



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Harvest Construction Company

File: B-267513

Date: November 16, 1995

William R. Potter, Esq., and Susan W. Gowan, Esq., Potter & Taylor, for the protester.

Allen W. Smith, and Charles Hill, Jr., Department of Agriculture, for the agency. Behn Miller, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protester's bid was properly rejected as nonresponsive where it contained a commercial bid bond form which extinguished the surety's liability once the bidder paid costs associated with its default equal to the penal sum of the bond, contrary to Federal Acquisition Regulation § 52.228-1(e) and standard form 24, which require the surety to be liable for all costs associated with contractor default up to the penal sum of the bond.

DECISION

Harvest Construction Company protests the rejection of its low bid as nonresponsive under invitation for bids (IFB) No. R3-12-95-22, issued by the Department of Agriculture for the excavation and construction of various low water crossing sites in Tonto National Forest, Arizona. Harvest contends that the agency improperly determined its submitted bid bond was deficient.

We deny the protest.

The IFB was issued on May 17, 1995, and required that all bidders submit a bid guarantee in the amount of 20 percent of the bid price, or \$3 million, whichever was the lesser amount. The IFB incorporated and set forth Federal Acquisition Regulation (FAR) § 52.228-1, which provides that a bidder's failure to furnish the required bid guarantee in the proper form and amount "may be cause for rejection of the bid" and which further mandates at subparagraph 1(e) that:

"In the event the contract is terminated for default, the bidder is liable for any cost of acquiring the work that exceeds the amount of its bid, and the bid guarantee is available to offset the difference." (Emphasis added.)

Additionally, the IFB advised bidders that the required bid guarantee "should be on Standard Form (SF) 24" (see FAR § 53.301-24), which provides in pertinent part that the surety's liability under the bond is void if, in the event of contractor default, the bidder pays the government "for any cost of procuring the work which exceeds the amount of the bid." Thus, FAR § 52.228-1 and SF 24 establish that the bidder is liable to the government for all costs associated with its default, and that the surety's liability is not extinguished unless all such costs are paid by the bidder.

At the June 27 bid opening, eight bids were received. Harvest submitted the apparent low bid. However, instead of providing its bid guarantee on the requested SF 24 bid bond form, Harvest submitted a commercial bid bond form. Unlike the language from the SF 24 quoted above, Harvest's bid bond provided that the surety's liability under the bond is void if, in the event of default, the bidder pays to the government the costs associated with the default "not exceeding the penalty of this bond."

The contracting officer viewed the commercial bid bond as unacceptable and rejected Harvest's bid as nonresponsive. On August 11--after learning that its agency-level protest was denied--Harvest filed this protest with our Office.

A bid guarantee assures that a bidder will, if required, execute a written contract and furnish payment and performance bonds. LM Env'tl., Inc., B-245388.3, June 30, 1992, 95-2 CPD ¶ 159. When the guarantee is in the form of a bid bond, it secures the liability of the surety to the government if the holder of the bond fails to fulfill these obligations. Seither & Cherry Co., B-242220, Apr. 10, 1991, 91-1 CPD ¶ 365. The guarantee is also available to offset the cost of procurement of the goods or services. See Kiewit W. Co., 65 Comp. Gen. 54 (1985), 85-2 CPD ¶ 497. A bidder's use of a commercial bond form, rather than the standard government form (SF 24), 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 the IFB. Seither & Cherry Co., supra. Instead, the determinative question as to the acceptability of a bid bond is whether the bid documents establish that the bond is enforceable against the surety for the required protection amount should the bidder fail to meet its obligations. See ERC General Contracting Servs., Inc., B-261404.2, Oct. 11, 1995, 95-2 CPD ¶ 170.

The commercial bid bond form submitted by Harvest significantly deviated from the rights and obligations of the parties as set forth in the IFB. The IFB incorporated FAR § 52.228-1, which obligates the bidder to pay the government "for any cost of procuring the work which exceeds the amount of its bid." If the principal fails to reimburse the government for all such costs, under the terms of the SF 24, the government can collect the remaining balance of these costs from the surety, up to the penal sum of the bond.

In contrast, in the event that Harvest does not pay all costs associated with its default, Harvest's bid bond does not permit the government to pursue the surety for the remaining costs. Whereas the surety's obligation under SF 24 is not extinguished until the principal has paid all costs, under the terms of Harvest's bid bond, the surety's liability is extinguished as soon as the principal pays costs equal to the penal amount of the bid bond. Harvest's bid bond thus provides the government with less than the protection required by FAR § 52.228-1 and set forth in the SF 24 bid bond since, in the event that the costs associated with contractor default exceed the penal amount of the bid bond, the government will not be able to proceed against the surety for the remaining balance. Since Harvest's submitted commercial bid bond provides the government with less than the required protection, the contracting officer properly rejected Harvest's bid as nonresponsive. See W.R.M. Constr., Inc., 69 Comp. Gen. 715 (1990), 90-2 CPD ¶ 227.

Harvest claims that the variance between its submitted commercial bid bond and the IFB's bid guarantee requirement should be waived since "[t]here is no reason to believe" that Harvest will not fully perform its contract. When a bid is properly rejected as nonresponsive based on an inadequate bid bond, the defective bond may not be waived or corrected after bid opening; otherwise, a bidder would essentially have the option, after bid opening, of accepting or rejecting the award by either correcting or not correcting the bond deficiency, which is inconsistent with the sealed bidding system.¹ See Tolman Building Maint., B-243654, Apr. 29, 1991, 91-1 CPD ¶ 422.

The protest is denied.

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¹To the extent Harvest contends that it should be allowed to correct its bond because the government would save money by making award to it, the importance of preserving the integrity of the competitive bidding system outweighs the possibility that the government might realize monetary savings if a material deficiency in a bid is corrected or waived. See Blakelee Inc., B-239794, July 23, 1990, 90-2 CPD ¶ 65.