



United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: BCI Construction USA, Inc.

File: B-407451

Date: December 4, 2012

Ronald J. Garber, Esq., Weissmann Zucker Euster Morochnik, PC, for the protester. Willie J. Williams, Esq., Department of the Army, for the agency. Pedro E. Briones, Esq., and Guy R. Pietrovito, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Where an invitation for bids required the submission of a bid guarantee, agency properly rejected protester's bid as nonresponsive where protester's bid bond listed an incorrect bid opening date and a solicitation number for a different procurement.

DECISION

BCI Construction USA, Inc., of Belleville, Illinois, protests the rejection of its bid under invitation for bids (IFB) No. W91237-12-B-0003, issued by the Department of the Army, Corps of Engineers, for construction services at Bolivar Dam in Ohio.

We deny the protest.

BACKGROUND

The IFB, which was issued by the agency's Huntington District on July 6, 2012, provided for the award of a contract for "service gates replacement, Big Sandy Creek of Tuscarawas River, Bolivar, O[hio], Bolivar Dam." IFB at 1. Bidders were required to submit a bid guarantee, or bid bond, in the amount of 20 percent of the bid price or \$3,000,000, whichever was less.¹ *Id.* at 90. The IFB advised bidders

¹ A bid guarantee is a form of security that ensures that a bidder will not withdraw its bid within the period specified for acceptance and, if required, will execute a written contract and furnish required performance and payment bonds. Federal Acquisition Regulation (FAR) § 28.001. The bid guarantee secures the surety's liability to the government, thereby providing funds to cover the excess costs of awarding to the

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that the failure to furnish the bid guarantee in the proper form and amount, by the time set for opening of bids, may be cause for rejection of the bid. Id. The agency amended the IFB four times to, among other things, extend the bid opening date. As relevant here, amendment 2 extended the bid opening date until August 17, IFB amend. 2, at 1, and amendment 4 extended the bid opening date to August 28. IFB amend. 4, at 1.

BCI, which submitted the apparent low bid, provided a bid bond that erroneously identified a different solicitation number² and the wrong bid opening date (August 17), and that stated that it was for “replacement of service gates.” AR, Tab G, BCI’s Bid Bond, at 1.

The contracting officer determined that BCI’s bid bond was defective, because the solicitation number on the bond was for a different ongoing procurement, the bid date was incorrect, and the bond’s description of the contract work did not reference the specific location of the work.³ See AR, Tab N, Corps Letter to BCI, Sept. 20, 2012. The Corps rejected BCI’s bid, and this protest followed.

DISCUSSION

BCI challenges the agency’s rejection of its bid, arguing that the bond’s citation to an incorrect solicitation number and bid opening date were minor clerical errors that BCI could have easily corrected or that the agency should have waived. Protest at 3, 5, citing FAR §§ 14.405 (Minor Informalities or Irregularities in Bids), 14.407 (Mistakes in Bids); Comments at 2-3. In this respect, the protester contends that the contracting specialist’s initial request that BCI submit a new bid bond confirms that the agency believed the incorrect date and solicitation number to be

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next eligible bidder in the event that the bidder awarded the contract fails to fulfill these obligations. See, e.g., Bob Cummins Constr. Co., B-406812.2, Aug. 28, 2012, 2012 CPD ¶ 243 at 3.

² BCI’s bid bond identified invitation for bids No. W911WN-12-B-0007, which is a procurement by the agency’s Pittsburgh District to rehabilitate gantry cranes at the Mahoning Creek Dam in Pennsylvania. See Agency Report (AR), Tab P, FedBizOps Notice, Solicitation No. W911WN-12-B-0007. BCI subsequently was awarded a contract under this solicitation on September 27, 2012.

³ The agency’s contract specialist contacted BCI on September 13 regarding what he perceived were errors in BCI’s bid bond, and initially requested a corrected bid bond, but later that same day informed BCI that further information concerning the errors would be forthcoming. Contracting Officer’s Statement at 3. BCI states that it did not submit a corrected bid bond pending BCI’s receipt of additional information from the agency’s contracting specialist. See Protest at 7.

minor defects. Protest at 4. The protester argues that rejection of BCI's bid was unwarranted, because there is no confusion regarding the liability of the surety or to which solicitation the bid bond applied. See id. at 3, 5; Comments at 3. For example, BCI argues that, although its bond identified the wrong bid opening date (August 17), the date identified in its bond reflected the bid opening date announced in IFB amendment 2 and the identified date does not relate to the solicitation erroneously identified in its bond. Comments at 3. BCI also maintains that its bond's description of the project satisfies the requirements of Standard Form (SF) 24, which does not specifically require a bidder to identify the specific location of the work in its bond.⁴ Id. at 3; Protest at 5.

The Corps responds that the bond was materially defective and disputes that the errors in BCI's bid bond constitute minor informalities or clerical mistakes that could be corrected or waived. See AR at 9. The agency claims that the errors, collectively, provide no assurance that the surety intended to be obligated to the government for the procurement in question. See id. The Corps argues that the FAR provisions for waiving noncomplying bid guarantees do not apply in this case. Id. at 14-15, citing FAR §§ 28.101-4(a), (c).

The determinative question in judging the sufficiency of a bid guarantee 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. As such, a required bid bond is a material condition of an IFB with which there must be compliance at the time of bid opening; when a bidder submits a defective bid bond or uncertainty exists at the time of bid opening that the bidder has furnished a legally binding bond, the bid itself is rendered defective and must be rejected as nonresponsive. See, e.g., id.; BW JVI, LLC, B-401841, Dec. 4, 2009, 2009 CPD ¶ 249 at 3.

The solicitation number referenced in a bid bond is a material element of the bond affecting its acceptability. Joseph B. Fay Co., B-241769.2, Mar. 1, 1991, 91-1 CPD ¶ 234 at 2. Nevertheless, a bid bond that cites an incorrect solicitation number may be acceptable where there are clear indicia on the face of the bond that otherwise identify it with the correct solicitation. Kirila Contractors, Inc., B-230731, June 10, 1988, 88-1 CPD ¶ 554 at 2-3 (incorrect solicitation number in bond appeared to be a typographical error and did not refer to an ongoing procurement). Such indicia may include correct identification of the bid opening date; accurate description of the type of services sought; and/or designation of a maximum penal sum in an amount which correlates with the amount of the bid. SEEMA, Inc., B-255884, Apr. 13, 1994, 94-1 CPD ¶ 256 at 2-3. Another significant factor to be considered in determining the acceptability of such a bond is whether or not there are other

⁴ BCI submitted its bid bond using SF 24. AR, Tab G, BCI's Bid Bond, at 1.

ongoing procurements to which the misstated solicitation number could reasonably refer. Kirila Contractors, Inc., supra.

Here, the record shows that the agency properly determined that BCI's bid bond was defective and rejected the protester's bid. It is uncertain whether, at the time of bid opening, BCI had provided the government a legally binding bid bond as required by the IFB, because the bond referenced a solicitation number for another ongoing procurement by the Corps and included an incorrect bid opening date. A bid bond is defective, and the agency may properly reject the bid, where the bond references a wrong bid opening date and identifies a different solicitation instead of the solicitation that the bond is actually intended to cover. A & A Roofing Co., Inc., B-219645, Oct. 25, 1985, 85-2 CPD ¶ 463 at 3. This is because the bid bond's reference to a different solicitation provides the surety with an opportunity to subsequently assert that it was liable only for a default on a bid for the wrongly cited procurement, not the bidder's intended procurement. See Conservatek Indus., Inc., B-254927, Jan. 26, 1994, 94-1 CPD ¶ 42 at 4 (bid rejected where bond referenced different construction project number). Moreover, the description of the project in BCI's bid bond--which is more general than the IFB's description of the project--by itself, is not enough to overcome the incorrect solicitation number and bid date. See Kinetic Builders, Inc., B-223594, Sept. 24, 1986, 86-2 CPD ¶ 342 at 3-4, aff'd, Fitzgerald & Co., Inc.--Recon., B-223594.2, Nov. 3, 1986, 86-2 CPD ¶ 510 at 1-2 (where bid bond references incorrect solicitation number for another ongoing procurement, bond's citation to correct bid opening date and general description of work did not sufficiently identify the bond with the correct solicitation); Joseph B. Fay Co., supra, at 2-3 (generic description of work does not render bid bond enforceable where bond references standard bidding form number instead of solicitation number and incorrect bid opening date).

In short, we agree with the agency that the liability of BCI's surety is uncertain, such that the bid guarantee was defective. A defective bid bond renders the bid nonresponsive, which may not be waived after bid opening. William V. Walsh Constr. Co., Inc., B-241257, Oct. 3, 1990, 90-2 CPD ¶ 270 at 2 n.1.

The protest is denied.

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General Counsel