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Comptroller General
of the United States

United States General Accounting Office
Washington, DC 20548

Decision

Matter of: Paradise Construction Company

File: B-289144

Date: November 26, 2001

Howell R. Riggs, Esq., for the protester.

Capt. Clay Robertson and John D. Inazu, Esq., Department of the Air Force, for the agency.

Mary G. Curcio, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protester's bid was properly rejected as nonresponsive where it contained a commercial bid bond form that limited the surety's liability to the government in the event of a default to the difference between the protester's bid and the new award amount, contrary to the terms of the solicitation, which required the surety to be liable for all procurement costs, up to the penal amount of the bond.

DECISION

Paradise Construction Company protests the rejection of its bid under invitation for bids (IFB) No. F12617-01-B0006, issued by the Department of the Air Force for the sealing of four maintenance hangar roofs. Paradise asserts that the Air Force improperly determined that its bid bond was insufficient and that its bid therefore was nonresponsive.

We deny the protest.

The IFB, which required bidders to submit a bid guarantee, incorporated Federal Acquisition Regulation (FAR) § 52.228-1, which provides that a bidder's failure to furnish the required bid guarantee in the proper form and amount "may be cause for rejection of the bid," and further states, at subparagraph 1(e), as follows:

In the event the contract is terminated for default, the bidder is liable for any cost of acquiring the work that exceeds the amount of its bid, and the bid guarantee is available to offset the difference.

In other words, the defaulting bidder is liable for reprocurement costs, and to protect the government's interests in the event the bidder fails to pay all those costs, the bond is to be available, up to its penal sum, to pay the difference between the costs the defaulting bidder paid and the costs of reprocurement.

Paradise submitted its bid bond on a commercial bid bond form that provided as follows:

If the principal shall pay to the obligee the difference not to exceed the penalty thereof between the amount specified in said bid and such larger amount for which the obligee may in good faith contract with another party to perform the work covered by said bid, then this obligation shall be null and void, and otherwise to remain in full force and effect.

The Air Force found that the quoted language rendered the bond insufficient because it limited the obligation of the surety to the difference between the amount bid by Paradise and the amount of any new contract that would be awarded in the event Paradise defaulted. Agency Request for Summary Dismissal. It determined that this was contrary to the requirement of FAR § 52.228-1, which holds the defaulting contractor liable for any reprocurement costs that the government may incur.

The bid was properly rejected as nonresponsive. A bid guarantee ensures that a bidder will, if required, execute a written contract and furnish payment and performance bonds. Where the guarantee is in the form of a bid bond, it secures the liability of the surety to the government if the holder of the bond fails to fulfill these obligations. The guarantee is also available to offset the cost of reprocurement of the goods or services. A bid bond is defective if it is submitted on a form that represents a significant departure from the rights and obligations of the parties as set forth in the IFB. Harvest Constr. Co., B-267513, Nov. 16, 1995, 95-2 CPD ¶ 226 at 2. If the bid bond is defective, the bid is nonresponsive and must be rejected. Id.

Here, the IFB required the bidder to be responsible for all reprocurement costs in the event of default. These costs would include the difference in the successful bidder's price and the price of any replacement contract, and also would include, for example, administrative costs the government would incur in reprocurring the services. The quoted language in Paradise's bond limited the liability of the surety to the difference between the bid submitted by Paradise and the amount of any new contract awarded for the services. The bond therefore would not be available to offset any administrative and other reprocurement costs, since they would be in excess of the difference in the successful bidder's price and the reawarded contract price. This is a significant diminution of the defaulting bidder's and its surety's obligation under FAR § 52.228-1 to pay all reprocurement costs (up to the penal

amount). See Harvest Constr. Co., supra. Consequently, the bid bond was insufficient, and the bid was properly rejected as nonresponsive.

The protest is denied.

Anthony H. Gamboa
General Counsel