



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Rufus Murray Commercial Roofing Systems

File: B-258761; B-259152

Date: February 14, 1995

Rufus E. Murray for the protester
Paul M. Fisher, Esq., Cynthia S. Guill, Esq., Billie
Spencer, Esq., and Diane D. Hayden, Esq., Department of the
Navy, for the agency.
Paula A. Williams, Esq., Susan K. McAuliffe, Esq., and
Michael R. Golden, Esq., Office of the General Counsel, GAO,
participated in the preparation of the decision.

DIGEST

Condition in bid bonds that would excuse surety from liability if the contract involves removal of asbestos material does not render bid bonds unacceptable where the specifications do not require removal of asbestos, and the remote possibility that such a requirement would be added to the contract would not occur until after the bid bond obligation had been discharged.

DECISION

Rufus Murray Commercial Roofing Systems protests the rejection of its apparent low bids as nonresponsive under invitation for bids (IFB) Nos. N62470-93-B-0430 and N62470-94-B-3273, issued by the Department of the Navy. IFB No. 0430 involves the replacement of built-up roofs at the Tarawa Terrace II family housing area at Camp Lejeune, North Carolina. IFB No. 3273 calls for performance of family housing maintenance services at Midway Park, Camp Lejeune. The protester contends that its bids were improperly rejected on the basis of defective bid bonds.

We sustain the protests.

Each IFB included a requirement for bidders to furnish a bid bond in the amount of 20 percent of the bid price or \$3,000,000, whichever is less; the awardee under each IFB also was required to furnish a performance bond in an amount equal to 100 percent of the contract price and a payment bond which equals 50 percent of the contract price. The protester submitted bids in response to both IFBs which included bid bonds in the proper amount underwritten by an

acceptable corporate surety. In the paragraph which sets forth the obligations of principal and surety, the bonds contain the following statement: "[i]f this contract includes the removal of asbestos material, then this bond is to be null and void."

The Navy asserts that while neither IFB's specifications called for the removal of asbestos material, the qualifying statement on the face of the bid bonds raised questions about their enforceability if asbestos material is discovered during performance of the contracts. The agency states that there is a possibility that given the age of the buildings, the contractor could encounter asbestos during performance of both contracts. Finding that this condition in the bid bonds could limit the agency's rights against the surety in the event the contracts were modified to include asbestos removal services, the contracting officer concluded that the bid bonds were defective on their face and rejected the protester's bids as nonresponsive.

The protester argues that the bid bonds it provided satisfied, in all material respects, the bonding requirements of the IFBs. The protester does not disagree with the agency's view that its bid bonds contain a condition which limits the liability of the surety if asbestos is encountered and its removal becomes the contractor's obligation; however, the protester argues that the condition was immaterial because there is no reasonable expectation that asbestos will be found at the sites--the protester points out that the housing units at Camp Lejeune have been extensively renovated within recent years, and asbestos material was never discovered during the prior renovation projects. In any event, while agreeing with the agency that asbestos removal services could reasonably be expected to be included in an "out of scope" modification to the contracts if asbestos is discovered, the protester insists that any such discovery would only occur after performance and payment bonds had been executed and contract performance was underway.

Bid bonds are a form of bid guarantee designed to protect the government's interest in the event of a bidder's default; as such, a required bid bond is a material condition of an IFB with which there must be compliance at the time of bid opening. See N.G. Simonowich, 70 Comp. Gen. 28 (1990), 90-2 CPD ¶ 298. The surety's bid bond obligations are satisfied when the bidder executes the contract and acceptable payment and performance bonds are delivered. Hydro-Dredge Corp., B-214408, Apr. 9, 1984, 84-1 CPD ¶ 400. Thus, the determinative question as to the acceptability of a bid bond is whether the bid documents

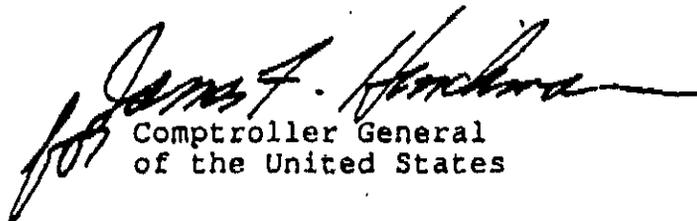
establish that the bond is enforceable against the surety, Star Brite Constr. Co., Inc., B-255206, Feb. 8, 1994, 94-1 CPD ¶ 89.

We think that the protester's bid bonds complied with the IFB's bid guarantee requirements notwithstanding the qualification inserted in the bid bonds. First, the condition on the bid bonds provides that the contracts are null and void only if the contract includes the removal of asbestos material. Here, the current IFB specifications which would be included in the contracts clearly do not include asbestos removal services--thus, the qualification on the bonds does not relate to any material requirement of the IFB or the contracts.

Second, while the possibility of the discovery of asbestos during performance is remote, as the parties agree, discovery of asbestos, if any, would occur during contract performance. By that time, the required performance and payment bonds would have been issued and the surety's obligations under the bid bonds in question would have been satisfied. Thus, inclusion of the cited condition in the bid bonds in no way limits the agency's rights against the surety of those bonds¹ if asbestos is found during performance of the contracts and if the contracts are thereafter modified to include asbestos removal services.

We recommend that the Navy make award to the protester, if otherwise proper, and we find that the protester is entitled to reimbursement of its costs of filing and pursuing the protests. 4 C.F.R. § 21.6(d)(1) (1994). In accordance with 4 C.F.R. § 21.6(f), the protester's certified claim for such costs, detailing the time and costs incurred, must be submitted directly to the agency within 60 days after receipt of this decision.

The protests are sustained.


 Comptroller General
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¹We note that the surety advises of its willingness to delete the condition on the bonds.