



Comptroller General
of the United States

Washington, D.C. 20546

Decision

Matter of: Johnson Trail Building

File: B-249378

Date: October 21, 1992

Terry C. Johnson for the protester.
Allen W. Smith, Forest Service, Department of Agriculture,
for the agency.
Linda S. Lebowitz, Esq., and Michael R. Golden, Esq., Office
of the General Counsel, GAO, participated in the preparation
of the decision.

DIGEST

Where a solicitation clearly and unambiguously required bid guarantees only for bids exceeding \$25,000, the agency improperly rejected the protester's apparent low bid, which did not exceed \$25,000, as nonresponsive for failure to submit a bid guarantee.

DECISION

Johnson Trail Building protests the rejection of its apparent low bid as nonresponsive under invitation for bids (IFB) No. R1-11-92-11, issued by the Forest Service, Department of Agriculture, for trail construction at the Gallatin National Forest in Montana. The protester argues that its bid was improperly rejected for failure to submit a bid guarantee.

We sustain the protest.

The IFB, issued on May 19, 1992, contemplated the award of a firm, fixed-price contract to the low, responsive, responsible bidder. Block 13B on the cover page of the IFB, designated by the agency as Section A, stated that "an offer guarantee [x] is, [] is not required." In Section L of the IFB, captioned "Instructions, Conditions, and Notices to Offerors," clause L-11--"Notice of Required Bid Security," Department of Agriculture Acquisition Regulation, 48 C.F.R. § 452.228-70 (1988)--stated that "[i]f a bid exceeds \$25,000, the bidder must submit a bid guarantee in the amount of 20 percent of [its] total bid price" In

Section I of the IFB, captioned "Contract Clauses," clause I-6 stated that a bidder's "[f]ailure to furnish a bid guarantee in the proper form and amount, by the time set for opening of bids, may be cause for rejection of the bid."

Eleven firms submitted bids by bid opening. The protester submitted the apparent low bid of \$22,845. Since clause L-11 stated that bid guarantees were required for bids exceeding \$25,000 and since the protester's bid was less than \$25,000, the protester did not furnish a bid guarantee. The contracting officer, however, rejected the protester's bid as nonresponsive because the protester did not furnish a bid guarantee.

In rejecting the protester's bid, the contracting officer basically relied on the IFB's order of precedence clause which provided that inconsistencies in the IFB were to be resolved by giving precedence, in the following order, to: (1) Sections A through H--Schedule; (2) Sections K and L--Representations and Instructions; and (3) Section I--Contract Clauses. Based on the order of precedence clause, the contracting officer concluded that to the extent the blanket bid guarantee requirement in block 13B of Section A was inconsistent with clause L-11 in Section L, which stated that a bid guarantee was required for bids exceeding \$25,000 in the amount of 20 percent of the total bid price, the bid guarantee requirement in Section A took precedence over the bid guarantee requirement in Section L. Accordingly, the contracting officer concluded that although the protester submitted a bid which did not exceed \$25,000, it nevertheless was required to furnish a bid guarantee and its failure to do so necessitated the rejection of its bid as nonresponsive. Pending our decision, the agency has not made an award to the second low bidder.

The protester challenges as improper the contracting officer's rejection of its apparent low bid as nonresponsive for failure to submit a bid guarantee. The protester contends that since its bid did not exceed \$25,000, it was not required under clause L-11 of the IFB to furnish a bid guarantee. The protester reports that Region One of the Forest Service, where this job is located, has never previously enforced the bid guarantee requirement, notwithstanding that the same clauses in this solicitation have been contained in other Region One solicitations. The protester states that it lost two projects in 1991 to low bidders who failed to furnish bid guarantees and the agency, in response to the protester's objections, stated that bid guarantees were not required for bids under \$25,000. The agency concedes that the wording of the Department clauses are confusing and that in the future the language will be revised to eliminate the confusion.

Unlike performance and payment bonds, which are mandated by the Miller Act for any construction contract exceeding \$25,000, 40 U.S.C. § 270a et seq., bid guarantees are requirements promulgated under the procurement regulations and are not mandated by the Miller Act. See Kenard Constr. Co., Inc., B-248830, Sept. 25, 1992, 92-2 CPD ¶ ____; LTT Constr., Inc., B-229062, Nov. 13, 1987, 87-2 CPD ¶ 484. Since an agency's authority to require a bid guarantee is not derived from the Miller Act, an agency may condition bid acceptance, for bids not exceeding \$25,000, upon the furnishing of a bid guarantee by the time of bid opening. Id. In this case, however, we find that the IFB clearly and unambiguously required bid guarantees only for bids exceeding \$25,000.

Here, block 13B in Section A contained a check-off that a bid "guarantee [is] required." While the cover page placed bidders on notice that a bid guarantee was required, the cover page did not, standing alone, provide any information about the terms of the bid guarantee. Thus, bidders were expected to look for a specific provision explaining the bid guarantee requirement. Section L, Representations and Instructions, specifically clause L-11, captioned "Notice of Required Bid Security," explained what was required. Clause L-11, which stated that a bid guarantee was required "[i]f a bid exceeds \$25,000 . . . in the amount of 20 percent of the total bid price . . .," clearly and unambiguously stated that a bid guarantee would be required only for bids which exceeded \$25,000 and provided a basis for calculating the appropriate bid guarantee amount. In our view, the notice of a bid guarantee requirement in Section A and the specific bid guarantee requirement in Section L are not inconsistent and can reasonably be read together as simply requiring a bid guarantee for bids exceeding \$25,000. For this reason, we find that the contracting officer improperly relied on the IFB's order of precedence clause as the basis for rejecting the protester's apparent low bid, which did not exceed \$25,000, as nonresponsive for failure to submit a bid guarantee. Since the protester's bid did not exceed the specific bid price threshold in clause L-11, the protester reasonably concluded that it was not required to submit a bid guarantee.¹

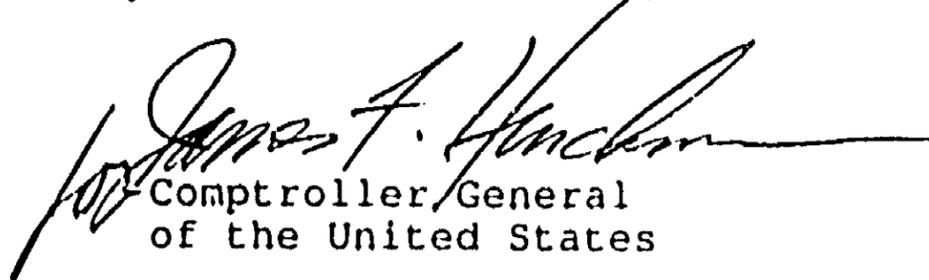
¹We also note that there was a blanket requirement for performance and payment bonds in Section A of the IFB, but that Section I, specifically clauses I-8 and I-9, required these bonds only if the contract exceeded \$25,000. Thus, bidders could reasonably conclude that in this case, just as a bid guarantee was not required for bids less than \$25,000, performance and payment bonds were not required for contracts less than \$25,000. See Federal Acquisition

(continued...)

Accordingly, we sustain the protest and recommend that the agency make an award to the protester, if otherwise appropriate. We also find that the protester is entitled to recover the costs it incurred in filing and pursuing its protest. Bid Protest Regulations, 4 C.F.R. § 21.6(d)(1) (1992).

While the contracting officer apparently intended to require the submission of bid guarantees regardless of bid prices, the language of the Department's regulation, 48 C.F.R. § 452.228-70, as reflected in clause L-11 and which is mandatory for any solicitation requiring performance and payment bonds, 48 C.F.R. § 428.102-3 (1991), only requires the submission of bid guarantees for bids exceeding \$25,000. The agency represents that under this IFB it intended to require the submission of bid guarantees regardless of bid prices. However, as long as the bid guarantee clause, which includes the \$25,000 threshold for the submission of bid guarantees, is included in a solicitation as required by the regulation, the potential for confusion concerning the agency's intention with regard to the submission of bid guarantees will remain, as conceded by the contracting officer in the agency report filed in response to this protest. We therefore recommend that the agency take steps to resolve this confusion, including the revision of 48 C.F.R. § 452.228-70, if necessary, in order to make clear the agency's intention concerning its requirement for the submission of bid guarantees.²

The protest is sustained.


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¹(...continued)

Regulation § 28.101-1(a). See also Roger L. Herbst, B-244773, Nov. 19, 1991, 91-2 CPD ¶ 476 in which we noted that the Department regulations, 48 C.F.R. §§ 428.102-3, 452.228-70, and 452.228-71 (1990), did not contemplate bid guarantees or performance and payment bonds if the bid or contract was less than \$25,000.

²The Department's regulation also provides procedures for obtaining deviations for individual solicitations or classes of contracts under appropriate circumstances. 48 C.F.R. §§ 401.403 and 401.404.