



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Western Management Services, Inc.; Mac-Bestos, Inc.

File: B-266147; B-270153

Date: January 23, 1996

Stan B. Williams, Esq., for Western Management Services, Inc.; and Jim J. Rivas, Jr., for Mac-Bestos, Inc., the protesters.

Col. Nicholas P. Retson, and Lt. Col. David S. Franke, Department of the Army, for the agency.

Jeanne W. Isrin, Esq., and David A. Ashen, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Material defect in a bid bond cannot be corrected after bid opening since this would afford a bidder the option of accepting or rejecting the award by either correcting or not correcting the bond deficiency and therefore would be inconsistent with the integrity of the sealed bidding system.

2. Protest against rejection of bid as nonresponsive on the basis of a defective bid bond is denied where the language of a rider to the bond limits the liability of the surety and bidder under the performance and payment bonds required in the event of award.

DECISION

Western Management Services, Inc. (WMS) and Mac-Bestos, Inc. protest the rejection of their respective bids as nonresponsive under invitation for bids (IFB) No. DAKF06-95-B-0048, issued by the Department of the Army for the removal, disposal, and remediation of underground storage tanks at Fort Carson, Colorado.

We deny the protests.

The IFB contemplated a firm, fixed-price, indefinite delivery/indefinite quantity contract for a base period beginning with the date of award through September 30, 1996, and two 1-year option periods. The IFB required that a bid guarantee be submitted with the bid in the amount of "twenty percent (20%) of the bid price or \$3,000,000, whichever is lesser." It warned that "[f]ailure to furnish a bid guarantee in the proper form and amount, by the time set for opening of bids, may be cause for rejection of the bid." The procurement was restricted to small disadvantaged business concerns under the section 8(a) program which were serviced by the Small Business Administration (SBA) district office in Denver, Colorado.

Eight bids were received at bid opening. Although WMS submitted the apparent low bid of \$3,435,713, the bid was rejected as nonresponsive because its bid guarantee of \$10 was deemed inadequate. The second low bidder was an 8(a) contractor not serviced by the Denver SBA office, and thus was ineligible for award. Mac-Bestos submitted the third low bid, but the bid was rejected as nonresponsive because it contained a bid bond which was subject to a rider whose conditions limited the liability of the surety and bidder. WMS and Mac-Bestos thereupon filed these protests with our Office.

WMS' PROTEST

WMS argues that the IFB was ambiguous as to whether the relevant price upon which to base the amount of the required bid guarantee was the base period price only or the base period price plus the prices for the 2 option years; WMS claims that due to the alleged ambiguity it was unable to determine the proper bid bond amount by the bid opening date. Further, WMS claims that a bid guarantee is not ordinarily required or necessary in 8(a)-restricted procurements because, since SBA is the prime contractor in these procurements, it is unlikely that a contract would not be executed. In any case, argues WMS, the agency either should have waived any deficiency in its bid bond or permitted it to cure the deficiency by posting an adequate bond subsequent to bid opening.

A bid guarantee is a material part of a bid and when a bond is required, it must be furnished with the bid package. Hugo Key & Son, Inc.; Alco Env'tl. Servs., Inc., B-251053.4; B-251053.5, July 15, 1993, 93-2 CPD ¶ 21, aff'd, B-251053.6, Sept. 27, 1993, 93-2 CPD ¶ 192. Federal Acquisition Regulation (FAR) § 28.101-4(a) requires rejection of a bid that does not comply with a solicitation requirement for a bid guarantee, unless the deficiency can be waived under FAR § 28.101-4(c).

The IFB required a bid guarantee of 20 percent of the bid price or \$3,000,000, whichever was lesser. To the extent that WMS believed the IFB to be ambiguous as to whether to base the amount of the required bid guarantee on the base period price only or on the base period price plus the option prices, its protest in this regard is untimely; our Bid Protest Regulations require that protests based upon such alleged improprieties in a solicitation which are apparent prior to bid opening shall be filed prior to bid opening. 4 C.F.R. § 21.2(a)(1) (1995). In any case, the amount of WMS' bid guarantee (\$10) was less than 20 percent (\$279,178) of WMS' base bid (\$1,395,891), as well as 20 percent (\$687,142) of its aggregate bid (\$3,435,713). Further, WMS' argument that a bid guarantee requirement is not appropriate in an 8(a) procurement is also untimely; since the requirement for a bid guarantee was clearly stated on the face of the IFB, any objection to it had to be raised prior to bid opening in order to be timely. 4 C.F.R. § 21.2(a)(1). As for WMS' offer to correct any deficiency with respect to the bond after bid opening, this could not be considered by the contracting activity; affording a bidder the

option of accepting or rejecting the award by either correcting or not correcting a bond deficiency would be inconsistent with the sealed bidding system. See Drill Constr. Co., Inc., B-239783, June 7, 1990, 90-1 CPD ¶ 538. Since none of the waiver provisions in FAR § 28.101-4(c) were applicable, WMS' bid was properly rejected.

MAC-BESTOS'S PROTEST

Mac-Bestos's bid bond as submitted consisted of a standard form 24 bid bond to which the surety had attached a "Rider to Bond Involving Toxic Material," which stated that the bond was "subject to the following conditions which shall survive the release and discharge of Surety from any further liability of its performance and payment obligations required under its bond." The rider's conditions provided that the bond is not a substitute for insurance; restricted the time for suits against Mac-Bestos or the surety under the bond; limited any right of action to the obligee (the government); and exclude the surety from liability for any negligence of Mac-Bestos and its agents resulting in personal injuries or property damage. The agency interpreted these conditions as limiting the surety's liability under the bid bond such that the bond did not satisfy the requirement for an unrestricted bid guarantee.

Mac-Bestos argues that its bid was improperly rejected as nonresponsive because the rider to the bid bond was removed after bid opening. In any case, asserts Mac-Bestos, the same rider has been attached to bid guarantees it has submitted for numerous federal contracts it has received, and the rider was never questioned.

A bid guarantee assures that the bidder will, if required, execute a written contract and furnish performance and payment bonds. Curry Envtl. Servs., Inc., B-228214, Dec. 9, 1987, 87-2 CPD ¶ 570. When the guarantee is in the form of a bid bond, it secures the liability of a surety to the government if the bidder fails to fulfill its obligations. Id. 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. Id.

The agency properly rejected Mac-Bestos's bid as nonresponsive on the basis of a defective bond. By stating its conditions in terms of survival of release and discharge of the surety, and given its reference to performance and payment obligations, the bond rider indicates an intent to limit materially the liability of Mac-Bestos and its surety under the required performance and payment bonds. Our Office has previously recognized that an agency therefore may reasonably reject a bid as nonresponsive where the required bid bond is subject to such a rider. See Curry Envtl. Servs., Inc., supra; Environmental Management Servs., Inc., B-244784, Aug. 26, 1991, 91-2 CPD ¶ 198. Further, even if, as Mac-Bestos claims, the same rider has been attached to bonds for other successful bids it has submitted, this did not require acceptance of the bid bond here; each procurement action is a separate transaction and the action taken under one is not relevant to the propriety of the

action taken under another procurement for the purposes of a bid protest. Westbrook Indus., Inc., B-248854, Sept. 28, 1992, 92-2 CPD ¶ 213. Furthermore, the removal of the rider after bid opening did not render Mac-Bestos's bid acceptable; as noted above, a material defect in a bid bond cannot be corrected after opening since affording a bidder the option of accepting or rejecting the award by either correcting or not correcting a bond deficiency would be inconsistent with the sealed bidding system. Hugo Key & Son, Inc.; Alco Envtl. Servs., Inc., supra.

The protests are denied.

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