

P. Jannelli
Page I

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

9145

FILE: B-193519

DATE: February 13, 1979

CNS 718

MATTER OF: Elevator Sales & Service, Inc.

DIGEST:

[Bid Rejected as Nonresponsive for Failure to Provide Bid Bond]

1. Protest based upon argument that Miller Act amendment enacted prior to bid opening but after solicitation issuance invalidated IFB provision requiring bid bond is untimely and will not be considered on merits, since basis for protest was known to protester before bid opening but protest was not filed until after bid opening. 4 C.F.R. § 20.2(b)(1) (1978).
2. Bid guarantee is material part of IFB which cannot be waived by contracting agency. Therefore, failure to provide bid bond where solicitation required one renders bid nonresponsive and agency action in rejecting bid was proper. Protest is denied.

Elevator Sales & Service, Inc. (ESS), filed a protest with our Office on November 20, 1978, against award of a contract for elevator repairs pursuant to invitation for bids (IFB) No. N62472-78-B-4666, issued by the Department of the Navy on October 11, 1978. ESS protests that its bid was improperly rejected as nonresponsive by the Navy for failure to provide a bid bond required by the IFB.

1

The IFB required each bid of more than \$2,000 to be accompanied by a bid bond in an amount equal to 20 percent of the amount bid and cautioned that "failure to submit the bid guaranty on time is cause for rejection of the bid." When bids were opened on November 14, 1978, only two bids had been received. ESS's bid of \$8,920 was low but was not accompanied by a bid bond. Instead, ESS's bid was accompanied by a letter dated November 10, 1978, which stated that no bid bond was being furnished because ESS understood the requirement for a bid bond to apply only to jobs for over \$25,000. The other bid, in the amount of \$9,865, was submitted by State Elevator

881

003627

dec

Company, Inc. (State), and was accompanied by a bid bond. On November 15, 1978, the Navy rejected ESS's bid as nonresponsive for failure to provide a bid bond. On November 15, 1978, ESS protested to the contracting activity on the basis that, under an amendment to the Miller Act, a bid bond could no longer be required of a bidder if the bid was in an amount less than \$25,000. On November 20, 1978, ESS filed its protest with our Office. The thrust of ESS's argument is that the solicitation requirement for a bid bond was derived from the Miller Act, 40 U.S.C. § 270a, et seq. (1976), which used to require performance and payment bonds for any contract exceeding \$2,000 in amount for the construction, alteration, or repair of public buildings but that the Miller Act was amended on November 7, 1978, to raise the amount to \$25,000 before performance or payment bonds are required. We note that the amendment to the Miller Act was actually approved on November 2, 1978. (Pub. L. No. 95-585, 92 Stat. 2484) (November 2, 1978). Since the Miller Act amendment was enacted after the solicitation was issued but before bids were opened, ESS contends that the new law, in effect, invalidated the solicitation requirement for a bid bond for bids in the \$2,000 to \$25,000 range. Accordingly, ESS believes that its bid need not have been accompanied by a bid bond and that its bid was clearly responsive under the new law.

The Navy report on this protest points out that the Miller Act requires performance and payment bonds for contracts over a stated amount but does not deal with bid bond requirements. Since the present protest is against a bid bond requirement, the Navy argues that the amendment to the Miller Act could not have eliminated the IFB's bid bond requirement. The Navy also argues that contracting activities must wait until statutory changes are implemented through the Defense Acquisition Regulation (DAR) before statutory changes can be implemented by contracting activities and incorporated into solicitations.

Although the Miller Act deals with performance and payment bonds rather than bid bonds, amendments to the Miller Act could have a direct effect on bid bond provisions. This is so because DAR § 10-102.2 (1976 ed.) states that, "Bid guarantees shall not be required unless the solicitation specifies that the contract must be supported by a performance bond or performance and payment bonds." Accordingly, if any amendment to the Miller Act

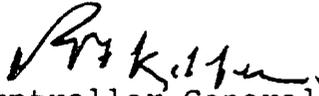
affected an IFB's performance and/or payment bond requirement it might also affect the IFB's bid bond requirement.

Under our Bid Protest Procedures, a protest based upon alleged improprieties in a solicitation which are apparent prior to bid opening must be filed prior to bid opening in order to be considered. 4 C.F.R. § 20.2(b)(1) (1978). ESS's protest essentially is based upon the fact that the bid bond provision in the solicitation was improper in light of the Miller Act amendment. Since ESS was aware of the basis of its protest by November, 10, 1978, at the latest (as evidenced by the cover letter accompanying its bid dated November 10, 1978), but did not protest to either the contracting activity or our Office until after bid opening (November 14, 1978), its protest against the bid bond provision is untimely filed and will not be considered on the merits. In this regard, if ESS had filed its protest with the contracting activity before bid opening, the contracting officer could have considered whether: (1) to amend the solicitation by deleting the bid bond requirement in view of the Miller Act amendment; (2) to amend the solicitation by delaying bid opening until the Navy decided what to do about the bid bond requirement; or (3) to leave the bid bond requirement as it was after examining the changed circumstances and determining that a bid bond was still necessary. See 40 U.S.C. § 270a(c) and Willard Company, Inc., B-187628, February 18, 1977, 77-1 CPD 121.

The next issue for consideration is whether ESS's bid should have been rejected as nonresponsive for failure to provide a bid bond given the bid bond requirement as originally stated in the solicitation. We have held that a bid guarantee requirement is a material part of an IFB, and that, except as provided in applicable regulations, a procuring activity must reject as nonresponsive a bid that does not conform with that requirement. Edward D. Griffith, B-188978, August 29, 1977, 77-2 CPD 155. As noted above, the IFB required a bid guarantee for bids of more than \$2,000. Section 2-404.2(h) of the DAR (1976 ed.) requires rejection of a bid which is not accompanied by a bid guarantee where the IFB requires one, and failure to provide a bid guarantee may not be waived as a minor informality under DAR § 2-405 since it affects the bid price.

Accordingly, the Navy was correct in rejecting ESS's bid as nonresponsive and, therefore, the protest is denied.

Regarding the Department of the Navy's contention that contracting officers cannot react to changes in the law until such changes are incorporated into the DAR, we have been informed by the Defense Acquisition Regulatory Council that appropriate actions have already been undertaken to incorporate the changes brought about by the amendment to the Miller Act regarding performance and payment bonds.


Deputy Comptroller General
of the United States