



**The Comptroller General  
of the United States**

Washington, D.C. 20548

## Decision

**Matter of:** Management Services Group, Inc.  
**File:** B-234412  
**Date:** May 24, 1989

### DIGEST

1. Substitution of sureties after bid opening is not permissible where more than one acceptable bid was received in response to the invitation for bids.
2. Protest of bid guarantee requirement is dismissed as untimely where requirement was apparent in the solicitation but protester did not object to it until after bid opening.

### DECISION

Management Services Group, Inc., protests the rejection of its bid under invitation for bids (IFB) No. N62467-83-B-9333, issued by the Naval Air Station at Corpus Christi, Texas, for various operation and maintenance services at the Station. The solicitation was issued as part of a cost comparison under Office of Management and Budget (OMB) Circular A-76 to determine whether accomplishing the work in-house or by contract was more economical. Management Services' bid, which was low, was rejected based on a finding by the contracting officer that its individual bid bond sureties were not responsible. The protester argues that it should be permitted to substitute two acceptable individual sureties for the ones rejected by the contracting officer. We deny the protest in part and dismiss it in part.

Management Services submitted the lower of the two bids received in response to the IFB. The Navy determined, based on a comparison of the bid with the cost estimate for government performance, that it would be more economical to have the work performed by contract. The contracting officer subsequently rejected Management Services' bid as unacceptable, however, based on her finding that neither of the individual sureties on its bid bond had demonstrated a net worth equal to or exceeding the penal sum of the bond.

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(The IFB, as amended, required that bidders submit a bid guarantee of 20 percent of the contract price.) The agency then determined, based on a comparison of the price offered by the other bidder, Consolidated Industrial Skills Corporation, with the government cost estimate, that it would be more economical to accomplish the services in-house.

In its protest, Management Services objected initially to the contracting officer's determination that its individual sureties were not responsible. Upon receipt of the agency report, however, the protester conceded that it was not clear that the two individual sureties possessed sufficient assets to meet the solicitation's requirements, and proposed to substitute two other individual sureties in place of the original ones.

As a general rule, the replacement of an unacceptable surety after bid opening is not allowable since the liability of the sureties is an element of responsiveness which must be established at the time of bid opening. Texas Elevator Co., Inc., B-233009, Oct. 25, 1988, 88-2 CPD ¶ 393. A bidder's failure to submit at the time of bid opening a bid guarantee which adequately establishes the liability of its sureties may be waived in a limited number of circumstances, however. Federal Acquisition Regulation (FAR) § 28.101-4. One such circumstance is where only one bid is received. FAR § 28.101-4(a). We have previously interpreted this exception to include situations in which more than one bid is submitted, but all except one are determined to be nonresponsive or otherwise ineligible for award. Ed Davis Construction, Inc., B-216353, Feb. 22, 1985, 85-1 CPD ¶ 226. Where only one bid remains eligible for award, a defect in the security required by the invitation to assure that the bidder will accept the award may be waived without resulting prejudice to other ineligible bidders since no acceptable bids will be discarded in the process. Id.

The protester argues that it is the only bidder eligible for award under the solicitation here since a cost comparison of the only other bidder's price with the government estimate resulted in a determination to retain the work in-house. Thus, Management Services contends that no other bidders will be prejudiced if it is allowed to substitute different sureties for those which it originally proposed.

We do not agree. We think that an in-house A-76 bid should be considered a bid for purposes of determining whether any other acceptable bids will be discarded if the protester is permitted to cure the defect in its bid. In this regard, the IFB explicitly provided that the cost estimate for

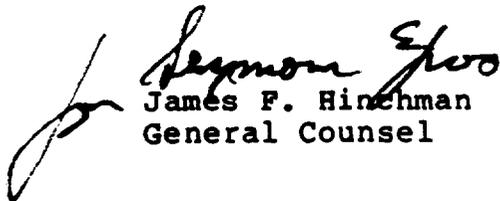
government performance would be considered a bid for purposes of the solicitation's late modification of bids provision and that a late modification that displaced an otherwise low cost estimate for government performance would not be considered. We see no reason why the estimate should be treated as a bid for this purpose but not for matters involving bid guarantees.

The protester further argues that the agency should permit it to replace its unacceptable sureties since the government will save money by awarding to it rather than retaining the services in-house. We have consistently rejected such arguments in the past on the grounds that the public interest in strictly maintaining the sealed bidding procedures required by law outweighs any monetary advantage that the government might gain in a particular case by a violation of those procedures. Harrison Contracting, Inc., B-224165, Oct. 7, 1986, 86-2 CPD ¶ 402. Since the agency is utilizing the competitive bidding system to further its cost comparison, we think the same rule applies here.

The protester also raises in passing the argument that no law or regulation required the contracting officer to include a bonding requirement in this solicitation in the first place.

This ground of protest is dismissed as untimely. Our Bid Protest Regulations require that a protest based on an alleged impropriety which is apparent in an IFB prior to bid opening be filed prior to opening. 4 C.F.R. § 21.2(a)(1) (1988). Thus, any objection to the bonding requirements set forth in the IFB should have been raised prior to bid opening. C&M Systems Corp., B-221961, Feb. 19, 1986, 86-1 CPD ¶ 175.

The protest is denied in part and dismissed in part.

  
James F. Hinchman  
General Counsel