

DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE: B-215723

DATE: December 7, 1984

MATTER OF: Consolidated Technologies, Inc.

DIGEST:

1. Agency properly rejected as nonresponsive a bid with bid guarantee \$26,189.67 less than required amount since deficiency is not de minimus nor does it fall within any of the regulatory exceptions provided for acceptance of otherwise deficient bid guarantees.
2. When required, a bid guarantee is a material part of a bid. Therefore, when an adequate bid guarantee is not furnished with the bid, the bid is nonresponsive and cannot be made responsive by submitting additional documents after bid opening nor by reference to past performance or specific cost savings to the government.

Consolidated Technologies, Inc. (CTI) protests the Department of the Navy's rejection of the firm's bid as nonresponsive under Invitation for Bids (IFB) No. N00024-84-B-2138 for Seaborne Power Target boats. The bid was rejected because the accompanying bid bond was deficient.

We deny the protest.

The solicitation invited bids for quantities of 12, 13, 14 and 15 boats, advising bidders that the award quantity would depend on the funding available. The IFB also included an option for an additional four boats, to be exercised within 1 year of award. Bidders were required to price all possible combinations of initial and option quantities by submitting a separate base quantity price for 12, 13, 14 and 15 boats, and four separate option prices, one for each base quantity. Bids were to be

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evaluated by adding the option prices to the corresponding base quantity prices--in effect calculating four total bids for each bidder--and award was to be based on the low total bid price for the award quantity plus the corresponding option price.

The solicitation required that bids be accompanied by a bid guarantee in the penal sum equal to 20 percent of the total price bid for 19 boats. The solicitation also notified bidders that bids not accompanied by a bid guarantee in the required amount would be rejected without further consideration, except as otherwise provided in paragraph 10-102.5 of the Defense Acquisition Regulation (DAR).

CTI's price bid for 19 boats was \$510,948.38, 20 percent of which is \$102,189.67. However, its bid guarantee was for the penal sum expressed as 20 percent not to exceed \$76,000. Because the penal sum of the bond was limited to \$76,000 it was short of 20 percent of the price bid by \$26,189.67.

The applicable DAR and Federal Acquisition Regulation (FAR) provisions are substantively the same, but since the solicitation was issued after April 1, 1984, we will apply the FAR provisions even though the DAR provisions are cited in the solicitation. FAR § 28.101-4, 48 Fed. Reg. 41,102, 42,287 (1983) (to be codified at 48 C.F.R. § 28.101-4), reads in pertinent part:

"Noncompliance with a solicitation requirement for a bid guarantee requires rejection of the bid, except in the following situations when the noncompliance shall be waived
. . . .

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(b) The amount of the bid guarantee submitted is less than required but is equal to or greater than the difference between the bid price and the next higher acceptable bid.

(c) The amount of the bid guarantee submitted, although less than that required by the solicitation for the maximum quantity bid upon, is sufficient for a quantity for which the bidder is otherwise eligible for award. Any award to the bidder shall not exceed the quantity covered by the bid guarantee."

The next low bidder--to which the Navy has already awarded a contract for the full 15 boat requirement with the option for 4 more--bid \$599,461.00 total for 19 boats. Therefore the difference between CTI's bid of \$510,948.38 and the next low bidder was \$88,512.62; \$12,512.62 more than CTI's bid bond amount of \$76,000.00.

CTI argues that, under the authority of FAR, § 28.101-4(c), 48 Fed. Reg. 42,287, the Navy should award it a contract for 14 boats without an option for any more. However, if the Navy awarded CTI 14 boats, it would still have a requirement for at least one more and possibly 5 more boats. Under this solicitation, which provided for one award rather than split awards, with the award quantity dependent upon the amount of funds available, the Navy could not properly award less than the 16 boats for which it has funds and award one more boat with or without an option for 4 more to another builder. For this reason, we agree with the Navy that FAR, § 28.101-4(c), 48 Fed. Reg. 42,287, does not apply here.

CTI also argues that the contracting officer could have waived its failure to meet the bid guarantee requirement by applying the de minimus rule articulated in Arch Associates, Inc., B-183364, Aug. 13, 1975, 75-2 CPD ¶ 106. In Arch, we pointed out that the purpose of a bid bond is to assure that the successful bidders will execute the contract and provide the necessary performance bond. In this connection, we found that the government's interests were adequately protected by a \$55,000 bond, only \$254.00 less than the 20 percent required. The de minimis rule is based on the theory that an insignificant deficiency in the bid guarantee can be waived or cured as a minor informality under what is now FAR, § 14.405, 48 Fed. Reg. 104, 42,180 (1983) (to be codified at 48 C.F.R. § 14.408). In this case the deficiency is \$26,189.61 or about 25 percent of the amount required. We do not view this as an insignificant deficiency.


CTI makes a number of additional arguments in support of its position that it should be awarded a contract. It argues that the \$76,000.00 figure on the bond form was an obvious clerical error while the 20 percent figure was not. To support this argument, it offers evidence of the surety's intent. CTI also argues that the Navy should have considered CTI's past performance and the cost savings the government would realize by awarding a contract to CTI for either 14 or 15 boats with or without the option quantity. It also takes exception to the Navy's requirement for a bid guarantee that covers the option quantity. All of these arguments must fail. CTI's bid guarantee was inadequate, therefore making its bid nonresponsive. A nonresponsive bid cannot be made responsive by correction of errors by use of extrinsic evidence, Hydro-Dredge Corp., B-214408, Apr. 9, 1984, 84-1 CPD ¶ 400; Wagner Moving and Storage, B-185725, Apr. 8, 1976, 76-1 CPD ¶ 237, nor because of past performance, Schneider Security Agency, Inc., B-206083, Mar. 4, 1982, 82-1 CPD ¶ 202, nor because award to another bidder will cost the government more for a particular requirement. Davisville Construction Co., B-190080, Dec. 12, 1977, 77-2 CPD ¶ 456.

Moreover, with respect to CTI's contention that the Navy should not have required a bid guarantee on the option quantity, that argument is untimely because it should have been raised prior to bid opening. See 4 C.F.R. § 21.2(b)(1) (1984). We do observe, however, that because of the contingent nature of an option and the purpose of a bid guarantee, it is not generally in the government's interest to require a bid guarantee to cover option quantities. A bid guarantee is designed to assure that a bidder will not withdraw within the designated acceptance period and will execute a written contract and furnish the required bonds within the period specified in the solicitation. FAR, § 28.001, 48 Fed. Reg. 41,102, 42,286 (1983) (to be codified at 48 C.F.R. § 28.001). An option is simply a unilateral right of the government by which, for a specified time, the government may elect to purchase additional supplies or services called for by the contract, or to extend contract performance. FAR, § 17.201, 48 Fed. Reg. 41,102, 42,236 (1983) (to be codified at 48 C.F.R. § 17.201); see 41 Comp. Gen. 760 (1962). The government generally does not desire to pay the contractor, in the form of a price that includes a

premium for a bond that covers option quantities or periods, for the protection of only a contingent interest. See Pacific Coast Utilities Service, Inc., B-209003.2, Jan. 20, 1983, 83-1 CPD ¶ 73, where we pointed out that generally bid bonds are not required to cover option periods.

Unlike the Pacific Coast case, and a previous case on which it relied, this case involves option quantities rather than option periods. While options to extend a contract performance period for subsequent years generally may not be exercised at time of award, options for increased quantities may be exercised at that time. Nonetheless, even though that means when such an option is exercised at award a bid bond that does not cover option quantities would not cover the total award amount, we believe the Pacific Coast rationale applies because at the time the solicitation requiring a bid bond is issued, the exercise of the option is contingent. We think that overall the government would spend more, because of higher bid prices, if it required bid bonds in every case to cover that contingency than it would save by being fully protected by a bid bond in the infrequent case where a bidder failed to execute contract documents after the government exercised an option at award time. We are therefore recommending to the Secretary of the Navy that in the future bid guarantees be based on the amount bid for the base quantities or periods only.

The protest is denied.


Acting Comptroller General
of the United States