

185-15

Ms. Tierney

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

FILE: B-202266.2

DATE: June 23, 1981

MATTER OF: Dee Cee Roofing Co., Inc.

DIGEST:

1. Protest challenging validity of bid guarantee requirement based on violation of Miller Act, as implemented by agency procurement regulations, and erroneous Government estimate is untimely and will not be considered on merits since bases of protest were apparent from IFB, but protest was not filed until after bid opening. 4 C.F.R. § 20.2(b)(1) (1980).
2. Failure to submit bid guarantee required by the IFB is material omission, and bid that does not comply with requirement must be rejected as nonresponsive.

Dee Cee Roofing Company, Inc. (Dee Cee), protests the proposed award to another firm of a contract for roofing at the Wallops Flight Center, National Aeronautics and Space Administration (NASA), pursuant to invitation for bids (IFB) No. 6P-3572. Dee Cee contends that its low bid was improperly rejected as nonresponsive for failure to submit a bid bond required by the IFB.

The IFB required that a bid bond in the amount of 20 percent of the bid accompany each bid submitted and warned that "failure to furnish a bid guarantee in the proper form and amount, by the time set for opening of bids, may be cause for rejection of the bid." Performance and payment bonds were required of the contractor. Bids were opened on February 19, 1981. Dee Cee's bid of \$15,355 was considerably below NASA's projected estimate of \$25,666. However, the contracting

[Protest of Bid Rejection as Nonresponsive]

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officer determined that, because Dee Cee had failed to submit a bid bond, the bid was nonresponsive. NASA proposes to award the contract to Baker Roofing Company, the next low bidder, which submitted a proper bond.

On March 2, 1981, Dee Cee filed a protest with our Office contending that the NASA procurement regulation (NASA PR) does not require a bid bond for any bid price less than \$25,000 in amount. Dee Cee apparently is contending that since the Miller Act, 40 U.S.C. § 270(a), et seq. (1976), as amended by Pub. L. No. 95-585, 92 Stat. 2484 (November 2, 1978), as implemented by NASA PR § 10.103 (1980), does not require performance and payment bonds for any construction contract less than \$25,000, in turn, the IFB's bid bond requirement which is derived from the Miller Act is invalid and its bid was improperly rejected.

Under our Bid Protest Procedures, a protest based upon alleged improprieties in a solicitation which are apparent prior to bid opening must be filed before the bid opening in order to be considered. 4 C.F.R. § 20.2(b)(1) (1980). Dee Cee's protest is that the bid bond provision in the IFB is improper under the Miller Act and the NASA PR and based on an inflated estimate of the actual contract cost. Since the bid, performance, and payment bond provisions and NASA's projected estimate were apparent from the IFB but Dee Cee failed to protest the alleged improprieties to either the contracting officer or GAO prior to bid opening, its protest is untimely and will not be considered on the merits. United States Contracting Corporation, B-198095, June 27, 1980, 80-1 CPD 446; Elevator Sales & Service Inc., B-193519, February 13, 1979, 79-1 CPD 102.

The next issue for consideration is whether Dee Cee's bid should have been rejected as nonresponsive for failure to submit a bid bond.

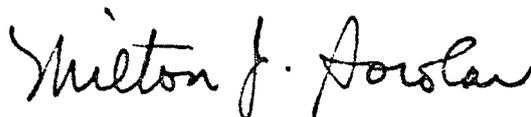
We find that NASA was correct in rejecting Dee Cee's bid as nonresponsive. A bid guarantee requirement is a material part of an IFB and, except as provided in applicable procurement regulations, a bid

that does not comply with the requirement must be rejected as nonresponsive. Burns Electronic Security Services, Inc., B-191312, November 27, 1978, 79-1 CPD 1; Edward D. Griffith, B-188978, August 29, 1977, 77-2 CPD 155. As previously noted, the IFB explicitly required a bid bond and warned that failure to submit a bid guarantee might result in rejection of the bid. Only in the limited circumstances set forth in NASA PR § 10.102-5 (1980), which are not applicable in the present case, is a waiver of the bonding requirement permitted. Elevator Sales & Service, Inc., supra.

Finally, Dee Cee urges that we sustain the protest since, as low bidder, Dee Cee's contract price would be a considerable savings to NASA and the taxpayers. The fact that an award of contract will be made at a higher bid price does not entitle the Government to arbitrarily waive bid bonding requirements. Rather, this Office has consistently held that monetary savings do not outweigh the public interest in strictly maintaining the public bidding procedures. Burns Electronic Security Services, Inc., supra.

The protest is dismissed in part and denied in part.

We expect that this situation will not recur since the record contains a recognition by contracting personnel that the IFB should have contained a notice that bids under \$25,000 did not require a guarantee.



Acting Comptroller General
of the United States