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Comptroller General  
of the United States

United States Government Accountability Office  
Washington, DC 20548

# Decision

**Matter of:** Simont S.p.A.

**File:** B-400481

**Date:** October 1, 2008

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Dr. Matteo Zappile, USCOMED Consultants, and Giobbe Giuseppe Piccolo, for the protester.

Amy M. Steed, Esq., Department of the Navy, for the agency.

Paul N. Wengert, Esq., and Ralph O. White, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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## DIGEST

Protest is denied where invitation for bids required submission of a bid guarantee, the protester failed to submit a bid guarantee, and the agency rejected the bid, notwithstanding the confusion regarding the agency's intent to delete a conflicting mislabeled bid guarantee provision, and the protester's claim that the omission of a bid guarantee was in good faith.

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## DECISION

Simont S.p.A. protests the rejection of its proposal by the Department of the Navy, Naval Facilities Engineering Command (NAVFAC) under invitation for bids (IFB) No. N33191-08-B-1005 for demolition and other services at the Naval Support Activity Capodichino, Naples, Italy. Simont argues that its bid was improperly rejected for lack of a bid guarantee, and explains that it omitted the bid guarantee in good faith based on its reading of the amended IFB.

We deny the protest.

NAVFAC issued the IFB on June 17, 2008, seeking bids to perform the demolition of Building 405 (also known as "Hangar 405") and other structures, asbestos abatement and removal, and site work. The original IFB included a provision requiring a bid guarantee.<sup>1</sup> Specifically, Federal Acquisition Regulation (FAR) § 52.228-1 Bid

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<sup>1</sup> Additionally, block 13B of Standard Form 1442, the solicitation cover page, was checked to indicate that "[a]n offer guarantee is . . . required."

Guarantee (SEP 1996) was reprinted in full, with the insertion of “2 [percent] of the bid price” for the amount of the guarantee. IFB at 11-12. However page 70 of the IFB contained another bid guarantee provision, thus:

5254.201-9300 BID GUARANTEE (JAN 1996)

To assure the execution of the contract and the performance and payment bonds, each bidder/offeror shall submit with its bid/offer a guarantee bond (Standard Form 24) executed by a surety company holding a certificate of authority from the Secretary of the Treasury as an acceptable surety, or other security as provided in FAR Clause 52.228-1, “Bid Guarantee”. Security shall be in a penal sum equal to at least 20 percent of the largest amount for which award can be made under the bid submitted, but in no case to exceed \$3,000,000. The bid guarantee bond shall be accompanied by a copy of the agent’s authority to sign bonds for the surety company.

IFB at 70.

Subsequently, NAVFAC electronically posted three amendments to the IFB. The first and third amendments are not relevant to the protest. Amendment 2 was posted on July 16 and, among other things, stated that “NFAS § 5252.228-9302 Bid Guarantee (JAN 1996)” was being deleted.<sup>2</sup> Amend. 2 at 15. However, the IFB did not contain any provision bearing “§ 5252.228-9302.” The amendment also reprinted in full, again, the text of FAR § 52.228-1, including the requirement that the bid guarantee be “2% of the bid price.” Amend. 2 at 11.

NAVFAC conducted the bid opening on July 24, and Simont submitted the lowest bid. By letter dated July 25, the contracting officer informed Simont that its bid had been rejected because it did not include a bid guarantee. Protest exh. 1. On July 28, Simont filed an agency-level protest, arguing that its bid should not have been rejected because the omission of the bid guarantee was in good faith. By letter dated August 13, NAVFAC denied the agency-level protest. Simont then filed a timely protest with our Office.

In its protest, Simont argues that the omission of the bid guarantee was in good faith, and that it should be allowed to submit a bid guarantee now. Simont states that it

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<sup>2</sup> NFAS is a reference to standard contracting provisions and clauses that are printed in a Naval Facilities Engineering Command Contracting Manual (also known as “NAVFAC P-68”), which is available online. Naval Facilities Engineering Command Contracting Manual, at 52-18 (Dec. 2000 edition) (available online at <https://portal.navy.mil/pls/portal/url/ITEM/FBCB61789B9622D4E0340003BA194E27>) (last visited September 17, 2008).

was misled by the deletion of “NFAS § 5252.228-9302” and the failure to list the bid guarantee as a required element of the bid in the “Instructions to Bidders” section of the IFB. Protest at 2.

Simont also points to the IFB provision requiring prospective bidders to pose any questions at least 10 days before the bid opening. IFB at 5; Amend. 2 at 4. The protester explains that since the bid opening was scheduled for July 24, and amendment 2 was posted electronically on July 16 (which was only 8 days before the bid opening), Simont was prohibited from resolving its confusion over the requirements of the amended IFB.

NAVFAC argues first that amendment 2 eliminated the conflict between the 2 percent bid guarantee required by FAR § 52.228-1 and the 20 percent bid guarantee required by NFAS § 5252.228-9302 by deleting the NFAS provision.

The NAVFAC argument is complicated by the fact that the NFAS bid guarantee provision was misidentified in the original IFB as § 5254.201-9300.<sup>3</sup> As a result, prospective bidders faced a challenge in understanding what was being deleted. Since amendment 2 did not explain that the provision being deleted had a different label in the original IFB, the prospective bidders (1) had to discern that the provision being deleted could be found in the NAVFAC Contracting Manual (made more difficult because its provisions are not part of the Navy FAR Supplement), (2) locate a copy of the Manual (such as at the Internet address noted previously), (3) look up § 5252.228-9302, and (4) search the IFB for text that matched the provision in the manual. Ultimately, bidders had to deduce that, notwithstanding the discrepancy, NAVFAC’s intention was to delete the mislabeled provision.

NAVFAC emphasizes that the amended IFB reiterated the requirement for a two percent bid guarantee, the protester’s bid did not include a bid guarantee of any type, and none of the exceptions in FAR § 28.101-4 applies. Therefore, NAVFAC argues, it was legally required to reject the protester’s bid. See FAR § 28.101-4(a).<sup>4</sup>

A bid guarantee assures that the bidder will, if required, execute a written contract and furnish performance and payment bonds. Curry Envtl. Servs., Inc., B-228214, Dec. 9, 1987, 87-2 CPD ¶ 570 at 2. Where a solicitation requires bidders to submit bid

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<sup>3</sup> It appears that there is no provision bearing this section number in the NAVFAC Contracting Manual.

<sup>4</sup> The Navy also argues that Simont could have filed a protest objecting to the allegedly confusing state created by amendment 2, even though the period for submission of bidder questions had passed. We agree. In general, a protest alleging that an IFB is ambiguous, or otherwise defective, may be filed at any time “prior to bid opening.” Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (2008).

guarantees with their bids, and a bidder fails to do so (and no exception applies), the bid must be rejected. Lawson's Enters., Inc., B-286708, Jan. 31, 2001, 2001 CPD ¶ 36 at 2. Affording a bidder the opportunity to supply its bid guarantee later provides the bidder the option of accepting or rejecting the award by either correcting or not correcting a deficiency, which would be inconsistent with the sealed bidding system. Western Mgmt. Servs., Inc.; Mac-Bestos, Inc., B-266147, B-270153, Jan. 23, 1996, 96-1 CPD ¶ 17 at 2-3.

In our view, amendment 2 confirmed the continuing validity of the original bid guarantee provision, FAR § 52.228-1. We believe that any ambiguity caused by NAVFAC's errors was patent and therefore had to be protested before the deadline for submission of bids. 4 C.F.R. § 21.2(a)(1). Thus, even if the error by Simont was subjectively in good faith, its bid was properly rejected because it did not include the bid guarantee required by the IFB, notwithstanding the confusion regarding NAVFAC's intent to delete the conflicting mislabeled bid guarantee provision.

The protest is denied.

Gary L. Kepplinger  
General Counsel