



Decision

Matter of: Capture, LLC

File: B-406284

Date: March 23, 2012

Marcus Carter, Government Contractor Services, for the protester.
Antonio R. Franco, Esq., and Kathryn V. Flood, Esq., Piliro Mazza PLLC, for
Seawolf Construction Corp., the intervenor.
Rebecca L. Tranthem, Esq., Department of Veterans Affairs, for the agency.
Peter D. Verchinski, Esq., and Guy R. Pietrovito, Esq., Office of the General
Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protester's bid bond was properly rejected where the protester attached a letter to the bid bond stating that the surety's support for the protester was contingent upon a number of conditions.

DECISION

Capture, LLC, of Tampa, Florida, protests award of a contract to Seawolf Construction Corp. of Jersey City, New Jersey, under request for proposals (RFP) No. VA-248-11-RP-0201, issued by the Department of Veterans Affairs (VA) for the expansion of a parking garage at the VA Medical Center in Gainesville, Florida. Capture challenges the rejection of its proposal, where the agency found that the protester's bid bond was defective.

We deny the protest.

BACKGROUND

The RFP provided for award of the contract on a lowest-price, technically acceptable basis without conducting discussions. Among other things, the RFP required offerors to submit a bid guarantee for 20% of the bid price or \$3 million, whichever was less. See RFP at 17, 21. Offerors were warned that the failure to furnish the required bid guarantee in the proper form and amount would result in the rejection of the bid. Id. at 17.

Capture submitted an executed bid bond on standard form (SF) 24 with its proposal. Agency Report (AR), Tab 3, Protester's Bid Bond. The protester's bid bond identified Capture LLC as the principal and contained the signature of an attorney-in-fact for the corporate surety, Fidelity and Deposit Company of Maryland. Attached to the bid bond was a letter from the attorney-in-fact to the contracting officer, stating that the surety had

performed our normal underwriting process of Capture, LLC and ha[s] agreed to support them on this project based upon certain conditions, including third party indemnity. We have been assured by Capture, LLC that they have notified your office of this arrangement.

Id. at 3.

The VA determined that Capture's bid bond was defective. Specifically, the agency found that protester's attachment to the bid bond rendered the bond unacceptable because the surety had placed conditions on the bond limiting the government's rights. AR at 2; Protest, exhib. 4-5, VA Letter to Capture, Aug. 19, 2011.

Award was made to Seawolf, and this protest followed.

DISCUSSION

Capture contends that it submitted a valid and enforceable bid bond. In this regard, Capture argues that the letter attached to its bid bond merely disclosed a third-party indemnification arrangement, which Capture argues is a standard business practice. Capture contends that the letter does not place any restrictions or conditions on the government or limits the VA's rights against the surety.¹ Protest at 3.

The determinative question in judging the sufficiency of a bid guarantee such as a bid bond is whether it could be enforced if the bidder subsequently fails to execute required contract documents and to provide performance and payment bonds. TJ's Marine Constr. LLC, B-402227, Jan. 7, 2010, 2010 CPD ¶ 19 at 3. The bid bond must clearly establish the liability of the surety; when the liability is not clear, the bond is defective. BW JVI, LLC, B-401841, Dec. 4, 2009, 2009 CPD ¶ 249 at 3.

¹ Capture explains that the surety required indemnification from a third party (unnamed in the letter) because the surety was concerned that, given the protester's small size, the surety would be unable to recover the amount of its guarantee from Capture alone in the event of Capture's default. Protest at 3.

Here, we find that the agency properly rejected Capture's proposal. The express language of the letter attached to Capture's bid bond indicated to the agency that the surety's obligation under the bond was based upon undisclosed conditions. In this regard, the letter specifically stated that the surety had been assured by Capture that the agency had been notified of the conditions, the record shows that Capture had not informed VA of any conditions (either prior to submitting its proposal or along with the proposal). Thus, the VA could not know what conditions had been placed upon the surety's obligation or whether the surety would be liable on the bond in the event of Capture's default. Given this, we agree with the agency that the attached letter created uncertainty as to the obligation of the surety to the government.

The protester has made various arguments attempting to explain away the attached letter. For example, Capture essentially contends that the agency should not have considered the attached letter as conditioning the surety's obligations where the face of the bid bond, SF 24, stated that the surety would be bound. The protester also parses the words of the attached letter to argue that because the letter stated in the past tense that the surety agreed to be bound, all of the conditions had been met. None of these arguments has any merit. The fact remains that, in its proposal, Capture provided a letter attached to its bid bond, and the express language of the letter reasonably indicated to the agency that the surety's obligations were conditioned upon unstated terms.

In short, the liability of Capture's surety is uncertain, and therefore the bid bond was properly rejected.

The protest is denied.

Lynn H. Gibson
General Counsel