

Government of the District of Columbia
CONTRACT APPEALS BOARD
717 14TH STREET, N.W., SUITE 430
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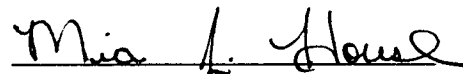
DATE: February 9, 1995

TO: Michael J. Cohen, Esquire
W.M. Schlosser Company, Inc.
2400 51st Place
Hyattsville, MD 20781-1396

Warren J. Nash
Assistant Corporation Counsel
441 4th Street, N.W., Suite 1060
Washington, D.C. 20001

SUBJECT: CAB No. P-425, Protest of W.M. Schlosser Company, Inc.

Attached is a copy of the Board's opinion in the above-referenced matter.


MIA J. HOUSE
Clerical Assistant (Typist)

Attachment

GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

PROTEST OF:

W.M. SCHLOSSER COMPANY, INC.)	
)	CAB No. P-425
Under Invitation No. 9469-94-A1-23-HC)	

For the Protester: Michael J. Cohen, Esquire. For the Government: Warren J. Nash and Howard S. Schwartz, Assistants Corporation Counsel.

Opinion by Administrative Judge Jonathan D. Zischkau, with Administrative Judges Lorilyn E. Simkins and Cynthia G. Hawkins-León, concurring.

OPINION

W.M. Schlosser Company, Inc. ("Schlosser"), the only bidder under Invitation No. 9469-94-A1-23-HC, protests the District of Columbia's determination that Schlosser's bid was nonresponsive because of a defective bid guarantee. Schlosser also challenges the District's decision to cancel the IFB and to reissue the solicitation under Invitation No. 5164-95-A1-23-DM. The District asserts that the contracting officer properly determined that Schlosser's bid guarantee was defective and that the contracting officer reasonably determined that bid cancellation and resolicitation were warranted. We sustain the protest.

FACTS

On October 3, 1994, the Department of Public and Assisted Housing ("DPAH") issued Invitation for Bids ("IFB") No. 9469-94-A1-23-HC in the open market to modernize the Eastgate Gardens apartments. (Agency Report ("AR") Exhibit 1). DPAH issued the IFB to eight vendors. On November 7, 1994, protester submitted the only bid received by DPAH. (AR Exhibit 2). The instructions to bidders are set forth in a form furnished by the U.S. Department of Housing and Urban Development ("HUD"). (AR Exhibit 1). Paragraph 9 of the instructions deals with bid guarantees and provides in pertinent part:

All bids must be accompanied by a negotiable bid guarantee which shall not be less than five percent (5%) of the amount of the bid. . . . The bid guarantee may be . . . a bid bond secured by a surety company Failure to submit a bid guarantee with the bid shall result in the rejection of the bid. . . .

The cover sheet for Schlosser's bid is a DPAH standard form entitled "Bid Form Construction Contract". (AR Exhibit 2, Attachment B). One line on the Bid Form reads: "Enclosed is bid guaranty consisting of 5% of the total amount bid. Bid Bond Certified Check Other" (*Id.*). The words "Bid Bond" are circled. The form is executed by Schlosser's president. The bid also contains a 2-page form entitled "Bid Bond (Construction)" which is another standard DPAH

form. (Schlosser Reply, Exhibit A). The bid bond form identifies the IFB, the bidder, the surety, and is executed by Schlosser and the surety. The following blocks (as completed by Schlosser) also appear on the bond:

TYPE OF ORGANIZATION (X)				
<input type="checkbox"/> INDIVIDUAL		<input type="checkbox"/> PARTNERSHIP		
<input type="checkbox"/> JOINT VENTURE		<input checked="" type="checkbox"/> CORPORATION		
STATE OF INCORPORATION Maryland				
PENAL SUM OF BOND				
AMOUNT NOT TO EXCEED				
(MILLIONS)	(THOUSANDS)	(HUNDREDS)	(CENTS)	5% OF BID
BID IDENTIFICATION				
BID OPENING DATE 11-02-94		INVITATION NO. 9469-94-A1-23-HC		

Although Schlosser entered the requested corporate and bid identification information in the top two and bottom blocks, neither Schlosser nor the surety entered any amounts or made any markings on the other blocks relating to the amount of the bid bond. Printed portions of the bond below these blocks contain, *inter alia*, the following language:

[T]he principal and Surety(ies) hereto, are firmly bound to the District of Columbia Government . . . in the above penal sum for the payment of which we bind ourselves

Five instructions appear on page 2 of the bid bond but none of them give any directions on filling out the blocks reprinted above.

On November 18, 1994, the contracting officer executed a Determination and Findings for Cancellation which indicated that because the bid bond of Schlosser did not contain a face value the bid was rejected as nonresponsive. (AR Exhibit 3). The rejection of the bid and cancellation of the IFB were approved by the Director of the Department of Administrative Services ("DAS") on November 21, 1994. (*Id.*). DPAH resolicited the requirements by reissuing the IFB (under Invitation No. 5164-A1-23-DM) on November 21, 1994. Bid opening was scheduled for January 13, 1995.

On December 7, 1994, Schlosser filed its protest, alleging that its bid was responsive because the bid bond was for the penal sum of five percent of the bid as required by the IFB. Schlosser requested that it receive contract award under the original IFB and that the new IFB be cancelled. On December 20, 1994, the District advised the Board that bid opening for the resolicitation was to be extended to January 27, 1995. Pursuant to a Board order of December 20, the District filed an agency report on January 6, 1995, and the protester filed a reply on January 17, 1995.

In its agency report, the District argues that the bid bond is clearly defective because: (1) no penal sum is identified in the appropriate box; (2) no "Amount Not To Exceed" is listed in the appropriate boxes; and (3) the "5% of Bid" box is not checked off. Noting *GNIJ Enterprises, Inc.*, CAB No. P-118, Sept. 28, 1990, 38 D.C. Reg. 3125, where we held that, in accord with 27 DCMR § 2702.2, it was improper for a contracting officer to reject the bid of the sole bidder where the only basis for rejecting the bid was the bidder's failure to furnish a bid bond, the District contends that the contracting officer had a reasonable basis for rejecting Schlosser's bid because HUD's "Procurement Handbook for Public Housing Agency's (PHAs) and Indian Housing Authorities (IHAs)," Handbook 7460.8 Rev-1 (Jan. 1993), requires rejection of a bid where a bid bond is defective.

In its January 17 reply to the agency report, Schlosser urges that the bid bond on its face sets forth the penal sum as "5% of Bid" and there was no requirement for checking off the box containing that notation. Schlosser also points to the bid form's indication of a bid guarantee consisting of "five percent of the total amount bid." Schlosser has attached an affidavit from the bonding agent who prepared and signed the bond on behalf of the surety stating that her understanding was that the bond was in the amount of five percent of the bid. Schlosser contends that 27 DCMR § 2702.2 and our ruling in *GNIJ* control the outcome here because the provision from the HUD Procurement Handbook relied upon by the District requires a bid guarantee of five percent "unless otherwise required by state or local laws or regulations."

DISCUSSION

The Board has jurisdiction over this protest pursuant to D.C. Code § 1-1189.3 (1992).

The Procurement Practices Act generally requires bid security (*e.g.*, a bid bond) for all competitive sealed bids and competitive sealed proposals for construction contracts when the price is estimated by the District to exceed \$100,000. D.C. Code § 1-1185.2(a)(1); 27 DCMR § 2701.2. The procurement statute and regulations also specify that a bid bond shall be in an amount equal to at least five percent of the amount of the bid or price proposal. D.C. Code § 1-1185.2(b); 27 DCMR § 2701.4. The statute provides that if an invitation requires a bid bond, and a bidder does not comply -- *i.e.*, by failing to submit a bid bond or by submitting a defective bid bond -- then the bid must be rejected unless, pursuant to the procurement regulations, it is determined that the bid fails to comply in a nonsubstantial manner with the security requirements. D.C. Code § 1-1185.2(c). Certain enumerated exceptions to the general mandatory requirement for bid security are contained in 27 DCMR § 2702. Under 27 DCMR § 2702.2, if a bidder fails to comply with the bid security requirements, but is the only one who submitted a bid, the bid may be accepted and the contracting officer shall require the furnishing of the bid security before the contract is signed.¹ In *GNIJ*, we held that it was improper for the contracting officer to reject a bid where there was only one bidder and where the sole basis for rejection was the bidder's failure to provide a bid bond. We stated that there had to be some other reasonable basis for rejection. 38 D.C. Reg. at 3127-28.

¹ The District's exceptions to the bid security requirements, such as 27 DCMR § 2702.2, have their counterparts in the Federal Acquisition Regulation. *See, e.g.*, 48 C.F.R. § 28.101-4(c)(1).

Citing HUD's Procurement Handbook, the District contends that HUD's procurement policy set forth in Chapter 4 of the Handbook requires all bidders to submit a bid bond in the penal sum of five percent and that a failure to do so requires rejection of the bid.² (AR at 5; AR Exhibit 4). According to the District, this procurement policy provides the "reasonable basis" for rejection required by *GNII*. We do not agree. Chapter 4 of HUD's Procurement Handbook expressly provides that a number of its requirements are not to override state or local law. The bid guarantee requirement is one such requirement. For construction contracts exceeding \$100,000, paragraph 4-16.E.1.a states: "24 CFR 85.36 provides that contractors shall be required to submit the following, unless otherwise required by State or local laws or regulations: (1) a bid guaranty from each bidder equivalent to 5% of the bid price" (AR Exhibit 4, at page 4-12 (emphasis added)). In addition, the introduction to Paragraph 4-16 of the Handbook states. "The required bond or guaranty is described in the sample procurement policy statement in Appendices 1, 2 and 3 based on HUD regulations." Appendix 1, entitled "Sample Statement of Procurement Policy for Public Housing Agencies," like Paragraph 4-16.E.1.a of the Handbook, requires in Section III.C.5 that bidders submit a bid guarantee equal to five percent of the bid price "unless otherwise required by State or local laws or regulations." (Protester's Reply, Exhibit E). There can be no question that District procurement law makes an exception to the requirement for bid security at the time of bid where only one bidder submits a bid. The Federal Acquisition Regulation contains the same exception to bid security requirements where there is only one bidder, *see* 48 C.F.R. § 28.101-4(c)(1), and the Comptroller General of the United States has even ruled that a local housing agency's decision to waive bid security requirements in connection with a HUD-funded project was fully in accord with federal law and regulation. *Ed Davis Construction, Inc.*, B-216353, Feb. 22, 1985, 85-1 CPD ¶ 226.

² Paragraph 4-16 of HUD's Procurement Handbook, at page 4-11, provides in relevant part:

A. Bid guarantee.

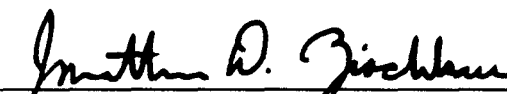
1. A bid guarantee or bid bond is submitted by the bidders with their bids and assures that, if awarded the contract, the bidder will accept and perform the contract and not attempt to withdraw or otherwise disavow the contract and will execute such contractual documents as may be required within the time specified. . . .
2. If the contractor does attempt to renege on the contract, the surety for the bond is required to step in and take over performance of the contract, or the check tendered may be cashed. . . . If the bid guarantee is not submitted with the bid, the [housing agency] shall reject the bid. . . .

Accordingly, the contracting officer should not have determined Schlosser's bid to be nonresponsive even if the bid bond was defective.³

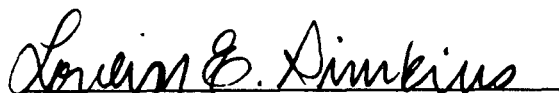
The protest is sustained. The District shall award the contract under the original invitation to Schlosser assuming it is found to be responsible. The reissued solicitation, Invitation No. 5164-A1-23-DM, shall be cancelled.⁴


SO ORDERED.

DATE: February 9, 1995


JONATHAN D. ZISCHKAU
Administrative Judge

CONCURRING:


LORILYN E. SIMKINS
Chief Administrative Judge


CYNTHIA G. HAWKINS-LEÓN
Administrative Judge

³ With regard to the issue of whether Schlosser's bid bond is defective, we are satisfied from the record that the bid bond sets forth a penal sum of five percent of the bid. No specific dollar amounts are set forth in the "Penal Sum of Bond" block or the "Amount Not To Exceed" block. We agree with the protester that the "5% of Bid" block indicates a bond in the required amount of five percent of the bid. The lack of a check mark or other indication in the "5% of Bid" block does not lead us to a contrary conclusion. The bid instructions neither suggested nor required such a marking. In the absence of a specified penal sum or NTE amount which contradicts the indication of "5% of Bid", this particular bid bond form identifies a bid security amount of five percent of the bid. Because we are of the view that the surety here would be held liable for five percent of the bid (if the bidder defaulted), the bid bond is not defective.

⁴ On January 26, 1995, the clerk orally advised the parties of the Board's decision to sustain the protest.