

Christine Davis

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**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Spotless Janitorial Services, Inc.

File: B-257341

Date: September 15, 1994

J. Raymond Sparrow, Jr., Esq., Shumate, Kraftson & Sparrow, P.C., for the protester.
Harmon R. Eggers, Esq., and Sharon Chen, General Services Administration, for the agency.
Christine F. Davis, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Submission of a performance bond does not satisfy a solicitation's bid guarantee requirement, and a bid that omits the required bid guarantee is nonresponsive.

DECISION

Spotless Janitorial Services, Inc. protests the rejection of its bid as nonresponsive under invitation for bids (IFB) No. GS-01P-94-BWC-0020, issued by the General Services Administration (GSA), for janitorial and related services at the Federal Building, U.S. Courthouse, Providence, Rhode Island. GSA rejected Spotless's bid because it did not include a bid guarantee, as required.

We dismiss the protest.

The IFB required each firm to furnish with its bid a bid guarantee in the amount of 20 percent of the bid price, with the amount not to exceed \$3 million. The IFB incorporated the clause at Federal Acquisition Regulation (FAR) § 52.228-1, which warned that failure to furnish a bid guarantee in the proper form and amount as of bid opening could result in the bid's rejection. The IFB also required the eventual awardee to furnish a performance bond within 15 calendar days after receiving notice of award, in an amount equal to 20 percent of the contract price.

Twelve firms submitted bids by the May 3, 1994, bid opening. Although Spotless was the apparent low bidder, its bid included only a performance bond, which the agency determined did not satisfy the legal requirements of a

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bid guarantee. Accordingly, the agency rejected Spotless's bid as nonresponsive, and this protest followed.

Spotless argues that, pursuant to FAR § 28.101-1, "[a]ll types of bid guarantees are acceptable for supply or service contracts." The protester interprets this provision to mean that any type of bond, such as a performance bond, constitutes a bid guarantee.

Spotless's argument ignores both the definition and purpose of a bid guarantee, as distinct from a performance bond. FAR § 28.001 defines a bid guarantee as a form of security assuring that the bidder (a) will not withdraw its bid within the period specified for acceptance and (b) will execute a written contract and furnish required performance and payment bonds. While a bid guarantee secures the execution of a contract and the provision of post-award bonds, a performance bond (one such post-award bond) secures the performance and fulfillment of the contractor's obligations under the contract. See FAR § 28.001. A performance bond, such as the one submitted by the protester, provides no security during the contract formation period, as a bid guarantee is required to do. By its terms, Spotless's performance bond does not take effect until "[t]he principal [Spotless] has entered into the contract," and only guarantees performance "during either the base term or an option term of the contract."

Because the performance bond submitted by Spotless does not constitute a bid guarantee, as required by the IFB, the protester's bid was properly rejected as nonresponsive. See Elevator Elec. Corp., B-213245, Oct. 25, 1983, 83-2 CPD ¶ 503. Furthermore, Spotless could not, after bid opening, cure the omission in its bid by submitting a bid bond and an affidavit attesting to its intent to be bound. A bid guarantee provision in a solicitation is a material requirement, and a bid that fails to meet such a requirement as of bid opening is nonresponsive and cannot be made responsive after bid opening. MK Consultants & Assocs., Inc., B-242059, Feb. 26, 1991, 91-1 CPD ¶ 221; Calculus, Inc., B-228393, Oct. 21, 1987, 87-2 CPD ¶ 381. Finally, while Spotless claims that the agency should waive its noncompliance with the IFB bid guarantee requirement, none of the regulatory circumstances that allow a waiver apply in this case. See FAR § 28.101-4(c).

The protest is dismissed.



Guy R. Pietrovito
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