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Comptroller General
of the United States
Washington, D.C. 20548

Decision

Matter of: Tolman Building Maintenance
File: B-243654
Date: April 29, 1991

Jeffrey Bodley for the protester.

DIGEST

1. Where a commercial bid bond form limits the surety's obligation to the difference between the amount of the awardee's bid and the amount of a procurement contract, the terms of the commercial bond represents a significant departure from the rights and obligations of the parties as set forth in the solicitation, which renders the bid bond deficient and the bid nonresponsive.
2. Where a commercial bid bond form does not refer to the solicitation by number or otherwise adequately identify the procurement to which it pertains, enforcement of the bond is uncertain; the bond thus does not constitute a firm commitment as required by the solicitation and the bid properly is rejected as nonresponsive.

DECISION

Tolman Building Maintenance protests the rejection of its bid under invitation for bids (IFB) No. GS-07P-90-HTC-0124/7ADB, issued by the General Services Administration (GSA). GSA rejected the bid based on its conclusion that the bid bond Tolman submitted was defective.

Since it is clear from the face of the protest that it does not establish a basis for challenging the agency's action, we dismiss the protest without obtaining an agency report. See Bid Protest Regulations, 56 Fed. Reg. 3,759 (1991) (to be codified at 4 C.F.R. § 21.3(m)).

The IFB required bidders to submit a bid guarantee with their bids. In response to this requirement, Tolman chose to submit a bid bond. Instead of submitting its bond on the government's Standard Form (SF) 24, Tolman submitted a commercial bid bond form signed by a corporate surety. In pertinent part, the bond form limited the surety's liability in the case of default by the bidder to "the difference . . .

between the amount specified in [the] bid and such larger amount for which [GSA] may in good faith contract with another party to perform the work covered by said bid" In the space on the form for inserting a description of the project to which the bond pertains, the bond states "General Janitorial Services" without further identifying the procurement. GSA concluded that the bid bond was inadequate, and rejected Tolman's bid as nonresponsive on that basis.

A bid guarantee ensures that the bidder will not withdraw its bid within the time specified for acceptance and, if required, will execute a written contract and furnish performance and payment bonds. 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. W.R.M. Constr., Inc., B-239847, Sept. 18, 1990, 69 Comp. Gen. , 90-2 CPD ¶ 227. The guarantee also is available to offset the cost of reprourement of the goods or services in question. See Kiewit W. Co., 65 Comp. Gen. 54 (1985), 85-2 CPD ¶ 497. A bidder's use of a commercial bid bond form rather than the standard government form is not per se objectionable, since the sufficiency of the bond does not depend on its form, but on whether it represents a significant departure from the rights and obligations of the parties as set forth in the solicitation. Eagle Asphalt & Oil, Inc., B-240340; B-240344, Nov. 14, 1990, 90-2 CPD ¶ 395.

Here, Tolman's bond, by its express terms, states that the surety would only be liable for the difference between the amount of Tolman's bid and the amount contracted for with another firm to perform the same work, provided that such amount was not to exceed the penal sum. The surety's liability, as set forth in the bond, thus significantly differs from that required under the bid guarantee clause of the solicitation, Federal Acquisition Regulation § 52.228-1(e), which provides for the government to recoup "any cost of acquiring the work that exceeds the amount of [the] bid." This language permits the government to recover, for example, administrative costs or the cost of performing in-house. Consequently, the promise on Tolman's commercial bond form to cover the difference in prices does not afford the government the same protection as under the solicitation, and the agency properly found that Tolman's bid was nonresponsive for failure to submit an adequate bid bond. W.R.M. Constr., Inc., B-239847, supra.

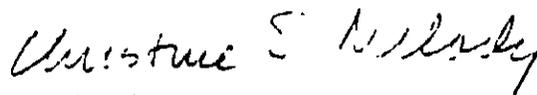
The bond also is defective because it does not refer to the IFB by number or otherwise adequately identify the procurement to which it pertains. Under these circumstances, GSA could not be sure that the bond was intended to apply to this particular solicitation. Since enforcement of the bond thus would be uncertain, the bond does not constitute a firm

commitment as required by the IFB, and Tolman's bid was properly rejected as nonresponsive. Urban Serv. Sys. Corp., B-235124, July 25, 1989, 89-2 CPD ¶ 78.

Tolman characterizes the defects in its bond as minor irregularities, and argues that it should be allowed to correct them by submitting a bond in the proper form. Tolman maintains that it had executed an SF 24 for this solicitation on the date of bid opening, and inadvertently failed to include it with its bid. When a bid is properly rejected as nonresponsive based on an inadequate bid bond, the bond deficiency may not be corrected after bid opening; otherwise, a bidder essentially would have the option, after bid opening, of accepting or rejecting the award by either correcting or not correcting the bond deficiency, which is inconsistent with the sealed bidding system. Bird Constr., B-240002; B-240002.2, Sept. 19, 1990, 90-2 CPD ¶ 234. The fact that Tolman maintains that it had executed an SF 24 on the bid opening date does not change this result.

To the extent that Tolman contends that it should be allowed to correct its bond because the government would save money by making award to it, the importance of preserving the integrity of the competitive bidding system outweighs the possibility that the government might realize monetary savings if a material deficiency in a bid is corrected or waived. Blakelee Inc., B-239794, July 23, 1990, 90-2 CPD ¶ 65.

The protest is dismissed.



Christine S. Melody
Assistant General Counsel