



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Kato Corporation--Reconsideration

File: B-250605.2

Date: March 19, 1993

Karl Dix, Jr., Esq., and George Papaioanou, Esq., Smith, Currie & Hancock, for the protester.

John Pettit, Esq., Department of the Air Force, for the agency.

Henry J. Gorczycki, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. The General Accounting Office affirms dismissal of a protest--which was dismissed on the basis that the protester was not an interested party under the Bid Protest Regulations to raise the particular protest ground--where, under the theory of the protest that a bid bond defect is a waivable minor deficiency, a lower priced bidder with the same bid bond defect would be in line for award ahead of the protester.

2. Where, in response to an invitation for bids for an indefinite quantity of construction work with a guaranteed minimum price of \$50,000, a bid bond is expressed as 20 percent of the bid price and the bid price is expressed as a coefficient multiplier, the putative contract value for determining the penal amount of the bid bond is \$50,000 and the bond's penal amount is \$10,000 (20 percent of the \$50,000); in the absence of a firm government estimate, this figure must be the same putative contract value that is used in calculating whether the insufficient bid guarantee can be waived under Federal Acquisition Regulation § 28.101-4(c)(2), which provides for waiver where the insufficient bid guarantee is greater than the difference between the bid price and the next higher acceptable bid price.

DECISION

Kato Corporation requests reconsideration of our dismissal of its protest against the award under invitation for bids (IFB) No. F64605-92-B-0017 issued by the Department of the Air Force for construction and repair of curbs, walkways and driveways at Hickam Air Force Base, Hawaii. We dismissed Kato's protest because we found that Kato was not an interested party to protest the award.

We affirm the dismissal.

The IFB contemplated the award of an indefinite delivery/ indefinite quantity, fixed-price contract. The IFB stated that the guaranteed minimum value of the contract was \$50,000 and that a statutory cost limitation of \$300,000 applied. The IFB also stated that the cost of the proposed construction would range from \$250,000 through \$500,000.¹ Instead of requesting that bid prices be expressed in dollars and cents, the IFB provided a price list for all the work that the Air Force could order under the contract and instructed bidders to submit their bid prices in the form of a coefficient by which the list prices would be multiplied to determine the price of the work actually ordered under the contract. In other words, the coefficient bid by each bidder represented the percentage of the IFB list prices at which the bidder was offering to perform the contract.² Award was made on the basis of the lowest priced bid, which would be represented by the lowest bid coefficient submitted. The IFB instructed bidders to submit bids with a bid bond in the amount of \$25,000, and specifically admonished bidders to express the bid bond amount in dollars and cents.

Bid opening was on September 9, 1992. Haron Construction, Inc. was the apparent low bidder with a bid coefficient of .866, followed by Kato at .992, and Projects Plus Inc. at .997. Both Haron and Kato submitted bid bonds with the amount expressed as 20 percent of the bid price, while Projects Plus's bid bond satisfied the \$25,000 bid bond requirement. The Air Force rejected both Haron's and Kato's bids as nonresponsive because the bond amounts were not expressed in dollars and cents. By letter dated September 18, 1992, the Air Force informed Kato that its bid was rejected and, on that same date, award was made to Projects Plus.

Kato protested in our Office on September 29, asserting that the defect in its bid bond constituted a waivable minor deficiency. We dismissed Kato's protest because, even if this defect was waivable, Haron's bid bond deficiency was identical to Kato's, which placed Haron, the low bidder, in line ahead of Kato to receive the award if the defect were

¹We note that the maximum value of the contract identified in the RFP as \$500,000 exceeds the \$300,000 statutory limitation.

²For example, a bid coefficient of 1.0 (100 percent) indicates that the bidder would perform the contract at the stated list prices; bid coefficients of .9 and 1.1 indicate that the bidders would perform the contract at 90 percent and 110 percent, respectively, of the stated list prices.

waived. Since Kato's protest did not challenge Haron's eligibility for award, we found that Kato was not an interested party to protest the award under the Competition in Contracting Act of 1984, 31 U.S.C. §§ 3551-3556 (1988), and our Bid Protest Regulations, 4 C.F.R. § 21.0(a) (1992), and dismissed the protest.

In its request for reconsideration, Kato alleges that we erred in finding that its argument for waiving its bid bond deficiency would apply equally to Haron's bid. In this regard, Kato states that although its bid bond and Haron's bid bond do not identify a dollar value, the dollar value of the bonds should be calculated using the guaranteed minimum contract amount of \$50,000. Therefore, both Kato and Haron submitted bid bonds of 20 percent of \$50,000, or \$10,000. Although Kato acknowledges that \$10,000 is insufficient to satisfy the IFB requirement for bid bonds of \$25,000, it asserts that its bid bond deficiency should be waived pursuant to Federal Acquisition Regulation (FAR) § 28.101-4(c)(2) because the difference between its bid price and the bid price of the next lowest bidder, Projects Plus, would always be less than \$10,000, even at the maximum contract value of \$300,000.³ Kato asserts that this is not the case with Haron's bid price because it alleges that the difference between Haron's bid price and the bid price of the next lowest bidder, Kato, exceeds Haron's \$10,000 bid bond amount at a contract value of \$79,366 or higher. Since Haron's \$10,000 bond amount is not greater than the difference between these two bid prices at all possible contract values, Kato argues that Haron's bid bond deficiency may not be waived. Therefore, Kato argues that it is an interested party, since its bid bond defect is waivable and Haron's is not. We disagree.

A bid guarantee is a material part of a bid and, when a bid 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 containing 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. Non-compliance with a solicitation requirement for a bid guarantee must be waived where the amount of the bid guarantee submitted is less than required, but is equal to or greater than the difference between the offered price and the price of the next higher acceptable bid. FAR § 28.101-4(c)(2).

³This difference, as computed by Kato, is as follows:
.997 - .992 = .005; .005 x \$300,000 = \$1,500.

Here, it is apparent from the execution and submission of the bid bonds that the sureties for Kato's and Haron's bid bonds intended to bind themselves to fulfill the requirements of the bonds up to 20 percent of the bid price. Haaq Elec. and Constr. Inc., 70 Comp. Gen. 180 (1991), 91-1 CPD ¶ 29; Charles Bainbridge, Inc., B-186060, July 23, 1976, 76-2 CPD ¶ 160. On an indefinite delivery/indefinite quantity contract with a coefficient multiplier price, we have found that the guaranteed minimum contract price should be used as the putative contract price for purposes of calculating the dollar value of bid bonds expressed as a percentage of contract price. Haaq Elec. and Constr. Inc., supra; cf. Charles Bainbridge, Inc., supra (for a requirements contract with a coefficient multiplier price, the bond value was based on the stated estimated contract price); Free State Builders, Inc., B-185899, July 12, 1976, 76-2 CPD ¶ 35 (same).

In using the guaranteed minimum price of \$50,000 to calculate the bid bond amounts--which is conceded by Kato to be the figure appropriate for determining the bid bond amount--both Kato's and Haron's bid bonds would be at the insufficient amount of \$10,000. Using the same figure of \$50,000 to represent the bid price, we calculate the difference between Haron's bid price and Kato's next lowest bid price to be \$7,275.⁴ Since this difference is less than the \$10,000 bid bond amount under this scenario, Haron's insufficient bid bond would satisfy the waiver provision at FAR § 28.101-4(c)(2), as did Kato's, and Haron would be in line for award ahead of Kato. Therefore, Kato would not be an interested party to protest the award.

⁴Since the IFB list price for Haron's assumed contract price of \$50,000 is \$57,737, which is \$50,000 divided by .866 (Haron's bid coefficient), the comparable putative contract price for Kato's bid would be \$57,275, which is \$57,737 multiplied by .992 (Kato's bid coefficient). The difference between Haron's \$50,000 putative contract price and the comparable Kato contract price of \$57,275 is therefore \$7,275. For purposes of the foregoing calculations, we assumed that Kato is the next lowest acceptable bidder; however, even if we use the awardee as the next lowest acceptable bidder, the difference between Haron's and Projects Plus's bid prices is \$7,564 under this scenario. We are unaware of any other logical method of determining the differences between the bid prices, since they were bid as multipliers. In any event, Kato concedes that the defect in Haron's bid bond can be waived at a \$50,000 contract value.

Kato essentially argues that once the amount of Haron's bid bond is calculated at \$10,000, which is insufficient to satisfy the solicitation requirement, that bond amount must be large enough to cover the difference in bid prices at all possible contract prices under the terms of the solicitation. We rejected a similar argument in Haag Elec. and Constr. Inc., supra, where we found that, if the value of a bid bond calculated using a putative contract value is insufficient to satisfy the IFB bid bond requirement, the same putative contract value should be used to calculate the difference in bid prices in determining if the bond deficiency is waivable under FAR § 28.101-4(c)(2). In Haag, we found that it would be too speculative to use the maximum possible contract price as the bid price for calculating the difference in bid prices.

Here, while it is true that the solicitation stated that the estimated cost of proposed construction would range between \$250,000 and \$500,000, the solicitation also stated a \$300,000 statutory cost limitation. Thus, we find no cost figure that could be reasonably characterized as a firm estimate of the ultimate contract value, and we regard any putative contract value, other than the guaranteed minimum price, to be too speculative on which to determine the difference in bid prices for determining whether to accept a bid containing an insufficient bid guarantee. Id. Thus, as discussed above, in calculating whether a waiver under FAR § 28.101-4(c)(2) is appropriate, the \$50,000 minimum contract amount should be used.

Thus, we are still of the view that Kato was not an interested party eligible to protest this award. Even if we were to have sustained its protest asserting that the bid bond deficiency should be waived, Haron would have been in line to receive the contract ahead of Kato, since Kato did not show that Haron would have been otherwise ineligible for award. See Discount Mach. and Equip., Inc., B-230721, June 9, 1988, 88-1 CPD ¶ 550.

We affirm our prior dismissal.


for James F. Hinchman
General Counsel