

Protest of) Date: April 3, 1987
)
 KEEHN BROTHERS, INCORPORATED)
)
 Solicitation No. 269986-87-A-0011) P.S. Protest No. 87-10

DECISION

Keehn Brothers, Incorporated, (Keehn) timely protests the contracting officer's determination that its bid, submitted in response to Solicitation No. 269986-87-A-0011, is nonresponsive. The contracting officer made his determination on the basis that Keehn's bid bond did not identify the solicitation number or the location of the work to be performed.

Background

Solicitation No. 269986-87-A-0011, issued on October 21, 1986, invited bids for the re-roofing of the Main Post Office in Minneapolis, MN. A bid guarantee in the amount of 20 percent of the bid price was required by PS Form 7387, Invitation for Bid. PS Form 7324, Bid Bond, was supplied with the solicitation for use by bidders in submitting their bid bonds. Bid opening occurred on November 20, 1986, as scheduled.

By letter dated November 24, 1986, a facilities contract specialist advised Keehn that its bid was the low responsive bid received, and requested submission of information on Keehn's experience, finances, and organization. Universal Applicators, Inc. (Universal), the second low bidder, objected by letter dated December 13, 1986, to the possible award of the contract to Keehn. Universal contended that Keehn's bid form was not signed by an authorized representative, and that Keehn's bid bond did not reference the "project number," as required. As a result of these alleged deficiencies, Universal asserted, Keehn might have requested that its bid be declared nonresponsive.

The bid bond accompanying Keehn's bid showed a bid date of November 20, 1986, and indicated a penal amount of 20 percent of the bid price. The solicitation number

did not appear on the bond; the box marked "Invitation No." contained the notation "Re-Roofing of Main Post Office." The contracting officer determined that the bond's failure to identify the solicitation number or the location of the work rendered Keehn's bid nonresponsive, and notified Keehn of his determination in a letter dated January 12, 1987.

Keehn protested the determination to the contracting officer in a letter dated January 26, 1987. On January 29, 1987, the contracting officer referred Keehn's protest to this office pursuant to PCM 2-407.8 e., and supplied this office with copies of the protest, the solicitation documents, Keehn's bid and bid bond, and his January 12, 1987, letter to Keehn. By letter dated January 30, 1987, Universal iterated its view that deficiencies in Keehn's bid bond would have given it the option of having its bid declared nonresponsive, with the result that Keehn would enjoy an advantage over bidders who submitted binding bids.

A submission on behalf of Keehn was received by this office on February 27, 1987. Keehn maintains that when its bid and bid bond are read together it is clear that the bond was meant to guarantee the bid in question. Keehn states that the bid and bond were submitted in the same envelope, and represent the only bid submitted by Keehn in response to the solicitation. These assertions are supported by an affidavit from Keehn's president. Keehn also notes that the bid form and bid bond indicate the same, correct bid date, and reports an assumption that the Postal Service issued only one solicitation for the project.

Keehn argues that the surety would be required to honor the bid bond, so that the Postal Service would receive the protection it sought in requiring such a bond. Thus, Keehn argues that the absence of the solicitation number and of an indication of the project's location should be waived as a minor irregularity. Acceptance of its bid, Keehn asserts, is in the best interest of the Postal Service.

Discussion

The essential test advanced by Keehn in support of its protest is in harmony with our past decisions. We have held that the sufficiency of a bid bond is assayed by a determination of whether the Postal Service could enforce the bond against the surety in the event that the bidder "failed to go forward with the faithful performance of his obligation." Mil-Pak Company, Inc., P.S. Protest No. 79-10, May 23, 1979, on reconsideration, July 13, 1979. We have not required compliance in every respect with the instructions on the bid bond form, following the Comptroller General's test.

[T]he question presented in cases where bid bond requirements are not complied with is "whether the Government obtains the same protection in all material respects under the bond actually submitted as it would have under a bond complying completely with the instructions on [the bond

form]." [Comp. Gen. Dec.] B-152589, [October 18, 1963 (unpub.)].

General Ship and Engine Works, Inc., Comp. Gen. Dec. B-184831, October 31, 1975, 75-2 CPD & 269, quoted with approval in S. Puma Company, Inc. and Chara Industries, Inc., P.S. Protest No. 82-37, July 27, 1982.

Keehn's assertion that its bid form and bid bond should be read together is likewise consistent with our precedents. We have often looked to the bid form in determining the effect of an omission in a bid bond. See, e.g., Richard E. Phillippi, Inc., P.S. Protest No. 75-77, November 4, 1975 (penal amount missing on bond form, but amount indicated on bid form and specific solicitation indicated on bond); PJR Construction Corporation, P.S. Protest No. 75-15, April 1, 1975 (bid bond not signed by bidder, but signed bid form indicated enclosure of bond).

Notwithstanding our agreement with Keehn on the standard by which the sufficiency of the bond is to be measured, we conclude that Keehn's bid bond is deficient under the standards set forth above. In order to be liable for the bidder's obligation, the surety must expressly agree to be bound. Ed Roberts Constructors, Inc., P.S. Protest No. 76-36, July 22, 1976. In the absence of the solicitation number on the bond, there is no clear indication in the bid documents that the surety expressly agreed to be bound to cover Keehn's bid. That Keehn referred to the bond on the sole bid form it submitted in response to the solicitation evinces a desire by Keehn to be covered by the bond, but does not support conclusions about the surety's intentions.

That the bond form references "Re-Roofing of Main Post Office" and that the bid date shown is identical to that on the bid form fail to tie the surety's obligation to Keehn's bid on the solicitation in question. Even if Keehn is correct in its assumption that the Postal Service issued only one solicitation for the Minneapolis Main Post Office re-roofing project, the bond could have been intended to cover a bid for any main post office.

Keehn relies on Custodial Guidance Systems, Inc., Comp. Gen. Dec. B-192750, November 21, 1978, 78-2 CPD & 355, in support of its argument that the surety would be bound by the bid bond it submitted.^{1/} In that case, an incorrect solicitation number, in which a letter was missing and the final two digits transposed, appeared on the bond. The Comptroller General concluded that

[u]nder the circumstances, it does not appear that there could arise any confusion as to the bid covered by the bond, nor do we believe that the discrepancy in the IFB identification number would affect its enforceability by the Government against the surety.

^{1/}This office looks to decisions of the Comptroller General for guidance, but is not bound by them. The Enterprise Corporation, P.S. Protest No. 85-24, July 3, 1985.

(citations omitted). However, this conclusion was based upon information establishing a clear link between the bond and the solicitation. In addition to the correct bid opening date and the correct contract category, the bond showed a solicitation number. The first four characters of that solicitation number identified the procuring activity, which conducted only one bid opening on the date shown. Finally, the procurement represented by the transposed final numerical sequence did not require a bond. These facts leave virtually no room for doubt about the enforceability of the bond.

Other decisions of the Comptroller General support our conclusion that Keehn's bid bond was deficient. For example, bids have been found nonresponsive where a bid guarantee (a letter of credit) failed to indicate the IFB number, the type of services and facility involved, or an expiration date, Daniel R. Hinkle, Comp. Gen. Dec. B-220163, December 9, 1985, 85-2 CPD & 639, and where an incorrect solicitation number identified a similar procurement at the same facility. A & A Roofing Co., Inc., Comp. Gen. Dec. B-219645, October 25, 1985, 85-2 CPD & 463.

We view Keehn's argument that the errors in the bond should be waived as a minor irregularity as subsidiary to its argument that the Postal Service would be protected, and the surety bound, by the bond. The failure to provide the protection sought by the requirement of a bid guarantee is not so "trivial," "negligible," or "immaterial" as to come within the definition of minor irregularities or irregularities in PCM 2-405. More specifically relevant to the contracting officer's determination is PCM 2-404.2(g), which states that when a bidder fails to furnish a guarantee "in accordance with the requirements of the invitation for bids, the bid shall be rejected except as otherwise provided in 10-103.4." PCM 10-103.4 sets out three circumstances in which noncompliance may be waived, none of which is applicable here.^{1/}

Finally, we do not accept Keehn's conclusion that acceptance of Keehn's low bid would be in the best interest of the Postal Service. The integrity of the competitive bidding system is of far greater significance to the Postal Service than any financial savings that might result from acceptance of a nonresponsive bid.^{1/} North Town Refrigeration Corporation, P.S. Protest No. 81-9, April 27, 1981.

The protest is denied.

^{2/}The conclusion that deficiencies denying the Postal Service the protection of a required bid guarantee should not be waived is consistent with prior holdings of this Office. See Universal Contracting, P.S. Protest No. 80-47, October 30, 1980; Bickelstone Construction Company, P.S. Protest No. 82-1, February 5, 1982.

^{3/}The affidavit submitted by Keehn notes that Keehn intended and intends to perform the contract work if it receives award. A contractor's willingness to perform does not justify acceptance of a bid accompanied by an insufficient bid guarantee. The Enterprise Corporation, supra.

William J. Jones
Associate General Counsel
Office of Contracts and Property Law

[Compared to original 2/23/93]