



United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Islands Mechanical Contractor, Inc.

File: B-404275

Date: January 24, 2011

J. Jacob R. Peek, Esq., Driver McAfee Peek & Hawthorne, for the protester.
Michael H. Saltalamachea, Esq., Department of the Army, for the agency.
Alyssa B. Weir, Esq., Paul E. Jordan, Esq., and David A. Ashen, Esq., Office of the
General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Proposal found to include only a photocopy of the required bid bond was properly rejected as unacceptable.

DECISION

Islands Mechanical Contractor, Inc. (IMC), of Middleburg, Florida, protests the Department of the Army, U.S. Army Corps of Engineers' (USACE) rejection of its proposal and award of multiple award task order contracts (MATOC) to other offerors, under request for proposals (RFP) No. W912HN-09-R-0018, for design/build and construction work in USACE's South Atlantic Division. IMC asserts that the agency improperly found that the protester failed to include an original bid guarantee with its proposal.

We deny the protest.

The RFP contemplated the award of multiple indefinite-delivery/indefinite-quantity contracts, with a base period of 3 years with 2 option years, for design/build or construction-type work in North Carolina, South Carolina, Georgia, Florida, Alabama, and Mississippi. The RFP required offerors to submit a bid guarantee for 20% of the bid price or \$3 million, whichever was less. RFP at 24 and 142 (incorporating Federal Acquisition Regulation (FAR) § 52.228-1). The RFP provided that the government would review the bid guarantee for legal sufficiency and that a bid guarantee found legally insufficient may render the offer ineligible for award. In this regard, the solicitation specifically cautioned that facsimile and photocopied bid guarantees were not acceptable. RFP at 24. Offerors were required to submit an original and one copy of Volume I of the proposal, which was to contain the required

bid guarantee. Id. The RFP provided that the government intended to evaluate proposals and award a contract without discussions.

IMC's proposal, 1 of 48 submitted, was evaluated as overall satisfactory. However, the agency found that IMC's bid bond was legally insufficient because it was not an original, lacked an original surety agent's signature, and failed to demonstrate that a duly authorized IMC officer had executed the bid bond. The agency thus excluded IMC's proposal from further consideration for award. The agency selected five contractors to participate in the MATOC and awarded a seed task order for construction of the Albritton Junior High School at Fort Bragg, North Carolina.¹ After notice of the awards and a written debriefing, IMC filed this protest.

IMC protests the agency's rejection of its proposal as legally insufficient, asserting that it submitted an original, duly executed bid bond. Specifically, IMC maintains that, in accordance with the RFP's instructions, it submitted both an original proposal Volume I (stamped "original") which included the original bid bond, and a copy which included a photocopy of the bid bond. IMC speculates that the contracting officer mistakenly furnished the attorney reviewing IMC's bid bond with the copy instead of the original bid bond. Since the only version of IMC's proposal Volume I retained by the agency is not marked "original" and contains a photocopy of the bid bond, Agency Response to Initial Comments ¶ 6, IMC further speculates that the agency destroyed the original bid bond by mistake. In support of its position, IMC has submitted affidavits from the employees who prepared its proposal that attest to the inclusion of the original bid bond, and a letter from its surety attesting to its provision of an original bid bond. Affidavits of Corporate Secretary and Program Manager; Surety Letter. The contracting officer and specialist, on the other hand, have submitted sworn statements that "to the best of [their] knowledge," IMC submitted a photocopy and not an original of its bid bond. Declarations of Contracting Officer and Contract Specialist.

The determinative question in judging the sufficiency of a bid guarantee such as a bid bond is whether it could be enforced if the bidder subsequently fails to execute required contract documents and to provide performance and payment bonds. TJ's Marine Constr., LLC, B-402227, Jan. 7, 2010, 2010 CPD ¶ 19 at 3. The bid bond must clearly establish the liability of the surety; when the liability is not clear, the bond is defective. BW JVI, LLC, B-401841, Dec. 4, 2009 CPD ¶ 249 at 3. In general, copies of bid guarantee documents do not satisfy the requirement for a bid guarantee since there is no way, other than referring to the original documents, for the agency to be certain that there had been no alterations to which the surety had not consented and could use as a basis to disclaim liability. TJ's Marine Constr., LLC, supra.

¹ The MATOC awardees were Brantley Construction Company, LLC; TEAM Construction, LLC; Triune-Beck Joint Venture; Tyler Construction Group, Inc.; and Leebcor Services LLC.

Here, the RFP expressly provided that photocopied bid guarantees would not be acceptable. Further, where, as here, award is made on the basis of initial proposals without discussions, noncompliance with a solicitation requirement for a bid guarantee requires rejection of the proposal as unacceptable, except in situations not present here. FAR § 28.101-4. Since the record indicates that at the time of review, IMC's bid bond was determined to be a photocopy, the agency properly rejected IMC's initial proposal.

IMC's assertion that the agency must have discarded IMC's original bond, provides no basis for relief. Agencies have a fundamental obligation to have procedures in place to receive submissions from competitors under a solicitation, to reasonably safeguard submissions received, and to fairly consider all submission received. Safety and Health Consulting Servs., Inc., B-290412, June 10, 2002, 2002 CPD ¶ 95 at 2. As a practical matter, however, even with appropriate procedures in place, an agency may lose or misplace a submission, and such occasional loss generally does not entitle an aggrieved competitor to relief. Joint Venture Penauillie Italia S.p.A., B-298865, B-298865.2, Jan. 3, 2007, 2007 CPD ¶ 7 at 6.

This result is justified by the unique circumstances arising in protests concerning lost information. The only means generally available to establish the content of allegedly lost information is for the offeror to reconstruct that information. However, allowing the offeror to do so would be inconsistent with maintaining a fair competitive system. Shubhada, Inc., B-292437, Sept. 18, 2003, 2003 CPD ¶ 161 at 3-4. Here, there is nothing in the record to independently establish the contents of IMC's original proposal Volume I. In this regard, IMC's corroborating evidence (employee affidavits and surety letter) does not constitute independent corroborating evidence of the original version's contents, including whether it contained an original bid bond instead of a photocopy. See Jay-Brant Gen. Contractors, B-274986, Jan. 10, 1997, 97-1 CPD ¶ 17 at 4 (employee statement attesting to submission of original bid bond is insufficient to establish submission of original bond); P.W. Parker, Inc., B-190286, Jan. 6, 1978, 78-1 CPD ¶ 12 at 3 (evidence from surety, with substantial interest in procurement, cannot be considered independent evidence).

Our office has recognized a limited exception to the rule that negligent loss of proposal information does not entitle the offeror to relief. The exception generally applies where the loss was not an isolated act of negligence, but rather arises out of a systematic failure in the agency's procedures that typically results in multiple or repetitive instances of lost information. Project Res., Inc., B-297968, Mar. 31, 2006, 2006 CPD ¶ 58 at 2; Shubhada, Inc., *supra*, at 4. The exception does not apply here as there is no evidence--and IMC has not suggested--that the agency has, for example, lost the proposal information submitted by other offerors, or previously lost proposal information.

In sum, even accepting the possibility that the agency lost or destroyed the original bid bond, on this record, we believe the agency reasonably rejected IMC's proposal as unacceptable.²

The protest is denied.

Lynn H. Gibson
General Counsel

² IMC also challenges the agency's findings that the surety agent's signature was not original and that a duly authorized IMC officer failed to execute the bid bond. Since IMC's failure to submit an original bid bond otherwise renders its proposal unacceptable, we need not resolve these other issues.