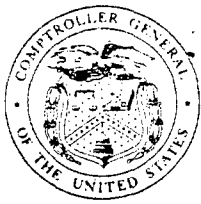


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DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548**

FILE: B-193844

DATE: February 14, 1980

MATTER OF: Southern Systems, Inc.

DLG 02947

DIGEST:

1. Where low bidder agrees with contracting agency that construction work is involved in procurement, but protests that, instead of IFB being canceled, award should have been made and Davis-Bacon Act wage provisions added by contract amendment, protest is denied, since appropriate way to rectify situation is cancellation and readvertisement where feasible.
2. Bid price structure used to circumvent Miller Act bond requirement renders bid nonresponsive.
3. Where low bidder protests rejection of second low bid, which second low bidder did not appeal, and resolution of low bidder's protest would not affect its entitlement to award, protest will not be considered.

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INVOLVING

Southern Systems, Inc. (SSI), ^{INVOLVING} protested the cancellation of ~~Naval Supply Center invitation for bids~~ ~~PIFB~~ N00189-78-B-0075 and the subsequent rejection of its bid under IFB N00189-79-B-0024, the readvertisement of the procurement.

The SSI protest is denied for reasons which follow.

IFB-0075 was issued as a solicitation for a supply contract. After the opening of bids, the IFB was canceled because it was decided that there were elements of construction in the IFB for which no coverage had been provided. For example, the IFB did not contain the minimum wage rates required

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to be paid by the Davis-Bacon Act, 40 U.S.C. § 276a (1976). SSI, the low bidder on the IFB, agrees that construction work is involved in the procurement, but contends it was not necessary that the IFB be canceled. SSI states that the award should have been made and the Davis-Bacon provision added by amendment to the contract.

GAH/Kes However, in 40 Comp. Gen. 565, 571 (1961), ~~we~~ held that the failure to include the Davis-Bacon minimum wage provisions in a contract could not be cured retroactively. ~~We indicated in that decision that~~ the appropriate way to rectify the situation is cancellation and readvertisement where it is feasible. See also Bick-Com Corporation, B-189894, November 23, 1977, 77-2 CPD 404, where we indicated that an award based upon minimum wage rate specifications negotiated after bid opening would violate the basic principles of the competitive bidding procedure. Therefore, we concur in the cancellation of the IFB in this case.

¶ The low bid submitted by SSI under the readvertised IFB was rejected as nonresponsive because it was not supported by a bid bond. SSI protested that the bid should not have been rejected because the bond requirement in the IFB was vague and ambiguous in that it was not clear whether the bond was to be based on the total bid price or only upon the price for the construction items. However, SSI has indicated that the sureties would not bond it for the total contract price and it admits that it arranged the price for the construction work to avoid the bond requirement. Under the arrangement, the prices for the supply items were overstated and the prices for the construction items were understated so as to have a total for construction work of less than \$25,000, the minimum amount provided in the IFB for requiring bonding. Whether the bonds were required in an amount sufficient to cover the whole contract or only the construction work, SSI admittedly used its pricing structure so that it would not have to furnish any bonds..

One of the purposes of the bid bond is to insure that the successful bidder will furnish performance and payment bonds required by the Miller Act, 40 U.S.C. § 270a (1976), amended November 2, 1978, Public Law 95-585, 92 Stat. 2489, where the cost of construction exceeds \$25,000. The Miller Act performance bond is for the protection of the United States against default by the contractor. The Miller Act payment bond is for the protection of persons supplying labor and material in the prosecution of the work. A bid price structure which is used to circumvent a statutory requirement renders the bid ineligible for award. Chrysler Corporation, B-182754, February 18, 1975, 75-1 CPD 100.


Therefore, if the bonds were required for the entire contract, SSI admits that the sureties would not furnish them to SSI and, in the alternative, if the bonds were required to cover the construction work alone, SSI admits that it arranged its bid prices to preclude that. Thus, regardless of which interpretation of the bond requirement is correct, SSI either would not be able to comply or improperly put itself in a position of noncompliance. In the circumstances, the noncompliance is attributable to SSI rather than the contracting agency. Accordingly, we have no reason to object to the rejection of the SSI bid.

Moreover, while SSI contends that the IFB was deficient in other respects as well, it appears that, even if the IFB was, SSI would have been non-responsive in any event because of the manner in which it responded to the bond requirement. Therefore, such alleged deficiencies cannot be considered to be materially prejudicial to SSI.

SSI has protested that the contracting office was not consistent in its position as to the application of the Walsh-Healey Act, 41 U.S.C. § 35 (1976), manufacturer-regular dealer requirement in that prior to the opening of bids it advised bidders that, if a bidder is neither, the requirement would be self-deleting, but after the opening of bids it rejected

the bid of the second low bidder, H&S Corporation, because it indicated it was only a general contractor. Since H&S did not appeal the rejection of its bid and any resolution in that regard would not affect SSI's entitlement to award, the protest will not be considered by our Office. In that connection, the Bid Protest Procedures provide at 4 C.F.R. § 20.1(a) (1979) that a party must be "interested" in order that its protest be considered. In determining whether a protester satisfies the interested party criterion, we consider the direct or indirect benefit or relief sought to be obtained. Kenneth R. Bland, Consultant, B-184852, October 17, 1975, 75-2 CPD 242.

In connection with the protest, SSI made a claim for bid preparation costs and related losses. Since we have concluded that the cancellation of IFB-0075 and the rejection of SSI's bid under IFB-0024 were proper, we find it unnecessary to consider SSI's claim.


Deputy Comptroller General
of the United States