



Comptroller General
of the United States
Washington, D.C. 20548

Decision

Matter of: Kenard Construction Company, Inc.

File: B-248830

Date: September 25, 1992

Kenneth A. Ray for the protester.
C. Dale Duvall, Esq., Department of Veterans Affairs, for
the agency.
Katherine I. Riback, Esq., and John Brosnan, Esq., Office of
the General Counsel, GAO, participated in the preparation of
the decision.

DIGEST

The failure to furnish a required bid guarantee renders a
bid nonresponsive.

DECISION

Kenard Construction Company, Inc. protests the rejection of
its bid as nonresponsive because of the firm's failure to
submit a bid guarantee under invitation for bids (IFB)
No. 664-013-92, issued by the Department of Veterans Affairs
(VA). The solicitation was for renovation of the prosthet-
ics office space at the VA Medical Center, San Diego, CA.
Kenard contends that its bid was improperly rejected because
the solicitation did not clearly require a bid guarantee for
bids under \$25,000.

We deny the protest.

On March 11, 1992, a notice of the procurement was published
in the Commerce Business Daily (CBD) which stated that the
estimated cost range of the project was from \$25,000 to
\$100,000 and specified that a bid guarantee was required.
The solicitation itself was issued on March 23. It speci-
fied on the first page in Block 13.B that "an offer guaran-
tee" is required. The solicitation also stated in its
instructions section that a "[b]id guarantee when required
is to be in an amount not less than 20% of the bid
price. . . ." The instructions further informed bidders
that the failure to furnish "the required bid guarantee"
will require rejection of the bid. The solicitation also
included the clause set forth at Federal Acquisition Regula-
tion (FAR) § 52.228-1 entitled "Bid Guarantee" which speci-
fied that failure to provide a proper bid guarantee could

result in the rejection of the bid and set forth the acceptable forms for the guarantee.

The solicitation also contained several provisions relating to the requirement for performance and payment bonds. Two of the references to these bonds stated that they were required for contracts "in excess of \$25,000."

Because Kenard intended to submit a bid of less than \$25,000 and because it was uncertain as to whether the bid guarantee requirement applied to bids under that amount, on April 27--before the solicitation's April 29 opening date--a representative of Kenard contacted the contracting officer and asked whether the solicitation required a bid guarantee for bids under \$25,000. The record shows that the contracting officer stated that bid guarantees were required. On April 28, Kenard telefaxed a request to the contracting officer asking that she reconsider her position that bid guarantees were required for bids under \$25,000. The contracting officer responded that same day by telefax, stating that the IFB required a bid guarantee and warning that any bid submitted without the required bid guarantee would be rejected as nonresponsive. That same evening after business hours Kenard sent the contracting officer another telefax questioning her authority to require bid bonds for bids under \$25,000. The contracting officer saw this correspondence prior to bid opening and telephoned the Kenard representative to remind him that bid guarantees, and performance and payment bonds were required. During that conversation the representative stated that he did not expect a response to the letter.

Ten bids were received at bid opening and three were for less than \$25,000. Kenard's bid was second low. The contracting officer concluded that the two low bids were nonresponsive for failure to include bid guarantees. On May 11, the contracting officer awarded the contract to Corrington Construction Inc., the third low bidder. This protest followed.


Kenard contends that the solicitation did not clearly require a bid guarantee for a bid under \$25,000. The protester points out that the Miller Act, 40 U.S.C. § 270a (1988) only requires performance and payment bonds for construction contracts that exceed \$25,000, and that FAR § 28.101-1 states that bid guarantees should only be required when performance bonds or performance and payment bonds are required. Kenard argues that in light of those provisions, and because the IFB stated that performance and payment bonds were required only for contracts in excess of \$25,000, this solicitation did not require that a bid guarantee have to accompany a bid of less than that amount.

Bid guarantees are requirements promulgated under the procurement regulations and are not mandated by statute. Therefore, the contracting activity does not derive its authority to require them from the Miller Act. This being true, an agency may condition bid acceptance, for contracts of less than \$25,000, upon the furnishing of a bid guarantee by the time of bid opening. Hirt Telecom Co., B-231534, June 7, 1988, 88-1 CPD ¶ 542.

Further, we find that this IFB when read as a whole required a bid guarantee for bids under \$25,000. First, Block 13.B of the IFB and the CBD notice clearly stated that a guarantee was required. The IFB also stated that the failure to furnish the required bid guarantee in the proper form and amount by bid opening, may require rejection of the bid. While the solicitation required that bidders furnish both performance and payment bonds for contracts over \$25,000, that section must be read in conjunction both with the estimated contract cost range of \$25,000 to \$100,000 that was stated in the CBD notice and the Block 13.B requirement for a bid guarantee. It is the agency's estimate of the contract amount as reflected in the CBD notice which controls whether a bid guarantee need be submitted. LTT Constructors, Inc., B-229062, Nov. 13, 1987, 87-2 CPD ¶ 484. Thus, it is our view that the blanket requirement that bid guarantees were required contained in Block B of the IFB, along with the agency's estimate of the cost of the project, should have been sufficient to inform competitors that bid guarantees were required of all bidders under the solicitation. Id.

To the extent Kenard had doubts whether the solicitation required bid guarantees for bids under \$25,000, its extensive communications with the contracting officer should have answered any remaining questions. The contracting officer clearly and repeatedly informed Kenard that a bid guarantee was required and that any bid submitted without one would be rejected. If Kenard objected to the VA's position, it could have filed a protest with either the agency or our Office prior to the bid opening. See Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1992). We therefore have no basis upon which to object to the rejection of the protester's bid as nonresponsive for its failure to include the bid guarantee. See LTT Constructors, Inc., supra.

The protest is denied.


James F. Hinchman
General Counsel