B. Timmerman

Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Seither & Cherry Company

File: B-242220

Date: April 10, 1991

Gary R. Martz, Esq., Baker & Hostetler, for the protester.
Craig R. Schmauder, Esq., Department of the Army, for the agency.
Barbara R. Timmerman, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Where a commercial bid bond limits the surety's obligation to the difference between the amount of the awardee's bid and the amount of a reprocurement contract, the terms of the commercial bond represent a material departure from the rights and obligations of the parties as set forth in the solicitation, which requires the bond to cover any cost of reacquiring the defaulted work; this deviation renders the bid bond deficient and the bid nonresponsive.

DECISION

Seither & Cherry Company protests the rejection of its bid under invitation for bids (IFB) No. DACA45-90-B-0100, issued by the United States Army Corps of Engineers, for the construction of production support facilities at the Iowa Army Ammunition Plant, Middletown, Iowa. Seither & Cherry's bid was rejected because the contracting officer determined that the company's bid bond was defective.

We deny the protest.

The IFB required each bidder to provide a bid bond in an amount equal to 20 percent of its bid price or $3,000,000, whichever was less. The IFB also provided that in the event the contract was terminated for default, the bidder was liable for any cost of acquiring the work that exceeded the amount of its bid. At bid opening on August 30, 1990, the agency received three bids. Seither & Cherry was the low bidder at $1,097,077, and C. Iber & Sons, Inc. submitted the second lowest bid at $1,218,423. Seither & Cherry submitted with its

bid a bid bond on a commercial form rather than the Standard Form 24 (SF-24) bid bond.

The Corps found Seither & Cherry's low bid nonresponsive because its commercial bid bond did not obligate the surety as required by the IFB. The Corps then made award to C. Iber & Sons on November 23. Seither & Cherry argues that since the commercial bond form submitted was not substantively different from the SF-24, its bid should not have been rejected as nonresponsive.

A bid guarantee assures that the bidder will not withdraw its bid within the time specified for acceptance and, if required, will execute a written contract and furnish performance and payment bonds. When the guarantee is in the form of a bid bond, it secures the liability of the surety to the government if the holder of the bond fails to fulfill these obligations. W.R.M. Constr., Inc., B-239847, Sept. 18, 1990, 69 Comp. Gen. ___, 90-2 CPD ¶ 227. The guarantee also is available to offset the cost of reprocurement of the goods or services in question. See Kiewit W. Co., 65 Comp. Gen. 54 (1985), 85-2 CPD ¶ 497. A bidder's use of a commercial bid bond form, rather than the standard government form, is not per se objectionable, since the sufficiency of the bond does not depend on its form, but on whether it represents a significant departure from the rights and obligations of the parties as set forth in the IFB. W.R.M. Constr. Inc., B-239847, supra.

Here the commercial form used by Seither & Cherry significantly deviated from the rights and obligations of the parties as set forth in the SF-24 and IFB. The form provided by Seither & Cherry states in pertinent part that:

> "(T)he Principal and Surety will pay unto the Obligee the difference in money between the amount of the bid of the said Principal and the amount for which the Obligee legally contracts with another party to perform the work if the latter amount be in excess of the former, but in no event shall liability hereunder exceed the penal sum hereof."

Thus, the commercial form, by its terms, limits recovery in the event of a default to the difference between Seither & Cherry's bid and the amount the agency contracted for with another firm to perform the same work. In contrast, the IFB and the SF-24 provide that if the contractor defaults in failing to execute the contract or to provide acceptable performance and payment bonds, the surety is obligated to pay the government "for any cost of acquiring the work which exceeds the amount of its bid." Under this provision, we think the government should be able to recover such

administrative costs or the other in-house costs of accomplishing the performance of the work in the event of the failure by a contractor to fulfill its obligations, and that Seither & Cherry's proffered commercial bid bond obligation was limited to the difference between the bidder's bid price and the amount of the replacement contract and did not cover such costs.

Seither & Cherry has submitted an affidavit from its surety stating that the surety interprets the language of the commercial form to obligate the surety to pay not only this difference but all costs directly attributable to the default of the principal (such as the administrative costs of a reprocurement). However, this interpretation is inconsistent with the express language used in the commercial form. We have consistently regarded language, similar or identical to that quoted above in Seither & Cherry's bid bond, as limiting the surety's liability to the difference between the bid amount and the replacement contract amount, and found that this limitation is material. See, e.g., W.R.M. Constr., Inc., B-239847, supra; Allgood Elec. Co., B-235171, July 18, 1989, 89-2 CPD ¶ 58; Kiewit W. Co., 65 Comp. Gen. 54, supra.

Seither & Cherry also argues that contrary to our decisions, it is not clear that the surety would be liable under law for these additional damages beyond the difference in bid prices, even if an SF-24 were submitted. However, Federal Acquisition Regulation (FAR) § 52.228-1(e) provides that "in the event the contract is terminated for default, the bidder is liable for any cost of acquiring the work that exceeds the amount of its bid. The bid bond, or bonds or notes of the United States, is available to offset the difference." (Emphasis added.) We think this provision (included in this IFB) makes clear the surety's liability for such costs.1/

Seither & Cherry also argues that this deviation should be waived pursuant to FAR § 28.101-4(c)(2), which provides that noncompliance with the solicitation requirements for a bid guarantee shall be waived if "the amount of the bid guarantee submitted is less than required, but is equal to or greater than the difference between the offer price and the next higher acceptable offer." Seither & Cherry argues that its bid bond in the amount of 20 percent of the bid ($219,453.90) is more than sufficient to cover the $121,436 difference between its bid and the next low bid plus applicable administrative expenses. In response to a similar argument about the applicability of this exception to a commercial bid bond that similarly limited the surety's liability, we

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1/ Ironically, Seither & Cherry's surety concedes that it would be liable for such costs under an SF-24.

observed that "this [FAR] provision is only an objective administrative standard for determining the sufficiency of a bid bond since it presumes that the government will not be faced with the necessity for a reprocurement action" and that this exception is not applicable where the commercial bid bond does not allow for recovery of "the full measure of damages otherwise available to the government." Kiewit W. Co., 65 Comp. Gen. 54, supra; see also American Roofing and Metal Co., Inc., and Port Enters., Inc., a Joint Venture, B-239457, Aug. 24, 1990, 90-2 CPD ¶ 153. In this regard, as discussed in Kiewit, many defaults on the bidder's obligation to provide acceptable payment and performance bonds occur after bids have expired and the government has to incur the additional expense associated with a reprocurement, such that the amount of the difference between the bid prices would not be a fair measure of the government's damages.

Seither & Cherry finally argues that the agency effectively waived the defect in the bid bond by the request to extend Seither & Cherry's bid expiration date--at which time Seither & Cherry tendered a properly executed SF-24--and by the agency's failure to mention this defect in the 3-month period between bid opening and award to the next low bidder, and only conveying to Seither & Cherry that its bid was considered nonresponsive 6 days after award, when Seither & Cherry inquired about the status of the procurement. A deficiency in a bid bond that renders the bid nonresponsive may not be corrected after bid opening. Eagle Asphalt & Oil Inc., B-240340, B-240344, Nov. 14, 1990, 90-2 CPD ¶ 395. Moreover, while we think the Corps should have earlier advised Seither & Cherry that its bid was nonresponsive, its failure to do so does not affect the validity of the rejection of the nonresponsive bid. See A.D. Roe Co., Inc., 54 Comp. Gen. 271 (1974), 74-2 CPD ¶ 194; Johnson Controls Inc., B-235517, Aug. 25, 1989, 89-2 CPD ¶ 177; Rodenberg's Floor Coatings, Inc., B-215807, Nov. 23, 1984, 84-2 CPD ¶ 548. Thus, the Corps could not waive this deficiency so as to accept Seither & Cherry's bid. Id.

The protest is denied.

Robert P. Murphy
for James F. Hinchman
General Counsel