DECISION

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

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FILE: B-185899 DATE: July 12, 1976

MATTER OF: Free State Builders, Inc.

DIGEST:

1. Government estimate of dollar volume for requirements contract--to be awarded under pricing structure which did not require bidders to submit formal "bid prices"--may be used as mathematical base in determining "possible alternative bid prices" and, in turn, possible bid bond amounts of low bidder whose bid bond was submitted in amount equal to "20% of bid price." There is no indication that dollar estimate was faulty; moreover, Government estimate of work areas was used under prior pricing structure so as to permit computation of formal "bid price."

2. Even though solicitation for requirements contract did not call for extended "bid price," mathematical approach analyzing possible alternative "bid prices" for purpose of computing amount of surety's liability is not defective, since mathematical variables--unit prices, percentage discount factor, and estimated dollar volume--needed to arrive at extended "bid price" are present in questioned bid.

3. Applying mathematical variables--unit prices, discount factor, and dollar estimate of work--contained in questioned bid lacking formal, extended "bid price," amount of "bid price," for purpose of calculating bid bond quoted as "20% of bid price," must be considered to be $127,002. Consequently, bid bond is determined to be $25,400.40.

4. GAO agrees that deficiency in amount of offered bid bond can be waived, since amount ($25,400.40) of bid guarantee submitted by questioned bidder, though less than amount ($40,000) required by the IFB, is greater than the difference between "price" ($127,002) in questioned bid and "price" ($130,980) in next higher acceptable bid.

Free State Builders, Inc. (Free State), has protested the decision of the General Services Administration (GSA) to waive an admitted bid bond deficiency in the low bid of W. Walter Bainbridge, Inc. (Bainbridge), under invitation for bids (IFB) No. GS-03B-63010. GSA issued the IFB on January 9, 1976, for a 1-year painting requirements contract for the "North Area Buildings (Group 2)" in Washington, D. C. We cannot question the waiver for the reasons stated below.

Bainbridge's bid stated that the company's bid bond was "20% of bid price." Free State, the second lowest bidder, observes, however, that there was no IFB requirement for a bidder to submit a formal "bid price," since the IFB's pricing scheme required bidders to quote only a single "percentage factor" bid for the work items involved. Free State further observes that there is, in fact, no dollar quantity labeled a formal "bid price" in Bainbridge's bid. Since there is no specific dollar quantity expressly labeled a "bid price" in Bainbridge's bid, Free State insists it is impossible to determine the precise amount of Bainbridge's bid bond for purposes of comparing the amount with the dollar amount of the required bid bond--$40,000. Hence, Free State insists Bainbridge's bid must be rejected.

GSA acknowledges that bid guarantee requirements are material and that, except as provided in applicable procurement regulations, the procuring agency cannot waive failures to comply with those requirements. See, for example, A. D. Roe Company, Inc., 54 Comp. Gen. 271 (1974), 74-2 CPD 194. On the other hand, GSA argues that Bainbridge did submit a bid bond in an amount sufficient to permit consideration of the company's bid.

GSA's argument begins with the assumption that the surety (bonding company) must have intended to be liable on the bond for 20 percent of some amount. Therefore, GSA has attempted to determine "what amount can be said to be Bainbridge's 'bid evaluation price' for purposes of calculating the penal amount of the [company's] bid bond." "Then," GSA's report on the protest continues, "we must determine whether a bid bond of 20% of that amount, constitutes an acceptable bid bond * * *."

The problem in determining what Bainbridge's "bid price" is stems from GSA's recent decision not to require bidders to quote unit prices or a total "bid price" for painting requirements contracts. Instead, GSA lists individual unit prices for the work items sought in the IFB. Bidders are required, however, to quote a single "percentage factor" (plus or minus) which, when multiplied by the GSA-established unit prices, will yield bidders' actual unit prices proposed for the categories. Award is then to be made to the responsible bidder submitting the "best single percentage factor."

GSA suggests that there are only three "possible alternatives" regarding the "bid price" as to which the surety's liability was fixed, namely:

1. The anticipated dollar volume of work under the contract--$200,000;

2. The anticipated dollar volume of work under the contract as discounted by Bainbridge's percentage factor (minus 36.499 percent)--$127,002;

3. The sum ($2.25) of the unit prices listed in the IFB as discounted by Bainbridge's percentage factor.

GSA advises that the third alternative can be ruled out summarily because of the absurdity of the "bid price" so computed when compared to the estimated dollar volume of the contract.

Counsel for Free State questions GSA's use of the anticipated dollar volume ($200,000) in calculating the first two possible alternatives of Bainbridge's "bid price." He points out that the IFB expressly stated that the anticipated dollar figure was not guaranteed and that the actual dollar volume of work "required and performed" might vary according to the needs of the Government. Because of the uncertainty associated with the estimate, counsel suggests that it is inappropriate to use the figure in calculating "possible alternative" bid prices.

There is no indication, however, that GSA's dollar estimate is faulty. Moreover, under GSA's prior pricing structure, bidders' formal "bid prices" were determined, in part, by multiplying quoted unit prices by stated Government estimates of work areas. Under the prior pricing structure, a "percentage of bid price" bid bond would have been acceptable even though the formal bid price was also based on Government estimates. Thus, we do not think it is inappropriate for GSA to use the stated dollar estimate as a mathematical base in determining Bainbridge's "possible alternative" bid prices.

Therefore, we agree that there are only three "possible alternatives--given the stipulated unit prices, percentage factor offered, and estimated contract dollar volume--as to what Bainbridge's "bid price" must be for purposes of calculating the amount of the surety's liability. (That the surety intended to be bound to some amount regarding Bainbridge's "bid price" is not questioned by Free State.) And we agree with GSA that the third alternative--$2.25--must be summarily rejected. Consequently, the fact that the IFB did not call for an extended "bid price" is not fatal to GSA's analysis since the mathematical variables--unit prices, discount factor, and estimated dollar volume--needed to arrive at an extended "bid price" are present in Bainbridge's bid.

Although Free State suggests that there is a "fourth and more logical" possible alternative "bid price"--a possible mistake in bid--there is no evidence of a mistake in bid other than Bainbridge's failure to realize that in the absence of an express "bid price" a bid bond submitted in the amount of "20% of bid price" would require GSA to examine possible alternative "bid price" amounts in order to determine the surety's liability. This failure, of course, was encouraged by the Bid Bond form (Standard Form 24--June 1964 ed.) which contained a blank entitled "Percent of Bid Price" where the surety could indicate the penal sum of the bond by inserting a percentage figure only. In any event, Bainbridge's failure should not prevent GSA from exploring "possible alternative bid prices" so as to compute the amount of the bid bond present in the company's bid.

We agree with GSA's further analysis that Bainbridge's "bid price" must actually be computed by applying the company's percentage discount factor to the dollar volume estimate--to do otherwise would result in neglect of one of the stated variables. Under this approach, Bainbridge's "bid price," for purposes of calculating the amount of its bid bond, must be considered to be $127,002. Although Free State notes GSA's statement that the precise contract price cannot be determined in advance because the contract is based on a dollar estimate only, we interpret the statement as an acknowledgement of the uncertainty attending any requirements contract--whether formed by a formal "bid price" as under GSA's prior pricing structure or by a "percentage discount factor" as with the new pricing structure.

Having determined Bainbridge's "bid price" ($127,002) for the purpose of determining the penal amount of its bond, GSA applies the company's quoted percentage factor (20 percent) in order to arrive at the amount ($25,400.40) of Bainbridge's bid bond.

GSA then argues that the deficiency in the amount of Bainbridge's bid bond can be waived under authority of Federal Procurement Regulations § 1-10.103-4(b) (1964 ed. circ. 1) which provides:

> "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:
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> * * * * *
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> "(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."

GSA has explained the final part of its argument as follows:

> "Bainbridge's 'bid evaluation price' for bid bond calculation purposes is $127,002. Free State was the apparent second low bidder with a bid of minus 34.51%. Therefore, Free State's 'bid evaluation price' for bid bond calculation purposes is $130,980 [$200,000 - .3451($200,000)]. Bainbridge's bid bond ($25,400.40) is clearly greater than the difference between Free State's 'bid evaluation price' ($130,980) and Bainbridge's 'bid evaluation price' ($127,002). Therefore, there being no compelling reasons to the contrary, Bainbridge's failure to submit a bid bond in the proper amount must be waived.

"Further, recognizing that the resultant contract is a requirements contract and the possibility that the total amount ordered thereunder could exceed the anticipated dollar amount, 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) of 41 CFR 1-10.103-4 inapplicable. Since it is highly unlikely that this amount will be ordered under the contract, the regulation should be applied."

We agree with GSA's argument.

Protest denied.

Paul G. Dembling

For the Comptroller General
of the United States