



Decision

Matter of: Shaka, Inc.

File: B-405552

Date: November 14, 2011

Dirk D. Haire, Esq., and Farah A. Shah, Esq., Smith, Currie & Hancock LLP, for the protester.

William A. Lubick, Esq., Department of the Army, for the agency.

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DIGEST

Agency improperly determined bid bond to be unacceptable where the surety's liability under the bid bond was unaffected by a letter in the bid package from the bidder and its subcontractor disclosing that the bidder had obtained the bond through the subcontractor's relationship with the surety and advising the agency that it was not affiliated with the subcontractor.

DECISION

Shaka, Inc., of Jeannette, Pennsylvania, protests the rejection of its bid by the Department of the Army, Corps of Engineers, Pittsburgh District, under invitation for bids (IFB) No. W911WN-11-B-0003, for the replacement of bridge bearings and related services on the Emsworth Locks and Dam main channel service bridge on the Ohio River in Pennsylvania.

We sustain the protest.

BACKGROUND

The agency issued the IFB on June 30, 2011. The IFB required bidders to submit a bid bond on a standard form (SF) 24 with their bid in the penal sum of 20 percent of the bid price or \$3 million, whichever is less. In order to be considered an acceptable surety, a corporate surety had to appear on the list contained in Department of Treasury Circular 570, "Companies Holding Certificates of Authority as Acceptable Sureties on Federal Bonds and Acceptable Reinsuring Companies."

The IFB admonished bidders that the failure to furnish a bid bond, or a valid power of attorney, with the bid could result in rejection of the bid. IFB at 25.

Three bids were received by bid opening on August 5. The agency determined that Shaka submitted the evaluated low bid after the applicable small business HubZone preference was applied. Agency Report (AR) at 2. The agency's review of Shaka's bid bond showed that Shaka submitted a bid bond on the appropriate form (SF 24), with Shaka listed as the principal, with the appropriate accompanying power of attorney document, and with a surety, Liberty Mutual Insurance Company, who is listed as an approved surety. Thus, the agency concluded that "[o]n its face, the bid bond was acceptable." Id.

Shaka also submitted with its bid a "Bid, Performance, and Payment Bond Disclosure" letter to the agency signed by representatives of Shaka and its intended subcontractor, Joseph B. Fay Co. (Fay) that stated:

The purpose of this letter is to disclose and make transparent to the [Small Business Administration] SBA and the U.S. Army Corps of Engineers the support of Joseph B. Fay Co. in acquiring the bid, performance and payment bonds for the above referenced project.

This does not alter the fact that Shaka, Inc. is the General Contractor. Shaka, Inc. will maintain complete control of the project from a management and financial perspective. Joseph B. Fay Co. is a separate entity that has no control over Shaka, Inc.

Liberty Mutual Insurance Company has been asked to provide the bid, performance and payment bonds for Solicitation No. W911WN-11-B-0003 for Shaka, Inc. Liberty Mutual maintains a bonding relationship with Joseph B. Fay Co. It is Liberty Mutual's understanding that Joseph B. Fay Co. will be assisting Shaka by performing significant portions of the work through a subcontract with Shaka, Inc.

By this disclosure, the U.S. Army Corps of Engineers acknowledges the terms of this arrangement do not cause any affiliation or similar issue to exist under applicable rules and regulations between Shaka, Inc. and Joseph B. Fay Co. If this arrangement does not comply with applicable rules and regulations, the Department of the Army should notify the surety before any final bonds are issued for this project.

AR, Tab 6, Shaka Disclosure Letter (Aug. 5, 2011).

Based upon Shaka's disclosure letter, the agency determined that "Shaka's bid [was] non[responsive] because it conditioned Liberty Mutual's surety obligation on a contractual relationship between Shaka and [Fay]." AR at 3. This protest followed.

DISCUSSION

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 next eligible bidder in the event that the bidder awarded the contract fails to fulfill these obligations. A.W. and Assocs., Inc., B-239740, Sept. 25, 1990, 90-2 CPD ¶ 254 at 2; General Ship and Engine Works, Inc., B-184831, Oct. 31, 1975, 75-2 CPD ¶ 269 at 2.. When required by a solicitation, a bid guarantee is a material part of the bid and must be furnished with it. Hostetter, Keach & Cassada Constr, LLC, B-403329, Oct. 15, 2010, 2010 CPD ¶ 246 at 3. Noncompliance with a solicitation requirement for a bid guarantee generally renders the bid nonresponsive and requires the rejection of the bid. FAR § 28.101-4(a); A.W. and Assocs., Inc., *supra*.

Responsiveness of a bid is determined from an examination of the face of the bid bond provided by a bidders' surety, and is limited to whether the surety is clearly bound by the terms of that bid bond. Stay, Inc., B-237073.2, Feb. 26, 1990, 90-1 CPD ¶ 225 at 3. Thus, we have repeatedly held that a bid bond is defective, rendering a bid nonresponsive, if it is not clear that the bond will bind the surety. All Star Maint., Inc., B-234820, Mar. 24, 1989, 89-1 CPD ¶ 305 at 2. On the other hand, when a required bid bond is found to be proper on its face, the bond is acceptable and the bid responsive. Contract Servs. Co., Inc., B-226780.3, Sept. 17, 1987, 87-2 CPD ¶ 263 at 2-3. Specifically, where a corporate surety is designated, a bid bond is proper "on its face" when it has been duly executed by the surety's agent, the surety has agreed to be obligated for the penal amount of the bond, and the surety appears on the Treasury Circular list of acceptable sureties. See Stay, Inc., *supra*, at 3.

As indicated, the agency acknowledges that Shaka's bid bond is proper on its face. AR at 4. Nonetheless, the agency claims that it cannot be assured that the surety will honor the bid bond since it appears to be contingent upon a continuing future contractual relationship between Shaka and Fay. AR at 3. Thus, the agency contends that Shaka's bid bond was reasonably deemed to be defective because the surety's liability was limited by Shaka's disclosure letter. AR at 5

We disagree with the agency's conclusion. Even assuming that the principal on a bid bond (that is, the bidder) could independently limit the liability of the surety under the bond, the Shaka disclosure letter contains no such limits.¹ Instead, the letter

¹ We have found no cases or authority that suggests that the principal covered by the bid bond (*i.e.*, the bidder) can limit the liability of the bond surety to the obligee under the bond (*i.e.*, the United States). The liability under the bond flows from the surety's bond obligations to the Government, subject only to the limitations that had
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simply advised the agency that it was obtaining its bid bond from Liberty Mutual because of its subcontractor's relationship with that surety. In addition, the letter requested the agency to notify the surety if this arrangement created an affiliation between the companies that could be seen as violating certain rules and regulations applicable to small business status. While the Corps asserts that this letter could allow the surety not to honor the bid bond in the event that Fay is no longer Shaka's subcontractor, this letter in no way alters the surety's obligation to the Government under the bid bond, which was executed without reservation or limitation. In this regard, Shaka is the only principal named on the bond, Fay is not mentioned in the bond, and the bond does not condition the surety's liability on the relationship between Shaka and Fay. Consequently, we find that the surety is clearly bound by the terms of the bid bond and that Shaka's bid was responsive.

The protest is sustained.

RECOMMENDATION

We recommend that the agency terminate its award to American Bridge and make award to Shaka, if otherwise responsible and eligible, as the lowest evaluated bidder. We also recommend that the protester be reimbursed the reasonable costs of filing and pursuing the protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d)(1) (2011). The protester should submit its certified claim for such costs, detailing the time expended and the costs incurred, directly to the contracting agency within 60 days after receipt of this decision.

Lynn H. Gibson
General Counsel

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been imposed by the surety. The cases cited by the agency in support of its determination that the surety's liability was improperly limited by other documents submitted with the bid involve conditions imposed by the surety, which were included or attached as riders to the bid bond. See ERC General Contracting Servs., Inc., B-261404.2, Oct. 11, 1995, 95-2 CPD ¶ 170 at 2 (bid bond conditioned upon the use of a particular performance bond rider that limits the liability of the surety); Cherokee Enters., Inc., B-252948, B-252950, June 3, 1993, 93-1 CPD ¶ 429 at 2-3 (bid bond stating that it was subject to certain undisclosed terms); Curry Env'l Servs., Inc., B-228214, Dec. 9, 1987, 87-2 CPD ¶ 570 at 3 (bid bond with rider limiting surety's liability).