



Comptroller General
of the United States
Washington, D.C. 20548

Shimamura

Decision

Matter of: Haag Electric and Construction Inc.
File: B-240974
Date: January 11, 1991

David A. Lewis, Esq., Doehrman & Lewis, for the protester.
William B. Lich for Delta Electric Company, Inc., an interested party.
Bruce H. Segal, Esq., and James K. White, Esq., Department of Commerce, for the agency.
Amy Mito Shimamura, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Bid bond in the amount of 20 percent of the bid price submitted by the low bidder on an invitation for bids (IFB) for an indefinite quantity construction contract, which did not solicit bid prices, but instead requested bidders to bid multipliers that would be applied to pre-priced items in performing the contract, is insufficient to meet the IFB requirement for a \$20,000 bid bond, since the IFB only provided for a \$50,000 minimum value and stated no estimate of the government's anticipated needs; thus, the bid bond amount would be \$10,000. However, the low bid may be accepted under applicable regulation because the difference between the low bid price and the next higher price is less than the insufficient \$10,000 bid bond amount under any reasonable calculation.

DECISION

Haag Electric and Construction, Inc. protests the rejection of its bid as nonresponsive under invitation for bids (IFB) No. 51-WCBC-1-06003RA, issued by the Department of Commerce for construction work at the Bureau of Census, Jeffersonville, Indiana.^{1/} Haag contends that its bid was improperly rejected for failing to provide an adequate bid bond.

We sustain the protest.

^{1/} No award has been made.

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The IFB was issued on June 25, 1990, for an indefinite quantity, multi-trade contract for various undefined construction projects for a base year and 2 option years. The contract work is to be ordered by delivery orders specifying the precise work to be performed. The IFB did not request fixed prices for the contract work, but instead incorporated an exhaustive list of pre-priced work elements, and required bidders to bid a single multiplier.^{1/} This multiplier will be applied to the pre-set prices for each task covered by a delivery order to determine the fixed price of that delivery order. The IFB provided that the government is required to place orders totalling a minimum of \$50,000 and not exceeding \$750,000 under the contract.

The IFB included a "NOTICE OF REQUIRED BID GUARANTEE," as follows:

"Each bidder must submit a bid guarantee in the amount of \$20,000. If a bid bond is submitted, it should be on a Standard Form 24"

The IFB also incorporated Federal Acquisition Regulation (FAR) § 52.228-1, which advised potential bidders that the "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."

Two bids were submitted in response to the IFB. Haag was the apparent low bidder with a multiplier of .80. Delta Electric Company, Inc., the only other bidder, bid a multiplier of .8275. Haag submitted with its bid a bid bond on a Standard Form 24 in the amount of 20 percent of the bid price. The agency found that this bond was not in the amount of \$20,000, as required by the IFB, and rejected Haag's bid as nonresponsive.

A bid guarantee is a material part of a bid and when a bond is required, it must be furnished with the bid package. Drill Constr. Co., Inc., B-239783, June 7, 1990, 90-1 CPD ¶ 538. A bid that contains a bid bond that does not comply with the solicitation requirements in all material respects must be rejected unless it falls under one of certain specified exceptions. Id; FAR §§ 14.404-2(j), 28.101-4 (1990).

^{1/} The IFB advised bidders to show the multiplier as a decimal. For example, if a bidder wanted to bid the same price as the schedule unit prices, the multiplier would be shown as 1.00; if a bidder wanted to discount the schedule prices by 20 percent, the multiplier would be shown as .80.

Haag contends that its bid was responsive because the Standard Form 24 specifically permits expressing the penal sum of the bid bond as a percentage of the bid price. Haag also argues that the penal sum of its bid bond could substantially exceed \$20,000 since the contract value could be as much as \$750,000 for the contract work (20 percent of \$750,000 is \$150,000). Commerce argues that Haag's bid bond is defective since it is expressed in terms of percentage of bid price and there is no bid price in this IFB.

We think Commerce is reading the obligation of Haag's surety on the bid bond too narrowly and without consideration of the terms of the IFB. It is apparent from the execution and submission of the bid bond that the surety intended to bind itself to fulfill the requirements of that bond to the extent of 20 percent of the bid price. Charles Bainbridge, Inc., B-186060, July 23, 1976, 76-2 CPD ¶ 160. While it is true that the calculation of the surety's liability in this case is made more difficult because bidders did not bid total or unit prices, the IFB expressly guaranteed a minimum \$50,000 price. Bidders (and their sureties) were cognizant that this amount would be paid under the contract, such that a bid bond expressed as 20 percent of the bid price would be enforceable based on this amount.

This calculation is analogous to that made in Charles Bainbridge, Inc., B-186060, supra, and Free State Builders, Inc., B-185999, July 12, 1976, 76-2 CPD ¶ 35, which involved IFBs issued by the General Services Administration (GSA) for requirements contracts for painting. The GSA IFBs also did not request bid prices, but only "percentage factors" to be applied to pre-priced items. In those cases, we considered the issue of the sufficiency of bid bonds, expressed in terms of a percentage of bid price, and found the estimated dollar volume estimates for the requirements contracts that were expressed in each IFB could be used as a mathematical base to determine the amount of the bid bond, even though there was no guarantee that this amount of work would be ordered under the contracts. We reasoned that this figure represented the government's good faith estimate of the contract work and the surety's liability could reasonably be calculated from this figure.

Here, while there is no estimated dollar amount stated in the IFB for the indefinite quantity contract, the IFB does provide for a \$50,000 minimum that can be used as a mathematical base to calculate the bid price and the sufficiency of the bid bond. Thus, Haag's 20 percent bid bond is calculated as \$10,000, an amount insufficient to satisfy the \$20,000 bid bond requirement specified in the IFB.

Haag suggests that the \$750,000 maximum order limitation be used to calculate the bid bond amount since the bid bond surety would anticipate that a contractor could be liable for this amount under the contract. However, this amount is not represented in the IFB, or otherwise by Commerce, as a good faith government estimate of the anticipated contract work, but rather is a "realistic" estimate based on "the most current information available" of the maximum possible contract value. See FAR § 16.504(a)(1). In the absence of a government estimate in the IFB on which bid prices could be calculated, and since the government has the obligation to order only \$50,000 worth of work under the contract, we think Haag's bid bond surety could limit its maximum liability to 20 percent of \$50,000, inasmuch as the surety's obligation on the bid bond expires upon execution of the contract and delivery of acceptable performance and payment bonds.^{2/} See BKS Constr. Co., 66 Comp. Gen. 492 (1987), 87-1 CPD ¶ 558. Thus, Haag's bid bond was insufficient in amount to satisfy the IFB's \$20,000 requirement.

As indicated above, there is a list of exceptions to the general rule that an insufficient bid bond requires the rejection of a bid. FAR § 28.101-4(c). One exception set forth in FAR § 28.101-4(c)(2) applies to situations where the amount of the bid guarantee submitted, although less than that required by the IFB, is equal to or greater than the difference between the offered price and the next higher acceptable bid. See American Roofing and Metal Co., Inc., and Port Enters., Inc., a Joint Venture, B-239457, Aug. 24, 1990, 90-2 CPD ¶ 153.

Because the bids here are expressed in terms of a multiplier, the calculation of the price difference between Haag's and Delta's bids also presents some difficulties. However, this calculation is possible and any reasonable calculation of this difference indicates it is considerably less than Haag's surety's \$10,000 bid bond amount because of the close proximity of the two bids (.80 and .8275).

The question of how the difference between bid prices can be calculated where bid prices are not solicited, but only percentage factors, was also addressed in the Bainbridge and Free State cases. Those cases found that the difference

^{2/} This case is different from that in A.R.S. Constr. Co., B-228476, Jan. 27, 1988, 88-1 CPD ¶ 82, where the IFB expressly required bonds to be based on a percentage of the estimated quantities stated in the IFB for an indefinite quantities contract, such that a bid bond based on a percentage of the minimum guaranteed amount was considered insufficient.

between the two low bids can be calculated by applying the percentage factor to the government estimates for the requirements contracts, that being the same figure used to calculate the penal amount of the low bidder's bid bond that was expressed in terms of a percentage of bid price.

Similarly, the difference between Haag's and Delta's bids can be calculated using \$50,000 as a mathematical base. For example, if the multipliers are directly applied to \$50,000, there would be a difference between the bid prices of \$1,375 ($(\$50,000 \times .8275)$ minus $(\$50,000 \times .80)$). A calculation of the difference in the dollar amounts of contract value, to which each bid multiplier would be applied to equal \$50,000, also is considerably less than \$10,000; that is, Haag's .80 multiplier times \$62,500 equals \$50,000, while Delta's .8275 multiplier times \$60,423 equals \$50,000, a difference of only \$2,077.

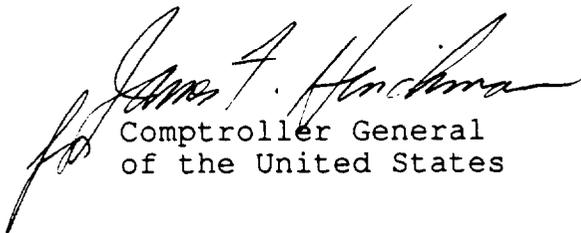
It could be contended that the minimum order amount is not the best assumption on which to base a comparison between the bid prices to determine the applicability of this exception to the bid bond requirements. However, the apparent reason for this exception is that the surety's liability on a bid bond is generally the difference between the low bid and the next highest acceptable bid. Since Commerce has not made an estimate of the contract work that would represent an accurate representation of the government's anticipated needs, we think the government could not successfully recover more than the difference between the two low bids based on the minimum guaranteed amount. Similarly, we do not think the \$750,000 maximum order limitation is a reasonable figure on which to calculate the difference between the bids, since the calculated difference between bids, based on a maximum order limitation, is too speculative on which to base a surety's liability.^{3/} See American Roofing and Metal Co., Inc., and Port Enters., Inc., a Joint Venture, B-239457, supra (options cannot be used to calculate bid prices for the purposes of determining whether a bid bond falls under this exception).

Commerce has not determined that it would be detrimental to the government's interest to accept Haag's low bid and we can perceive no reason why it would be detrimental. Under the circumstances, Commerce is required to waive the insufficient bid bond. See Charles Bainbridge, Inc., B-186060, supra.

We sustain the protest.

^{3/} If the \$750,000 figure were used for purpose of calculating the penal amount of the bid bond, Haag's bond would equal \$150,000 and would thus be sufficient.

We recommend that award be made to Haag if it is otherwise responsible. The protester is also entitled to recover its costs of filing and pursuing the protest, including reasonable attorneys' fees. 4 C.F.R. § 21.6(d)(1) (1990). Haag should submit its claim for protest costs directly to the agency. 4 C.F.R. § 21.6(e).

James F. Henchman
Comptroller General
of the United States