



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: ERC General Contracting Services, Inc.

File: B-261404.2

Date: October 11, 1995

Edmund T. Baxa, Jr., Esq., and Paul R. Monsees, Esq., Foley & Lardner, for the protester.

Deidre A. Lee, National Aeronautics and Space Administration, for the agency.
Behn Miller, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Where bidder conditioned enforceability of submitted bid bond upon agency's acceptance of unacceptable performance bond, agency properly rejected bid as nonresponsive.

DECISION

ERC General Contracting Services, Inc. protests the rejection of its low bid as nonresponsive under invitation for bids (IFB) No. 10-95-0016, issued by the National Aeronautics and Space Administration (NASA) for construction work to close a landfill located at the John F. Kennedy Space Center, Cape Canaveral, Florida.

We deny the protest.

The IFB was issued on March 22, 1995, and required that all bidders submit a bid guarantee in the amount of 20 percent of the bid price, or \$3 million, whichever was the lesser amount. Because the amount of the awarded contract was expected to exceed \$25,000, and because the procurement was for construction services, the IFB advised contractors that the successful awardee would be required to furnish a standard performance bond shortly after award. Federal Acquisition Regulation (FAR) § 28.102-1.

At the May 3 bid opening, 10 bids were received; ERC submitted the apparent low bid along with a Standard Form (SF) 24 bid bond for 20 percent of the bid price. ERC's submitted bid bond contained the following limitation:

"THIS BID BOND IS CONDITIONED UPON THE USE OF THE
ATTACHED PERFORMANCE BOND RIDER.
WITNESS: IF SUCH BOND IS REQUIRED."

The attached "PERFORMANCE BOND RIDER" specified that in the event of the contractor's default:

"The [indemnification] obligation of the Surety shall not include liability for loss, cost, damage, fines, penalties or expense (including attorneys' fees) from personal injury (including death), or from property damage (including environmental impairment or cleanup), or from any criminal or tortious act arising out of the performance, default, or completion of the incorporated contract, nor shall the Surety be obligated to provide or maintain any policy or undertaking of liability insurance."

The rider further provided that in the event of "conflict or inconsistency" between the provisions of the rider and the provisions of the "attached bond" or IFB, the provisions of the performance bond rider "shall control, or the obligation of the Surety be deemed null and void."

The agency viewed the rider as unacceptable. Accordingly, the contracting officer rejected ERC's bid as nonresponsive. On June 2, ERC filed this protest with our Office; award has been withheld pending the outcome of this protest.

A bid bond assures that a bidder will, if required, execute a written contract and furnish payment and performance bonds. LM Envtl., Inc., B-245388.3, June 30, 1992, 95-2 CPD ¶ 159. The surety's bid bond obligations are satisfied when acceptable payment and performance bonds are delivered and the bidder executes the contract. Id. A bid bond, even if in the proper amount, is defective and renders the bid nonresponsive if it is not clear that it will bind the surety. Techno Eng'g & Constr., Ltd., B-243932, July 23, 1991, 91-2 CPD ¶ 87. The determinative question as to the acceptability of a bid bond is whether the bid documents establish that the bond is enforceable against the surety should the bidder fail to meet its obligations. Fred Winegar, B-243557, Aug. 1, 1991, 91-2 CPD ¶ 111.

In its protest, ERC asserts that the performance bond rider does not render its bid bond nonresponsive since the rider applies only to a performance bond, which is not required to be furnished by the successful contractor until after award. As such, the protester argues that the performance bond rider does not affect the surety's obligations under the submitted bid bond, and therefore ERC's bid was responsive to the solicitation's bid bond requirement.

As noted above, the performance bond rider language which ERC incorporated into its submitted bid bond expressly conditioned the bid bond's use upon the agency's acceptance of the performance bond terms offered by ERC in the accompanying bid bond rider document. By the express terms "conditioned upon the use of the attached performance bond rider," acceptance of ERC's bid bond would have

obligated NASA to accept the performance bond rider. Since the agency determined the rider to be unacceptable, the accompanying bid bond, with the condition on its use, also had to be viewed as unacceptable.

In its comments on the agency report, ERC argues that the performance bond rider should not have been rejected as unacceptable since the rider does not affect the basic performance bond indemnification obligations required of the surety under FAR subpart 28. Specifically, ERC maintains that because there is no language in the standard performance bond form (SF 25) granting the government the right to recover against the surety for the items disclaimed in ERC's performance bond rider, the performance bond rider should not have been rejected. We find this argument unpersuasive.

The purpose of a performance bond is to secure performance and fulfillment of the contractor's obligations under the contract. FAR § 28.001(f). This broad purpose is reflected in the standard performance bond form, which makes the surety "jointly and severally liable" if the contractor fails to perform and fulfill "all the undertakings, covenants, terms, conditions, and agreements of the contract . . . " and only extinguishes the surety's broad indemnification obligation to the government when the contractor has fully performed all the contract terms. Similarly, the provision at FAR § 52.249-10, the standard clause regarding contractor default in fixed-price construction contracts, specifically states that "[t]he Contractor and its sureties shall be liable for any damage to the Government resulting from the Contractor's refusal or failure to complete the work within the specified time" (Emphasis added.) FAR § 52.249-10(a); see generally Appeal of Milner Constr. Co., Inc., DOTCAB No. 2043, July 17, 1991, 91-3 BCA ¶ 24,195 (by issuing a performance bond, guaranteeing that the contractor would perform all of its contractual obligations, surety accepts and binds itself to guarantee the satisfaction of any liability which might arise under the default clause). Given the broad purpose of the performance bond, we think that ERC's performance bond rider created doubt as to whether the surety's liability under the performance bond would extend to everything encompassed by the broad language of the default clause and the bond itself. Under these circumstances, the agency reasonably could be concerned that the rider might not be interpreted consistent with the terms of the standard performance bond, and reasonably could conclude that the rider rendered the performance bond unacceptable.

Accordingly, since acceptance of the proffered bid bond was conditioned upon acceptance of an unacceptable performance bond, we conclude that the contracting officer properly rejected ERC's bid.¹

The protest is denied.

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¹The protester also contends that its current bid should not be rejected as nonresponsive since ERC has submitted similar bid bond/performance bond rider combinations under previous procurements without being rejected as nonresponsive. The protester's reliance on NASA's alleged acceptance of bid bonds with similar discrepancies under prior procurements has no bearing on the merits of the issue before us, as each procurement is a separate transaction, and action taken on any one procurement does not govern the conduct of all similar procurements. See U.S. Gen., Inc.--Recon., B-242769.2, Aug. 5, 1991, 91-2 CPD ¶ 126.