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Comptroller General
of the United States

United States General Accounting Office
Washington, DC 20548

Decision

Matter of: Lawson's Enterprises, Inc.

File: B-286708

Date: January 31, 2001

Tina J. Copeland, Esq., for the protester.
Sherry Kinland Kaswell, Esq., and Alton E. Woods, Esq., Department of the Interior, for the agency.
John L. Formica, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

A solicitation for the rehabilitation of a residence can only reasonably be read as requiring the submission of bid guarantees with all bids, including those under $100,000, and the protester's bid of under $100,000, which did not include a bid guarantee, was properly rejected as nonresponsive.

DECISION

Lawson's Enterprises, Inc. protests the rejection of its bid as nonresponsive under invitation for bids (IFB) No. 50181-0-B036, issued by the United States Fish and Wildlife Service, Department of the Interior, for the rehabilitation of a residence at the E.B. Forsythe National Wildlife Refuge in New Jersey.

We deny the protest.

The IFB, issued on August 29, 2000, provided for the award of a fixed-price contract for the rehabilitation of the residence. The contractor will be required to provide all labor, materials, and equipment necessary to rehabilitate the residence, to include, for example, the furnishing and installation of framing, windows, doors, cabinets, a bathroom, and a heating, ventilating and air conditioning system.

Three bids were received by the bid opening date of September 29. Lawson's submitted the apparent low bid of $96,740, and Northside Danzi General Contractors submitted the apparent second low bid of $130,500. Because the Lawson's bid did not include a bid bond, its bid was rejected as nonresponsive and award was made to Northside Danzi. Agency Report at 1.

Lawson's argues that the solicitation did not require a bid guarantee for bids under $100,000. The protester points out that the Miller Act, 40 U.S.C. §§ 270a, 270d-1 (1994), requires payment and performance bonds only for construction contracts that exceed $100,000, and that Federal Acquisition Regulation (FAR) § 52.228-15, which was incorporated by reference in the solicitation, provides that "[u]nless the resulting contract is $100,000 or less, the successful offeror shall furnish performance and payment bonds." The protester next points to FAR § 28.101, which states that "[a] contracting officer shall not require a bid guarantee unless a performance bond or a performance and payment bond is also required." The protester concludes that given the provisions of the Miller Act and the FAR, as well as FAR § 52.228-15, which was incorporated by reference in the IFB, the solicitation cannot be read as requiring that payment or performance bonds were required for contracts under $100,000, and consequently, cannot be read as requiring bid guarantees for bids under $100,000.

Bid guarantees are requirements promulgated under the procurement regulations and are not mandated by statute. Therefore, the contracting activity does not derive its authority to require them from the Miller Act. Because of this, we have long held that an agency may condition bid acceptance, for contracts totalling less than the amount specified in the Miller Act and the FAR for payment or performance bonds, upon the furnishing of a bid guarantee by the time of bid opening. Kenard Constr. Co., Inc., B-248830, Sept. 25, 1992, 92-2 CPD ¶ 207 at 3; Hirt Telecom Co., B-231534, June 7, 1988, 88-1 CPD ¶ 542 at 1. As such, neither the provisions of the Miller Act nor the FAR requirements relating to payment or performance bonds necessitate that an IFB be read, regardless of the remainder of the provisions contained in the IFB, as requiring a bid guarantee only if the bid totals more than $100,000. Where an IFB requires all bids to include a bid guarantee, any bid (even one under the Miller Act threshold) failing to provide the required guarantee by bid opening must be rejected as nonresponsive. Hirt Telecom Co., supra.

Here, the standard form (SF) 1442 included in the IFB noted that a "bid bond, 20%" was required, and block 13.B of the SF 1442 specified that "[a]n offer guarantee . . . is . . . required." The IFB also incorporated by reference the "Bid Guarantee" clause set forth at FAR § 52.228-1, specifying that the failure to provide a proper bid guarantee could result in rejection of the bid. IFB at 17. Given these provisions, the IFB, when read as a whole, clearly required a bid guarantee for bids under (or over) $100,000. Accordingly, the agency acted properly in rejecting the protester's bid as nonresponsive, given that Lawson's failed to furnish the required bid guarantee with its bid.

The protest is denied.

Anthony H. Gamboa
Acting General Counsel