

Protest of) Date: December 30, 1988
TOMPKINS & ASSOCIATES)
Under Solicitation No. 489986-88-A-0412) P.S. Protest No. 88-58

DECISION

Tompkins & Associates (Tompkins) protests the rejection of its bid as nonresponsive under a solicitation for removal of asbestos-containing materials from boilers and piping and for other modifications at the Enid, OK, Main Post Office. Tompkins alleges that its bid and accompanying bid bond did not qualify its liability to the Postal Service under its bid, performance or payment bonds, and that its bid was, therefore, responsive.

Solicitation No. 489986-88-A-0412 was issued by the Dallas Facilities Service Office on July 25, 1988, with a bid opening date of August 26. The solicitation required that a bid guarantee on Postal Service Form 7324, Bid Bond, in the amount of 20% of the bid price, accompany each bid, and also provided that payment and performance bonds would be required from the successful bidder.

Tompkins' bid included the prescribed bid guarantee on Form 7324, but the form contained an added note which stated, "See Attached Rider." The rider provided:

RIDER TO BOND INVOLVING TOXIC MATERIALS

This bond is being issued subject to the following express conditions which shall survive the release and discharge of Surety from any further liability of its performance and payment obligations required under its bond:

FIRST: The bond issued by Surety shall not be considered to be a substitute for or in any other way satisfy the requirement for any type of insurance that may be contained in the contract documents between the Principal, Obligee and/or Owner.

SECOND: No suit shall be commenced against the Principal or Surety for any default in performance or for labor performed or material supplied, after two years from the date of the

contract between the Principal and Oblige, or one year after substantial completion, whichever occurs last.

THIRD: No right of action against Surety shall inure to the benefit of any person, firm or corporation other than the Oblige, or for the use or benefit of the Oblige.

FOURTH: Notwithstanding any provision contained to the contrary in the contract documents between the Principal, Oblige and/or Owner, Surety shall not be held liable or in any other respect be responsible to the Oblige or to any other person, firm or corporation for any act(s) of negligence by the Principal, its agents, servants or employees or by any contractor employed by Surety to complete the contract in the event of the Principal's default, while performing the contract, which results in personal injuries or property damage.

Tompkins was the low bidder. On September 1, the contracting officer issued a letter to Tompkins which declared its bid nonresponsive under Postal Contracting Manual (PCM) 1-111.1 because the bid bond contained a rider which deviated from the prescribed form set out by the PCM.^{1/} Also on September 1, the contracting officer awarded a contract to the next low bidder, Michael Robinson and Associates.

Tompkins protested the rejection of its bid by letter dated September 8. The protest states that the contracting officer advised it on September 6, in a telephone call, that its bid was nonresponsive because of the first provision of the rider stating the bond was not insurance and focuses much of its attention on supporting that provision. Tompkins argues that the provision does not limit the right of the Postal Service to enforce the bid bond, and is nothing but a gratuitous statement which neither adds nor detracts from the bid bond. Tompkins argues that the acceptability of a bid bond is determined by whether the bid documents could be enforced if the bidder failed to execute the contract, and that rejecting the bid because of the rider is mere form over substance, citing various Comptroller General decisions for support.^{1/}

^{1/}At the time of this solicitation, the Postal Service's contracting regulations were in transition. The protest refers, in part, to the newer postal contracting regulation, the Postal Service Procurement Manual (PM). Because this solicitation was not issued or awarded under the PM's procedures, but rather was accomplished under the procedures of the older regulation, the Postal Contracting Manual, we refer to that regulation as controlling.

^{2/}The protest also requested that award not be made pending resolution of the protest citing Procurement Manual 4.5.5 and the Competition in Contracting Act, 31 U.S.C. ' 3553. The Competition in Contracting Act does not apply to the Postal Service. Motorola, Inc., P.S. Protest No. 86-93, December 22, 1986;

The contracting officer's report states that the rider rendered the bid nonresponsive because it changed the prescribed bond form by adding language to the form and limited the time and extent of liability under the payment and performance bonds. The contracting officer cites Summit Construction Co., Comp. Gen. Dec. B-227491.2, September 14, 1987, 87-2 CPD & 244, (hereafter "Summit") and Curry Environmental Services, Inc., Comp. Gen. Dec. B-228214, December 9, 1987, 87-2 CPD & 570, ("Curry") as support for his decision.^{1/}

Falcon Systems, Inc., Comp. Gen. Dec. B-222549.2, June 5, 1986, 86-1 CPD & 526. Since the contract was awarded prior to the protest, the provisions of the applicable bid protest regulation governing the stay of award, PCM 2-407.8 g., are not applicable.

^{3/}Summit involved a contract awarded by the Army Corps of Engineers for barracks renovation, including asbestos removal. Summit's bid was accompanied by a bid bond which limited the surety's liability for expense arising from the existence of asbestos, and contained a statement that the payment and performance bonds to be furnished under the contract would contain a similar provision. The Corps initially concluded that the limitation on the bid bond did not render the bid nonresponsive, and awarded the contract to Summit while advising it that its payment and performance bonds could not contain the same limitation. However, when the second low bidder protested the award, the Corps reversed its position, terminated Summit's contract for convenience, and awarded to the protester. Summit then protested that award. The Comptroller General upheld the Corps' rejection of Summit's bid, finding that the limitation "clearly showed the firm's (and its surety's) intent to disclaim responsibility for damages, expenses or costs resulting from performance of the asbestos related work required by the IFB." Since the determination of responsiveness had to be made from the bid documents, Summit could not later cure the defect by supplying an unqualified performance bond.

Curry involved another Army solicitation for asbestos removal work. The bid guarantees of the two lowest bidders were accompanied by a rider with the same caption and apparently the same contents as the rider at issue here. When the Army rejected both bids because the bid guarantees were qualified, Curry (referred to in the decision as CESI) protested. The Comptroller General denied the protest, noting, in part:

In our view, the Army properly rejected CESI's bid as nonresponsive. The conditions, while described as basically harmless by CESI, as a whole, evince an intent to materially limit the liability of CESI and its surety under the bid bond and, inferably, under the performance and payment bonds in the event of award. From CESI's perspective, the rider's language is meaningless in the context of a bid bond under which the only performance required is the bidder's agreement to execute contract documents and required bonds.

From our perspective, however, the rider's language also applies to the performance and payment bonds. By stating its conditions of survival of release and discharge of the surety, and its repeated references to performances and payments obligations, the rider indicates an intent to apply its conditions on future bonds. This indication is supported by CESI's prior use of the same rider on performance and payment bonds furnished under a contract with another agency. When CESI applied the rider in that instance, the government required CESI to remove it before allowing performance to proceed.

The decision then discusses Summit and the distinction that there the intent to include the rider in the subsequent bonds was deliberate, acknowledging the absence of such explicit language in CESI's bid,

In reply Tompkins argues that the contracting officer's report made only conclusory arguments and did not demonstrate how the rider limited the Postal Service's rights. It attempts to distinguish Summit on the ground that the bid materials in Summit expressly stated that the performance and payment bonds would include the limiting language of the bid bond rider while there is no such reference in Tompkins' bid bond. It argues that Curry is limited to situations where there was an intention to apply the rider to future payment and performance bonds, while here, conversely, both Tompkins and its surety have affirmed, after bid opening, that there was no such intention to qualify future bonds.

The contracting officer replies that Tompkins has not distinguished the Summit and Curry decisions, and that language in the bid bond and rider establishes Tompkins' intent with regard to future bonds. He further replies that the language in the rider clearly qualifies the extent of liability and that post hoc explanations that the rider is not applicable are not allowed if it would affect the responsiveness of a bid.

A conference was held November 18 at which the protester discussed its position. In post-conference comments, Tompkins stated that it had submitted an identical rider in response to a Corps of Engineers solicitation and after award of the contract to it did not attach riders to the payment and performance bonds, thereby factually distinguishing Curry. Tompkins had also submitted bids with riders on five previous Postal Service solicitations and, although not the low bidder, was never informed by the contracting officer that those bids were nonresponsive, thereby wrongfully inducing Tompkins to believe the bids were acceptable.^{4/} The test for the responsiveness of a bid is whether it is an offer to perform, without exception, the exact thing called for in the invitation and, upon acceptance, will bind the contractor to perform in accordance with all the terms and conditions of the invitation. Sensory Electronics, Inc., P.S. Protest No. 87-124, January 21, 1988. The responsiveness of a bid must be determined from material available at bid opening; post-opening explanations and actions cannot be considered to correct a nonresponsive bid. Pease Management and Construction, Inc., P.S. Protest No. 86-68, October 24, 1986. When required, a bid bond is a material part of the bid, and its terms establish the liability of the surety. See Universal Contracting, P.S. Protest No. 80-47, October 30, 1980. In determining responsiveness, we look at the legal obligation to perform according to the terms of the

but noting that "the language of the rider and CESI's prior history indicate that very intent." The decision continued:

We are not convinced that [the deliberate inclusion of the rider into the bid guarantee] was a meaningless exercise when the rider makes sense in the context of, and reasonably read, can only foreshadow the application of the identical conditions to the payment and performance bonds later to be provided in the event of an award.... It was not unreasonable of the Army to reject the bid as nonresponsive under these circumstances.

^{4/}Tompkins also alleges that on various specified occasions the contracting officer had accepted bids with qualified guarantees. Inquiry to the contracting officer established with regard to those instances that although some offers with qualified bids had been received, in all but one instance they were not the low bids, and that in the one instance, award was made to the second low (unqualified) bid.

IFB and not the bidder's current willingness to perform. Mattox Motor Service, P.S. Protest No. 83-36, August 12, 1983.

The language in the second enumerated paragraph of the rider clearly limits the surety's and the contractor's liability under the bid bond and, as such, impermissibly qualifies Tompkins' bid because it constrains the time within which suits for nonperformance under the guarantee can be brought. The rider clause attempts to cut off remedies otherwise available to the Postal Service under the contract, and thereby offers less than the performance called for in the solicitation. The attempt to limit the contractor's obligation to provide exactly everything asked of it in the solicitation is an impermissible qualification of its bid requiring that it be rejected as nonresponsive. Sensory Electronics, *supra*.

This conclusion is consistent with that reached by the Comptroller General in Curry, involving a similar rider. The decision discusses the rider as affecting the responsiveness of the bid because it materially affected the liability of the bidder and its surety under the bid guarantee and because by its terms the rider indicated an intent to apply similar conditions to the payment and performance bonds. While the Comptroller General also considered evidence that the bidder had applied the rider to previous payment and performance bonds, lending support to the conclusion concerning intent, we do not read that evidence as critical to the decision. As noted above, responsiveness is to be determined from the material available at bid opening. Tompkins' subsequently furnished information concerning its practice with respect to other contracts with other agencies is not available to counter the intent evident from the bid.

Similarly, nothing in Tompkins' previous submission of unsuccessful bids with similarly qualified bid guarantees requires a contrary result. The contracting officer must review the low bid for responsiveness and determine responsibility before contract award, but there is no obligation to do this review for other offerors. If the protester had wished information concerning the acceptability of the rider, it could have sought advice pursuant to the solicitation's instructions. Further, even if contracts had been awarded to others whose bids contained similar limitations, the contracting officer would not be stopped from finding this bid nonresponsive. De Santis Industries, Inc., On Reconsideration, P. S. Protest No. 84-27, June 11, 1984.

Tompkins' bid was properly rejected as nonresponsive. The protest is denied.

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[checked against original JLS 3/4/93]