



United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Bob Cummins Construction Company

File: B-406812.2

Date: August 28, 2012

Gregory A. Henry, Esq., for the protester.
William A. Lubick, Esq., U.S. Army Corps of Engineers, for the agency.
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GAO, participated in the preparation of the decision.

DIGEST

Protester's proposal was properly rejected where agency reasonably determined that the bid guarantee was defective because the surety may not be liable in the event that the protester failed to furnish a required payment bond after contract award.

DECISION

Bob Cummins Construction Company, of Bradford, Pennsylvania, protests the rejection of its proposal under request for proposals (RFP) No. W911WN-12-R-0001, issued by the U.S. Army Corps of Engineers for construction services.

We deny the protest.

BACKGROUND

The RFP provided for the award of a fixed-price contract for the construction of a new resident engineer office building at East Branch Lake in Elk County, Pennsylvania. RFP at 1. As pertinent here, offerors were required to submit a bid guarantee with their proposals for 20 percent of their proposed price, or \$3 million, whichever was less. *Id.* at 13, 15. Offerors were informed that the contractor would be required to furnish performance and payment bonds within 10 calendar days after contract award.¹ *Id.* at 1. The RFP included standard FAR clause 52.228-1,

¹ The Miller Act requires contractors performing government construction contracts to post acceptable surety bonds to insure completion of the work and the payment
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Bid Guarantee, and warned offerors that failure to furnish the required bid guarantee in the proper form and amount would result in the rejection of the offer. See id. at 15. Offerors were also advised that the agency intended to evaluate proposals and make award without conducting discussions. Id. at 12.

Cummins provided an executed commercial bid bond as its bid guarantee, in lieu of a completed FAR standard form 24 bid bond. The protester's bond stated, in relevant part, that if the agency made award to the protester within 60 days

according to the terms of the proposal or bid made by the Principal [Cummins] therefor, and the Principal shall duly make and enter into a contract with the Obligee [the agency] in accordance with the terms of said proposal or bid and award and shall give bond for the faithful performance thereof with Surety or Sureties approved by the Obligee; or if the Principal shall, in the case of failure so to do, pay to the Obligee the damages which the Obligee may suffer by reason of such failure, not exceeding the penalty of this bond, then this obligation shall be null and void; otherwise it shall be and remain in full force and effect.

Agency Report (AR), Tab 2, Protester's Bid Bond, at 1 (emphasis added).

The agency determined that Cummins' bid bond was defective, because it did not provide that the surety was liable if Cummins failed to furnish the required payment bond. See AR, Tab 3, Letter to Cummins, May 25, 2012, at 1. Cummins was advised that negotiations were not contemplated for the acquisition and that proposal revisions would not be considered. Id. The Corps rejected Cummins' proposal, and this protest followed.

DISCUSSION

Cummins protests the agency's rejection of its proposal based on the sufficiency of its bid guarantee. See Protest at 1. The protester maintains that the language of its bond "obligate[s] the Surety to post **all** bonds" required for Cummins' performance of the contract, including the submission of performance and payment bonds as required by the terms of RFP and contract. See Comments at 2 (emphasis in original). The protester also suggests that the agency should have "clarified" Cummins' apparent noncompliance with the RFP's bonding requirements during

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of subcontractors. 40 U.S.C. § 3131 (2006). A performance bond protects the government's interest by providing a source of funds to complete the contract in the event of default; a payment bond assures payment to all persons supplying labor or materials. See Federal Acquisition Regulation (FAR) §§ 28.001(5), (6).

“negotiations” (i.e. discussions), because the acquisition was conducted as a negotiated procurement under FAR Part 15. See Protest at 2; see also Comments at 3.

The agency responds that Cummins’ commercial bid bond only addresses the obligation to furnish a performance bond, and not the payment bond, and therefore is insufficient. AR at 3. The Corps also states that, because award was to be made without conducting discussions, the agency could not allow the protester to correct its bid bond. Id. at 4, citing FAR § 28.101-4(b).

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. 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.² 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. 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.

An offeror’s use of a commercial bid bond form, rather than a standard government form is not per se objectionable, since the sufficiency of the bond does not depend on its form, but on whether it represents a significant departure from the rights and obligations of the parties as set forth in FAR standard form 24.³ See, e.g., Alarm Control Co., B-246010, Nov. 18, 1991, 91-2 CPD ¶ 472 at 2. In this respect, the bid

² In this respect, FAR clause 52.228-1 advised offerors that, if the contractor failed to furnish executed bonds within 10 days after receipt of the contract, the agency may terminate the contract for default and the bid guarantee would be available to offset the difference between the contractor’s price and the cost of acquiring the work. RFP at 13.

³ To the extent that the protester complains that the RFP did not include standard form 24 or inform offerors where to locate that form, Protest at 1-2; Comments at 2, this form (which the RFP explicitly referenced in its instructions to offerors) appears at FAR § 53.301-24. RFP at 15. Cummins is on constructive notice of the FAR’s contents, including the standard forms that are specified by the FAR for use in acquisitions, since the FAR is published in the Federal Register and the Code of Federal Regulations. See Environmental Tech. Assessment Compliance Serv., B-258093, Dec. 13, 1994, 94-2 CPD ¶ 239 at 3; Page, Anderson & Turnbull, Inc., B-223849, Oct. 14, 1986, 86-2 CPD ¶ 427 at 4.

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.

We find that the agency reasonably determined that the protester's bid bond was insufficient and properly rejected Cummins' proposal. The express language of Cummins' bid bond holds the surety liable only for the protester's failure to give bond for the performance of the contract. AR, Tab 2, Protester's Bid Bond, at 1. Cummins' bid bond on its face does not establish that the surety would be liable in the event that the protester failed to furnish a required payment bond after contract award. At best, the bond is ambiguous with respect to the liability of the surety in this regard, and our Office will not convert ambiguous aspects of bid bonds into mere matters of form which can be explained away and waived. See Standard Roofing USA, Inc., B-245776, Jan. 30, 1992, 92-1 CPD ¶ 127 at 4.

Insofar as the protester suggests that the agency should have addressed any ambiguity in Cummins' bid bond by holding discussions with the firm, where, as here, award is made on the basis of initial proposals without discussions, noncompliance with a solicitation requirement for a bid guarantee requires rejection of a proposal as unacceptable (except in situations not present here). FAR § 28.101-4(b); Islands Mech. Contractor, Inc., B-404275, Jan. 24, 2011, 2011 CPD ¶ 26 at 3.

In short, we agree with the agency that the liability of Cummins' surety is uncertain, such that the bid guarantee was defective, and that the protester's proposal was therefore properly rejected.

The protest is denied.

Lynn H. Gibson
General Counsel