



Comptroller General
of the United States

Washington, D.C. 20548

150-153

11/22/93

Decision

Matter of: Alco Environmental Services, Inc.--
Reconsideration

File: B-251053.6

Date: September 27, 1993

Terrence M. O'Connor, Esq., for the protester.
Diane D. Hayden, Esq., Department of the Navy, for the
agency.
Aldo A. Benejam, Esq., and Christine S. Melody, Esq., Office
of the General Counsel, GAO, participated in the preparation
of the decision.

DIGEST

Reconsideration request is denied where protester does not show that decision dismissing its protest contained any errors of fact or law or present information not previously considered that warrants reversal or modification of the decision.

DECISION

Alco Environmental Services, Inc. requests that we reconsider our decision in Hugo Key & Son, Inc.; Alco Envt'l Servs., Inc., B-251053.4; B-251053.5, July 15, 1993, 93-2 CPD ¶ 21, in which we dismissed Alco's protest of the Department of the Navy's decision to cancel invitation for bids (IFB) No. N62472-93-B-0814, for demolishing and removing a wood framed structure on Gould's Island, in Narragansett Bay. We dismissed Alco's protest based upon our finding that Alco submitted a nonresponsive bid, rendering the firm ineligible for award under the canceled IFB. Since Alco would not have been in line for award even if its protest were sustained, we found that Alco was not an interested party under our Bid Protest Regulations eligible to protest the agency's decision to cancel the solicitation.

We deny the request for reconsideration.

The IFB, issued on August 24, 1992, contemplated the award of a combination firm, fixed-price/indefinite quantity contract for the required work. Bidders were required to submit a firm, fixed price for dismantling, demolishing, and removing the building, contract line item number (CLIN) 0003, and unit and extended prices for the indefinite

quantity work, CLIN 0005AA (asbestos removal inside building) and CLIN 0005AB (demolition and removal of bulk wastes, and steel masonry), based on estimated quantities set forth in the IFB for each of those CLINs. The IFB also provided a space for bidders to include a price for additional bonding, CLIN 0005AC. The schedule provided a space for bidders to insert the sum total of indefinite quantity line items, and a grand total bid price for all line items. The IFB required bidders to submit a bid bond in the amount of 20 percent of the bid price. Award was to be made on an "all or none" basis to the firm submitting the lowest total price for all CLINs.

Three firms submitted bids by the September 23 bid opening date, with the following total prices: Hugo Key (\$474,747); Alco (\$665,553); and Safe Environment of America (\$745,891). The Navy awarded the contract to Hugo Key on January 12, 1993, and on January 14, Alco protested the award to our Office.

The agency subsequently informed us that upon reexamining Hugo Key's bid documents, the Navy discovered that the bid bond Hugo Key submitted with its bid was defective, and that, as such, its bid should have been rejected as nonresponsive. See Fort Steuben Enters., B-233746, Dec. 22, 1988, 88-2 CPD ¶ 621 (when a bidder supplies a defective bond, the bid itself is rendered defective and must be rejected as nonresponsive). The agency also informed us that damage caused by a severe storm since the IFB was issued had materially changed the government's requirements. In view of Hugo Key's defective bid bond which required rejection of the firm's bid as nonresponsive, and in light of the changed requirements, the Navy decided to terminate the award, cancel the IFB, and resolicit the requirement. Accordingly, we dismissed Alco's protest as academic. On March 9, Hugo Key filed a protest in our Office challenging the agency's decision to rescind the contract, reject its bid as nonresponsive, and resolicit the requirement; on March 12, Alco protested the cancellation. We denied in part and dismissed in part Hugo Key's protest, and dismissed Alco's protest.

ALCO'S PROTEST

In response to the protest, the agency argued that Alco was not an interested party to challenge the cancellation because Alco's bid bond was defective, requiring rejection of the bid as nonresponsive. Alco challenged the agency's conclusion that its bid was nonresponsive, arguing that under various exceptions authorized by the Federal Acquisition Regulation (FAR), its bid bond satisfied the IFB's bonding requirement.

The solicitation called for a bid guarantee in the amount of 20 percent of the total bid price. Alco's bid consisted of a firm, fixed price of \$202,000 for CLIN 0003 and a total of \$463,553 for the indefinite quantity work, for a grand total bid price of \$665,553. With its bid, Alco submitted a bid bond on a Standard Form 24 for 20 percent of the bid price, for an "amount not to exceed" \$60,000. Based on the IFB's bid guarantee provision, we concluded that Alco was required to submit a bid bond in the amount of \$133,110 (20 percent of its total bid, \$665,553). Since Alco submitted a bid bond for less than half of that amount, we found that the bond was insufficient, rendering Alco's bid nonresponsive. Since its own bid was nonresponsive, Alco would not have been in line for award even if its protest challenging the cancellation were sustained.

Alco argued that its bid bond deficiency should have been waived pursuant to FAR § 28.101-4(c)(2), which provides several exceptions to the general rule that a bid accompanied by an insufficient bid bond requires rejection. One exception set forth in that provision 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.

Alco argued that the exception applied to its bid because the amount of its bid bond is greater than the difference between its bid price for CLIN 0003 (i.e., the firm, fixed-price portion of its bid), and the bid price of the next higher bidder, Safe Environment of America, for that CLIN. Alco asserted that since its bid price for CLIN 0003 was \$202,000, its bond for more than 20 percent of that amount satisfied the IFB's bid bond requirement.

We disagreed with the protester's contention that in determining whether its insufficient bond is waivable, the difference between prices to be calculated should be limited to the difference between the prices bid for CLIN 0003. Rather, we stated that the difference to be calculated is between Alco's and Safe Environment's total bid prices. We concluded that since Alco's bid bond in an amount not to exceed \$60,000 was not equal to or greater than the difference between Alco's total bid (\$665,553) and Safe Environment's next higher bid (\$745,891)--a difference of \$80,338--the exception in FAR § 28.101-4(c)(2) was inapplicable. Accordingly, since Alco's bid was properly rejected as nonresponsive, we concluded that Alco was not an interested party eligible to protest the agency's decision to cancel the solicitation. See 4 C.F.R. §§ 21.0(a) and 21.1(a) (1993); Trimarchi, Inc., B-231547.2, Oct. 14, 1988, 88-2 CPD ¶ 352.

RECONSIDERATION REQUEST

The protester relies on our decision in Commercial Sanitation Serv., 55 Comp. Gen. 352 (1975), 75-2 CPD ¶ 212, to argue that in calculating the difference between Alco's and Safe Environment's total bid prices for purposes of the exception in FAR § 28.101-4(c)(2), we improperly failed to consider Safe Environment's prompt payment discount.

The protester in Commercial Sanitation Serv. submitted the low bid with a prompt payment discount of 8 percent if payment was made within 20 days. With its bid, Commercial submitted a bid bond in the amount of \$34,585, representing 20 percent of its bid price as required by the IFB, less the prompt payment discount it offered. The contracting officer rejected Commercial's bid as nonresponsive stating that it had submitted a bid bond in an insufficient amount, and implying that the bid bond should have been for \$37,592.40, representing 20 percent of Commercial's bid price without the prompt payment discount.

In deciding Commercial's subsequent protest of the rejection of its bid, we relied on several provisions of the Armed Services Procurement Regulation (ASPR), the applicable regulations then in effect, to conclude that Commercial's bid had been improperly rejected. Specifically, ASPR § 2-407.3(b) required that any discount offered be deducted from the bid price if a prompt payment discount is offered for payment within 20 days. Since Commercial's bid contained a 20-day prompt payment discount, we stated that its bid should have been evaluated on the basis of its discounted price. Relying on the ASPR, we expressed the view that where a prompt discount is offered by a bidder and a bid bond is required, the amount of the bond may be calculated on the basis of the bid price less the discount. Alco points to that decision to argue that since Safe Environment offered a 1 percent prompt payment discount, the gap to be covered by Alco's bid bond should be the difference between Alco's bid and Safe Environment's discounted bid price. According to the protester's calculations, since that difference is \$53,714, its bond for \$60,000 is sufficient under the FAR exception.

Alco's reliance on our decision in Commercial Sanitation Serv. is misplaced. That case was decided based on the ASPR provisions applicable at the time, whereas this procurement is governed by the FAR. The protester does not cite, and we are unaware of, any current authority which supports Alco's position that in evaluating the sufficiency of a bid bond, agencies should consider the next higher bidder's price after subtracting offered prompt payment discounts. In fact, FAR § 14.407-3, entitled "Prompt Payment Discounts," applicable to this procurement, specifically prohibits

contracting agencies from considering prompt payment discounts in evaluating bids. See also FAR § 52.232-8 (the standard "Discounts for Prompt Payment" clause incorporated by reference in the solicitation); IFR Sys., Inc., B-222533, Aug. 26, 1986, 86-2 CPD § 224. Since the applicable regulations now provide that prompt payment discounts are not to be considered in the evaluation of bids, Alco's argument that in determining the sufficiency of its bond the agency should have considered Safe Environment's discounted bid price is without merit.¹

Alco also argues that in calculating total bid prices the agency should have considered only the prices bid for CLIN 0003 (the fixed-price portion of the bid), and CLINs 0005AA and 0005AB (the indefinite quantity portion), and should have excluded the prices for CLIN 0005AC, which, rather than identifying a contract work item, simply allowed bidders to insert a price for additional bonding. Alco states that including the price of CLIN 0005AC in the calculations to determine total prices is inconsistent with the IFB instructions which stated that the price for the indefinite quantity work was the total of CLIN 0005AA and 0005AB, and that the estimated quantities for those CLINs were provided for establishing the penal sums of bonds.

¹In a supplemental submission, the protester argues that since under the rules applicable to reprocurments, the agency would be obligated to mitigate its damages in the event Alco were to be terminated for default, the Navy was required to deduct Safe Environment's prompt payment discount in determining whether Alco's insufficient bid bond is waivable under the exception in FAR § 28.101-4(c)(2). Regarding terminations, FAR § 49.401(a) states that,

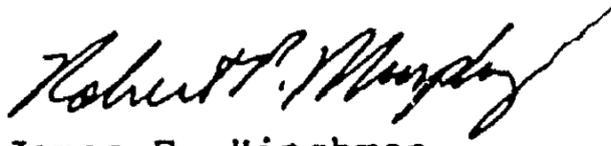
"Termination for default is generally the exercise of the government's contractual right to completely or partially terminate a contract because of the contractor's actual or anticipated failure to perform its contractual obligations."
[Emphasis added.]

The facts in this case clearly do not involve a reprocurment following the termination of a contract for default. See FAR § 49.402-6 (repurchase against contractor's account after termination for default). Whether the Navy would be required to mitigate damages following such a termination by considering a prompt payment discount offered by the take-over contractor, as the protester argues, is thus irrelevant here.

Even assuming that the agency should have excluded the prices for CLIN 0005AC in determining the sufficiency of bid guarantees, Alco's argument fails. Excluding CLIN 0005AC, Alco's bid price was \$664,918, while Safe Environment's price was \$725,891--a difference of \$60,973. Alco's bid bond in an amount not to exceed \$60,000 would nevertheless be insufficient under Alco's theory.

Under our Bid Protest Regulations, to obtain reconsideration the requesting party must show that our prior decision may contain either errors of fact or law or present information not previously considered that warrants reversal or modification of our decision. 4 C.F.R. § 21.12(a). The protester's reliance on our decision in Commercial Sanitation Serv., supra--a case based upon a superseded ASPR provision which has no parallel in the current regulations applicable to the procurement--and mere disagreement with our decision do not meet this standard. R.E. Scherrer, Inc.--Recon., B-231101.3, Sept. 21, 1988, 88-2 CPD ¶ 274.

The request for reconsideration is denied.


for James F. Hinchman
General Counsel