



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Cherokee Enterprises, Inc.

File: B-252948; B-252950

Date: June 3, 1993

Frank E. Riggs, Jr., Esq., and Joseph Paul Henner, Esq.,
Smith, Currie & Hancock, for the protester.
James M. Ulam, Esq., Ott, Purdy & Scott, for GM&R
Construction Co., Inc, an interested party.
Deidre A. Lee, National Aeronautics and Space
Administration, for the agency.
Linda C. Glass, Esq., and Andrew T. Pogany, Esq., Office of
the General Counsel, GAO, participated in the preparation of
the decision.

DIGEST

1. Agency properly determined that a bid bond was defective and that the bid therefore was nonresponsive under a sealed bid procurement where the bond contained language that it was "subject to agreement to assist in business development efforts" which the agency reasonably determined created uncertainty as to whether the bond would be enforceable against issuer.
2. Since a bid guarantee provision in a sealed bid procurement is a material requirement which must be met at the time of bid opening, a bid which is nonresponsive, due to a defective bid bond, cannot be made responsive by the surety's post-bid-opening offer to remove the conditional language.

DECISION

Cherokee Enterprises, Inc. protests the rejection its low bids as nonresponsive under invitation for bids (IFB) Nos. 10-93-0031 and 13-SSC-B-92-14, issued by the National Aeronautics and Space Administration (NASA). IFB No. 0031 involved construction for modifications to an underground communications system at the John C. Stennis Space Center located in Hancock County, Mississippi. IFB No. 92-14 involved the installation of underground conduit and manholes at the John F. Kennedy Space Center located in Cape Canaveral, Florida. Cherokee's bids were found nonresponsive due to defective bid bonds.

We dismiss the protests.

The IFBs required all bidders to submit a bid guarantee with their bids. Cherokee submitted bids in response to both IFBs which contained bid bonds in the proper amount and underwritten by an acceptable surety. However, in the block set aside for the name and address of the surety, the bonds contained the following language: "THIS BOND IS SUBJECT TO AGREEMENT TO ASSIST IN BUSINESS DEVELOPMENT EFFORTS." The "Agreement to Assist" was not provided with the bonds but was furnished to the agency subsequent to bid opening. This "Agreement to Assist" provided to the agency was an agreement between the protester and another contractor. The "Agreement to Assist" contained specific conditions with which the protester was required to comply, such as:

"(1) CONTRACTOR to provide proof positive of an active, valid, fully enforceable contract with the National Aeronautics and Space Administration.

(2) CONTRACTOR exercise all plausible and reasonable options available and within its means to secure the resources necessary to finance the above referenced project. GUARANTOR is not routinely engaged in the business of contract financing and does not hold itself to be:"

NASA asserts that it could not determine definitely from the documents submitted with the bids that the surety would be bound since there was a conditional statement on the face of the bid bonds which raised questions about their enforceability. NASA maintains that at bid opening, it was impossible for the contracting officers to know if the conditions under the "Agreements to Assist" had been satisfied or to even know what the conditions encompassed because the agreements were not furnished until after bid opening. NASA further maintains that the conditions as stated in the agreements further support its position that the bidder was nonresponsive.

The protester argues that the bid guarantees it provided complied in all material respects with the requirement of the IFBs and that the "stamped language" added to the bid bonds did not go to the substance of the bid guarantees and was therefore immaterial. The protester also argues that the only reasonable interpretation of its bid is that the bonds were "based on" or "made possible by" another contractor's agreement to provide financial backing and that the language was merely providing NASA with some information regarding the nature of the relationship between the surety and the principal.

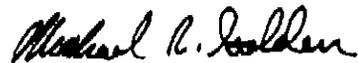
A bid guarantee is a firm commitment to assure the government that a successful bidder will execute contractual documents and provide payment and performance bonds required under the contract. Its purpose is to secure the surety's liability to the government for excess procurement costs in the event the bidder fails to honor its bid in these regards. The key question in determining the sufficiency of a bid guarantee is whether the government will be able to enforce it. Imperial Maintenance, Inc., B-224257, Jan. 8, 1987, 87-1 CPD ¶ 34. When the guarantee is in the form of a bid bond, it secures the liability of a surety to the government if the holder of the bond fails to fulfill these obligations. O.V. Campbell and Sons Indus., Inc., B-216699, Dec. 27, 1984, 85-1 CPD ¶ 1. When required, a bid guarantee is a material part of the bid and by its terms must clearly establish the requisite liability of the surety or the bid must be rejected as nonresponsive. See Tom Mistick & Sons Inc., B-222326, Apr. 3, 1986, 86-1 CPD ¶ 323. If the terms of the bid guarantee qualify the surety's liability, then the bid must be rejected. Harrison Contracting, Inc., B-224165, Oct. 7, 1986, 86-2 CPD ¶ 402. Furthermore, a bidder's intention to be bound by the solicitation requirements and provide the requested items must be determined from the bid itself at the time of bid opening. See Allen County Builders Supply, 64 Comp. Gen. 505 (1985), 85-1 CPD ¶ 507; Franklin Instrument Co., Inc., B-204311, Feb. 8, 1982, 82-1 CPD ¶ 105.

In the present case, we agree with NASA that the bid bonds provided by Cherokee specifically stated that they were subject to undisclosed terms contained in a document not submitted with the bid bonds which render the enforceability against the surety uncertain. While the protester argues that the language, "subject to agreement to assist in business development efforts," was immaterial because the bid guarantee complied with all other requirements of the IFB, the language at a minimum created an ambiguity concerning the liability of the surety because the agency was not aware of the substance of the "Agreement to Assist" at time of bid opening and could not determine if Cherokee had complied with all the terms and conditions of the agreement in order to determine the surety's liability. Further, the actual language in the "Agreement to Assist" which states that Cherokee must "provide proof positive of an active, valid, fully enforceable contract" with NASA materially limited the liability of the surety since the purpose of the bid guarantee is to protect the government should the contractor not execute contractual documents. Since the language contained on the bid bonds qualified the surety's liability, we do not find it unreasonable for NASA to have rejected the bid as nonresponsive. Curry Envtl. Serv., Inc., B-228214, Dec. 9, 1987, 87-2 CPD ¶ 570.

The submission of the "Agreement to Assist" and the offer to remove the conditional language after bid opening does not cure the responsiveness problems. The determination as to whether a bid is acceptable must be based solely on the bid documents themselves, as they appear at the time of bid opening. See Allen County Builders Supply, supra. Thus, the offer to remove the conditional language after bid opening could not cure the defect.

Finally, to the extent Cherokee contends that its submission of the lowest price bids is a basis for acceptance notwithstanding the defective bid bonds, the public interest in strictly maintaining the sealed bidding procedures required by law outweighs any monetary advantage which the government might gain in a particular case by a violation of those procedures. See Building Sys. Contractors, Inc., B-219416, July 9, 1985, 85-2 CPD ¶ 36.

The protests are dismissed.



Michael R. Golden
Assistant General Counsel