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Questioning performance

Contractor fights what Corps calls defective bid bond

The matter of *Bob Cummins Construction Co., 2012 Comp. Gen. B-406812.2 (August 28, 2012)* involved a bid for construction of a U.S. Army Corps of Engineers resident engineer office in Pennsylvania. The project was bid as a fixed-price negotiated procurement. The Corps informed offerors that it intended to make an award from its review of proposals without entering into post-bid discussions with any offerors.

The request for proposals stated that proposals must be accompanied by a bid guarantee for 20% of the proposed price or \$3 million, whichever is less. Offerors were further advised that the successful offeror must furnish the required performance and payment bonds within 10 days after contract award. The RFP incorporated standard F.A.R. clause 52.228-1, Bid Guarantee, and warned offerors that failure to furnish the required bid guarantee in the proper form and amount may be cause for rejection of the offer.

The protestor in this case, rather than using the standard Form 24 Bid Bond, which is prescribed at F.A.R. 53.301-24, submitted a commercial bid bond form that provided that if the Corps made award to the protestor within 60 days, "... according to the terms of the proposal or bid made by the Principal [protestor] therefor, and the Principal shall duly make and enter into a contract with the Obligee [government] 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 . . ."

The Corps reviewed the bid bond and determined that it was defective because although it covered the protestor's failure to submit a performance bond, it made no mention of the payment bond requirement. The Corps thus concluded that the bid bond surety's liability for the bidder's subsequent failure to furnish a payment bond was unclear. Consequently, the Corps rejected the proposal, which led to the protest.

The protestor argued that despite the reference in the bid bond to only the performance bond, the express requirement that it enter into a contract with the Corps in accordance with the terms of "said proposal or bid and award" otherwise obligated it to post a payment bond as well and thus the surety was liable if it failed to do so. The protestor also argued that the Corps had a duty to clarify the alleged nonconformity with the protestor because the project was advertised as a negotiated procurement.

The Corps argued that because the bid bond language expressly mentioned the performance bond only, the surety's liability with respect to the payment bond requirement is, at the very most, ambiguous. This ambiguity renders the bid bond insufficient. Lastly, the Corps pointed to the provision in the RFP advising that it did not intend to conduct post-proposal discussions with bidders and contended that it was without authority to allow the protestor to clarify or correct the defective bid bond.

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The Comptroller General (GAO) agreed with the Corps and ruled that, although the protestor's use of a commercial bid bond rather than Form 24 was not per se objectionable, the bid bond was nevertheless insufficient because the liability of the surety was ambiguous at best, whereas such liability must be clearly expressed. The GAO also agreed that the Corps was foreclosed from seeking clarification or correction of the bid bond issue in light of its pre-bid declaration that no post-bid discussions would be held with proposers.

The substance of bond forms are often overlooked in the rush of assembling proposal and bid packages. However, the Cummins protest illustrates the harsh results of failing to set aside a few minutes to ensure the bid bond surety is guaranteeing precisely what is required in the bid documents. **R&B**

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