

Protest of) Date: February 9, 1988
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 GATTO-VIKTOR)
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 Solicitation No. 497786-88-A-0038) P.S. Protest No. 88-05

DECISION

Gatto-Viktor timely protests the award of a contract for concrete/masonry cleaning and coating at the Salt Lake City main post office to Hydro-Tech. Gatto-Viktor contends Hydro-Tech's bid should have been rejected as nonresponsive for failure to include a bid bond required by the solicitation.

Invitation for Bids (IFB) No. 497786-88-A-0038, issued November 30, 1987, by the Salt Lake City Procurement & Materiel Management Office (P&MMO), provided, "A Bid Guarantee is required in the amount of 20% of this offer (see Paragraph 4 of PS Form 7389)." PS Form 7387, Block 7. The referenced paragraph 4 provided, in part,

Where a bid guarantee is required by the invitation for bids, failure 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.

The reverse of the Instructions to Bidders contained the warning: "Bidders are required to submit the following forms to be considered an acceptable bid: ... 4. PS Form 7324, Bid Bond..." The November 30 cover letter transmitting the solicitation to potential bidders advised that bid bonds are required; item 6 of the Notice to Bidders (PS Form 7389-A) reminded bidders of the requirement ("Does your bid guarantee conform to the requirements of PS Form 7387, Invitation for Bids and PS Form 7389, Instruction to Bidders?"); and the solicitation contained a blank PS Form 7324, Bid Bond. Block 8 of the Invitation for Bids established the Postal Service's estimate of the project cost range at \$50,000 to \$90,000.

Hydro-Tech's bid of \$23,979 was low of the twelve received, but did not include a bid bond. The protestor, second low at \$34,983, did include a bid bond. The contracting

officer awarded the contract to Hydro-Tech at its bid price on January 20, 1988.^{1/} This protest, dated January 25, followed. Gatto-Viktor contends the solicitation required bidders to submit bid bonds with their bids, that Hydro-tech did not, and that, therefore, Hydro-Tech's bid should have been rejected as nonresponsive.

In his report to this office, the contracting officer advises that before the bid opening date a representative of Hydro-Tech called the P&MMO and was advised by a postal employee that a bid guarantee was not required if the bid amount was under \$25,000. The contracting officer relies on the above quoted language from paragraph 4 of the Instructions to Bidders that failure to submit a required bid guarantee by the solicitation may cause rejection as authorizing waiver of the bid bond requirement, authority which the contracting officer exercised in awarding to Hydro-Tech. He recommends that the award to Hydro-Tech be allowed to stand.

We disagree. The solicitation unequivocally required submission of a bid guarantee and made no allowances for submission of bids below \$25,000 without a bid guarantee. According to PCM 2-404.2 (g), "[W]hen a bid guarantee is required and a bidder fails to furnish it in accordance with the requirements of the invitation for bids, the bid shall be rejected except as otherwise provided in 10-103.4." Section 10-103.4 provides:

Where an invitation for bids requires that a bid be supported by a bid guarantee and noncompliance occurs, the bid shall be rejected, except in [three listed situations, none of which is applicable here].

The facts here are indistinguishable from those in Universal Contracting, P.S. Protest No. 80-47, October 30, 1980. There the solicitation required a bid guarantee, the postal estimate exceeded \$25,000, and the protester's low bid, unaccompanied by a bid guarantee, was less than \$25,000. We agreed with the contracting officer's rejection of the low bid as nonresponsive for failure to include a bid guarantee.^{1/} See United States Contracting Corporation, Comp. Gen. Dec. B-198095, June 27, 1980, 80-1 CPD & 446. "The unforeseen fact that one [bidder] was able to underbid the Postal Service estimate, substantially, cannot transform a solicitation with a bona fide bonding requirement into one free of all bidder guarantees." Universal Contracting, supra.

^{1/}Notice to proceed has not yet been issued.

^{2/}In that decision, we mentioned PCM 18-302.4, applicable to minor repairs and improvements contracting, which provides, "A bid guarantee is not required of any offeror whose offer is \$25,000 or less, unless the contracting officer decides that one is necessary." The unequivocal requirement in the solicitation that bids be accompanied by bid guarantees triggers application of the mandatory requirements of the PCM cited in the text, and cannot be varied by this section. If this apparent disparity in requirements caused Hydro-Tech any confusion, its remedy was to seek written clarification prior to submission of its bid and not to ignore the unequivocal language of the solicitation. See Universal Contracting, supra.

The language in the solicitation stating that failure to provide a bid guarantee may cause rejection does not authorize waiver of the requirement by the contracting officer. See Universal Contracting, supra. The Comptroller General agrees:

The failure to furnish a bid guarantee in accordance with the solicitation's terms requires the rejection of the bid as nonresponsive. Consolidated Installations Corp., B-202630, Apr. 20, 1981, 81-1 CPD & 301. Thus, we have held that the statement in the bid guarantee requirement that failure to comply "may be cause for rejection" of a bid is just as compelling and material as if more positive language were employed. Id. As a result, the contracting agency has no blanket discretion to waive deficiencies in bid guarantees. Colorado Elevator Service, Inc., B-206950.2, May 6, 1982, 82-1 CPD & 434. Hannan Associates, Inc., Comp. Gen. Dec. B-226180, February 20, 1987, 87-1 CPD & 197.

Any oral advice given Hydro-Tech contrary to the clear requirements of the IFB does not prevent the bid from being considered nonresponsive. Bidders seeking clarification of solicitation requirements must make their requests "in writing and with sufficient time allowed for a reply to reach bidders before the submission of their bids.... Oral explanations or instructions given before the award for the contract will not be binding." Paragraph 1, Instructions to Bidders, PS Form 7389. No employee of the P&MMO had authority to alter the mandatory requirements in this fashion, and Hydro-Tech's possible reliance on oral advice does not afford a basis for finding Hydro-Tech's bid responsive. See Jean Frances Frederick, P.S. Protest No. 80-15, June 17, 1980. Hydro-Tech's bid should have been rejected as nonresponsive. The award was improper, and this contract should be terminated for convenience. If otherwise proper, award may be made to the second low bidder.

The protest is sustained.

William J. Jones
Associate General Counsel
Office of Contracts & Property Law

[checked against original JLS 6/21/93]