

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

CC 1195

FILE: B-186060

DATE: July 23, 1976

MATTER OF: Charles Bainbridge, Inc.

97869

**DIGEST:**

Bidder's failure to submit bid bond in full amount required by solicitation leading to award of requirements contract may be waived where bond submitted is sufficient to cover estimated dollar difference between low bid and next low bid, even though actual dollar difference between the two bids cannot be determined until after completion of contract performance.

Charles Bainbridge, Inc. (Bainbridge) has protested the decision of the General Services Administration (GSA) that its bid under invitation for bids (IFB) No. GS-03B-63011 issued January 7, 1976, for a 1-year requirements contract for painting and related work in the North Area Buildings, Group No. 3, in Washington, D.C. was nonresponsive because its bid bond was deficient.

This situation arises from GSA's decision not to require bidders to quote unit prices or a total bid price. Instead, GSA listed in the IFB individual unit prices for the schedule items and required bidders to submit a single percentage factor (plus or minus) which, when multiplied by the GSA-established unit prices, would yield bidders' actual unit prices proposed for each line item of work. Under this approach, award is made to the bidder submitting the most favorable percentage factor.

Because there was to be no total bid price, GSA determined that the usual bid bond requirement of 20 percent of the bid price would be "meaningless" and instead required that the "Bid Bond shall be in the amount of \$80,000." This amount was based on a total dollar volume estimate of \$400,000, which was revealed to bidders in Section 0110 of the Special Conditions of the IFB, as follows:

"The figures given herein show previous expenditures in dollars for a 12-month period or an estimate of the anticipated volume. The volume of work required and performed may vary according to the needs of the Government.

Total Dollar Volume \$ 400,000."

Bids were opened on January 28, 1976, and Bainbridge was found to be the apparent low bidder with its minus 25.625999999 percent bid, while Free State Builders, Inc. (Free State), was second low bidder with a bid of minus 22.5333 percent. Bainbridge, however, had furnished a bid bond on Standard Form 24 in the penal sum of "20% of the bid price, not to exceed \$16,000." GSA consequently rejected Bainbridge's bid as nonresponsive and awarded the contract to Free State on March 3, 1976.

Bainbridge contends that its bid should not have been rejected because GSA's new approach for submission of bids, coupled with an unclear IFB, created confusion concerning the proper bid bond amount. Bainbridge further contends that GSA was not required to reject its bid even if the bid bond was inadequate.

We do not agree that the IFB was unclear. The Instructions for Standard Form 24 (Bid Bond) state that:

"The penal sum of the bond may be expressed as a percentage of the bid price if desired. In such cases, a maximum dollar limitation may be stipulated \* \* \*."

However, in view of the specific statement in the IFB requiring a bid bond in the amount of \$80,000, we do not believe that any bidder should have been misled by the printed instructions on the Standard Form, which in any event are merely permissive in nature.

It is now well settled that a bid guarantee requirement is a material part of an invitation for bids, and that, except as provided in applicable regulations, a procuring activity must reject as nonresponsive a bid that does not comply with that requirement. 38 Comp. Gen. 532, 536 (1959); 39 id. 827 (1960); 40 id. 561 (1961); Majestic Window Cleaning Company, B-182968, April 17, 1975, 75-1 CPD 231. Bainbridge, nevertheless, contends that GSA should have waived any deficiency in its bid bond because the IFB incorporated by reference the following language of Standard Form 22, paragraph 4:

"Failure to furnish a bid guarantee in the proper amount may be cause for rejection of the bid." (Emphasis added.)

That contention was answered in our decision E. Sprague, Batavia, Inc., B-183082, April 2, 1975, 75-1 CPD 194, in which we held that:

"The permissive term 'may' is used to allow for the acceptance of a bid containing an insufficient guaranty if one of the four exceptions contained in section 1-10.103-4 of the Federal Procurement Regulations \* \* \* is present."

Deficiencies in Bainbridge's bid bond were not, therefore, properly waivable merely as a result of the permissive language incorporated in the IFB. Accordingly, what must be determined is whether the bid bond meets one of the exceptions provided for in Federal Procurement Regulations (FPR) § 1-10.103-4 (1964 ed.), which provides as follows:

"§ 1-10.103-4 Failure to submit proper bid guarantee.

"Where an invitation for bids requires that a bid be supported by a bid guarantee and noncompliance occurs, the bid shall be rejected, except in the following situations when the noncompliance shall be waived unless there are compelling reasons contrary:

"(a) Where only a single bid is received. In such cases, however, the Government may or may not require the furnishing of the bid guarantee before award.

"(b) Where the amount of the bid guarantee submitted, though less than the amount required by the invitation for bids, is equal to or greater than the difference between the price stated in the bid and the price stated in the next higher acceptable bid.

"(c) Where the bid guarantee is received late and the late receipt may be waived under the rules established in § 1-2.303 for consideration of late bids.

"(d) Where a bid guarantee ceases to meet the requirements of paragraph (b) of this § 1-10.103-4 as a result of the correction of a mistake in bid under § 1-2.406."

The exceptions enumerated in subparagraphs (a),(c) and (d) are inapposite to the present factual situation. With regard to subparagraph (b), GSA states the following:

"In order for this exception to apply, the amount of Bainbridge's bid bond (\$16,000) must be equal to or greater than the difference between Bainbridge's bid price and Free State's bid price. However, because the present contract is a requirements contract, the total dollar volume of work under the contract cannot be determined until the term of the contract has expired and all work has been fully performed. Therefore, it is impossible to determine the contract price (i.e., a bidder's total bid price) in advance. It is possible, however, to determine the range of the total dollar volume of work for which Bainbridge's bid bond would be acceptable (i.e., would satisfy section 1-10.103-4(b) of the FPR)."

GSA then determined (correctly) that Bainbridge's bid bond would be acceptable for a total dollar volume of \$517,309, and concluded that "because the total bid price cannot be determined until one year after award and because we cannot be certain that the total dollar volume of work will not exceed \$517,000," it would not be "appropriate to invoke exception (b)." We cannot agree.

We recently held, in a case similar to this one, that it was appropriate to utilize GSA's dollar volume estimate for this type of contract to determine the adequacy of a bid bond. See Free State Builders, Inc., B-185899, July 12, 1976, 76-2 CPD \_\_\_\_\_. There the IFB required a bid bond of \$40,000. However, the low bidder submitted a bid bond for "20% of bid price." We agreed with GSA that the dollar amount of the bid bond could be properly computed by taking 20 percent of the total dollar volume estimate set forth in the IFB (\$200,000) discounted by the bidder's negative percentage factor. Since the amount thus computed fell within the exception of FPR § 1-10.103-4(b), and since "the amounts ordered would have to exceed more than \$1,000,000, or 500% of the anticipated volume to make the formula set forth in subparagraph (b) \* \* \* inapplicable," we upheld GSA's decision to waive the bid bond deficiency.

Here, GSA recognizes that the \$400,000 figure included in the IFB represents its "estimate of the anticipated total dollar volume of work." A computation based on that figure indicates

that Bainbridge's bid bond also falls within the subparagraph (b) exception and would do so for any contract amount up to \$517,309.

As GSA recognized in Free State Builders, Inc., supra, a deficiency with respect to a bid bond which falls within the subparagraph (b) exception "must be waived" unless there are compelling reasons to the contrary. Also, in Commercial Sanitation Service, 55 Comp. Gen. 352, 355 (1975), 75-2 CPD 212, we held that a bid which meets a regulatory exception should not be rejected unless there has been a specific finding that a waiver would not be in the Government's best interests. Here GSA has neither identified a compelling reason not to waive the Bainbridge bid bond deficiency nor furnished us with any specific finding militating against a waiver. It has said only that it does "not feel that it is appropriate to invoke exception (b)" because "it is certainly possible that the total dollar volume of work might exceed \$517,000."

We believe that is too speculative a reason for not invoking the exception. It is GSA's own best estimate that the total dollar volume will be approximately \$400,000. There is nothing in the record to indicate that this estimate is in any way faulty. Furthermore, the record shows that GSA used this estimate as the basis for requiring the successful bidder to furnish a \$400,000 performance bond and a \$200,000 payment bond. In addition, GSA concedes that the Bainbridge bid bond is viable even if the actual work ordered under the contract totals more than \$517,000, some 29 percent in excess of that estimate.

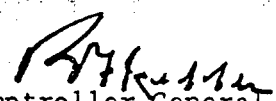
The purpose of the bid guarantee is to protect the Government against a successful bidder's failure to execute any required post-award contractual documents and bonds by providing a penal sum which would be available toward offsetting any excess costs incurred by the Government in repro-curing the work in the event of such failure. FPR § 1-10.103-3 (a)(2). Although the total volume of work to be performed under a requirements contract usually cannot be determined with precision at the time the IFB is issued, the Government's interests must be reasonably protected by an adequate bid bond. GSA believed that an adequate bid bond for this contract would be one for \$80,000, which was based on taking 20 percent of the \$400,000 total volume estimate. Since that \$400,000 estimate was regarded as valid for determining the amount of the bid bond to be furnished, we think it must also be regarded as valid for determining the applicability of the subparagraph (b) exception.

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For the foregoing reasons it is our view that the low bid of Bainbridge should have been regarded as responsive. Accordingly, we recommend that the contract with Free State Builders, Inc. be terminated for the convenience of the Government and that award be made to Charles Bainbridge, Inc. as the low bidder.

Since our decision contains a recommendation for corrective action, we have furnished a copy to the congressional committees referenced in section 236 of the Legislative Reorganization Act of 1970, 31 U.S.C. § 1176 (1970), which requires the submission of written statements by the agency to the Committees on Government Operations and Appropriations concerning the action taken with respect to our recommendation.

Deputy

  
Comptroller General  
of the United States