



Comptroller General
of the United States

Washington, D.C. 20548

146-152

Decision

Matter of: K & M Electric Corp.

File: B-247450

Date: April 23, 1992

Paul Knickerbocker for the protester,
C. Dale Duvall, Department of Veterans Affairs, for the
agency,
Tania L. Calhoun, Office of the General Counsel, GAO,
participated in the preparation of the decision.

DIGEST

Absence of a protester's corporate surety from Department of the Treasury Circular 570 rendered the bid nonresponsive; protester thus was not an interested party to protest award to another bidder since it did not question the finding of nonresponsiveness and since at least one other bidder could be awarded the contract if the awardee were found ineligible.

DECISION

K & M Electric Corp. protests the award of a contract to Sellers & Sons under invitation for bids (IFB) No. 678-105-91, issued by the Department of Veterans Affairs (VA) for telephone system site preparation at the VA Medical Center in Tucson, Arizona.

We dismiss the protest because the protester is not an interested party. See 4 C.F.R. § 21.0(a) (1992).

The IFB was issued on August 13, 1991, as a set-aside for emerging small business concerns.¹ The IFB required bidders to submit a price for a base bid and an alternate bid; the IFB also required the submission of a bid guarantee. Of the six bids VA received by the extended September 20 bid opening date, K & M submitted the apparent low bid. VA rejected the protester's bid as nonresponsive, however, because it determined that K & M's bid guarantee

¹"Emerging small business" means a small business concern whose size is no greater than 50 percent of the normal size standard applicable to the standard industrial classification code assigned to a contracting opportunity. Federal Acquisition Regulation (FAR) § 19.1002.

was unacceptable. Specifically, VA found that K & M's corporate surety for its bid guarantee, Pacific International Indemnity Co., Ltd., was not an approved surety listed in Department of the Treasury Circular 570, entitled "Companies Holding Certificates of Authority as Acceptable Sureties on Federal Bonds and as Acceptable Reinsuring Companies." Following the rejection of K & M's bid, VA awarded the contract to Sellers as the next low bidder on January 17, 1992. In its protest, K & M argues that Sellers's bid should have been rejected as nonresponsive because it certified that Sellers was not an emerging small business concern.

Under FAR S 28.202-1(a)(1), all corporate sureties offered for bonds furnished with contracts to be performed in the United States must appear on the list contained in Circular 570. Where, as here, a solicitation provides that failure to provide a bid bond in proper form or amount may be a basis for rejection of a bid, a bidder is on notice that not all sureties will be considered adequate and it is incumbent upon a bidder to determine which sureties are acceptable to the government. American Asbestos Abatement, Inc., B-237613, Nov. 29, 1989, 89-2 CPD ¶ 504. As a result, the absence of a bidder's corporate surety from Circular 570 renders the bid nonresponsive, notwithstanding the fact that the solicitation does not specifically mention the requirement concerning corporate sureties. Siska Constr. Co., Inc., B-218428, June 11, 1985, 85-1 CPD ¶ 669. Here, at the time of bid opening, K & M's corporate surety was not listed in Circular 570. Therefore, K & M's bid was properly rejected as nonresponsive.

K & M argues that the agency acted unfairly because it allowed Sellers to change its size status certification,² which K & M alleges to be a matter of responsiveness, but did not allow K & M to correct the bond defect which made its bid nonresponsive. However, failure to certify size status does not affect a bid's responsiveness because that information is not required to determine whether a bid meets the IFB's material requirements. Insinger Mach. Co., B-234622, Mar. 15, 1989, 89-1 CPD ¶ 277. In contrast, as noted above, failure to provide a bond surety listed on

²Sellers's bid certified it was not an emerging small business; however, it also certified it had gross annual revenues of \$2 to 3.5 million and fewer than 100 employees. Since the emerging small business size standard here was gross annual revenues of \$8.5 million and fewer than 500 employees, the contracting officer asked Sellers to clarify its certification. Sellers subsequently claimed it had made a clerical error and, based on the information in the bid, the agency found the bid responsive.

Circular 570 is a matter of responsiveness; a nonresponsive bid cannot be made responsive after bid opening. See Lava Tap Cleaning Servs., Inc., B-234728, May 18, 1989, 89-1 CPD ¶ 479.

Under the bid protest provisions of the Competition in Contracting Act of 1984, 31 U.S.C. §§ 3551-3556 (1988), only an "interested party" may protest a federal procurement. That is, a protester must be an actual or prospective supplier whose direct economic interest would be affected by the award of a contract or the failure to award a contract. 4 C.F.R. § 21.0(a). A protester is not an interested party where it would not be in line for contract award were its protest sustained. ECS Composites, Inc., B-235849.2, Jan. 3, 1990, 90-1 CPD ¶ 7. Since K & M's bid was nonresponsive, and since the record shows there is at least one other bidder which could be awarded the contract if Sellers were found ineligible for award, K & M lacks the direct economic interest necessary to be an "interested party" eligible to protest the award to Sellers. FeinFocus, USA, Inc., B-245119, Dec. 3, 1991, 91-2 CPD ¶ 502; York Int'l Corp., B-235079, Apr. 21, 1989, 89-1 CPD ¶ 400.³

The protest is dismissed.

Christine S. Melody
Christine S. Melody
Assistant General Counsel

³K & M also protests the agency's delay, including two extensions of bid acceptance time, in informing K & M that its bid was nonresponsive. However, this deficiency does not affect the validity of the rejection of the bid. Rodenberg's Floor Coatings, Inc., B-215807, Nov. 23, 1984, 84-2 CPD ¶ 548.