nov. 3, 1986, 86-2 CPD ¶ 510, affirming Kinetic Builders, Inc., B-223594, Sept. 24, 1986, 86-2 CPD ¶ 342. Under the circumstances here, we find that Kirila's bid bond was acceptable despite its reference to the wrong solicitation number.

The protester argues, and the Corps does not disagree with the possibility, that the erroneous reference in the bond to the other solicitation--one incorrect letter--is a typographical error. Moreover, while there were many similarities between the two solicitations, the solicitation number erroneously cited in the bond refers to a solicitation under which bids had been opened 2 1/2 months earlier and a contract already awarded 3 weeks prior to the bid opening date for IFB-DACA. While the Corps states that there was another solicitation with the same February 9 bid opening date, that solicitation number (DACA31-88-B-0206) is considerably different from the number cited in Kirila's bond, and the Corps has offered no other reason to assume that the bond might pertain to that solicitation. Moreover, Kirila did not bid on either IFB-DACW or the other solicitation opened on February 9.

In our view, since Kirila's bond cited the correct bid opening date and there was no ongoing solicitation with which the bond could have been confused, the incorrect solicitation number did not affect the enforceability of the bond, and the bond thus was acceptable. Accordingly, the Corps' rejection of Kirila's low bid based on the defect in the bond was improper. As a result, we recommend that the Corps terminate the contract awarded to Devore Construction, Inc. and make award to Kirila Contractors, Inc., if otherwise appropriate. Further, under the circumstances, we find that Kirila is entitled to the costs of filing and pursuing its protest. Bid Protest Regulations, 4 C.F.R. § 21.6(d) (1988); see also 52 Fed. Reg. 46445, 46447-8.

The protest is sustained.


for William J. Arnold
Comptroller General
of the United States