



Comptroller General
of the United States

Washington, D.C. 20548

Bednarz
145788

Decision

Matter of: Atlantic Services, Inc.

File: B-245753

Date: January 30, 1992

William D. Blakely, Esq., and James S. Ganther, Esq., Piper & Marbury, for the protester.
Paul M. Fisher, Esq., Department of the Navy, for the agency.
Christine F. Bednarz, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency properly rejected low-priced bid as obviously erroneous pursuant to Federal Acquisition Regulation § 14.406-3(g)(5), where the bid was based upon a misinterpretation of the contract requirements and waiver of the mistake would prejudice other bidders; furthermore, the rejection of the bid as obviously erroneous under the mistake in bid procedures is not a matter of bidder responsibility.

DECISION

Atlantic Services, Inc. protests the rejection of its bid under invitation for bids (IFB) No. N62477-90-B-0099, issued by the Department of the Navy, Naval Facilities Engineering Command, for the inspection and testing of boilers in the Washington, D.C. area.

We deny the protest.

The IFB requested bids on six indefinite quantity line items requiring various inspections and tests to be performed on hot water boilers and unfired pressure vessels for a 1-year period. Pertinent among these were item Nos. 0001, 0002, and 0003, which required, respectively, type "A"--

¹An "unfired pressure vessel" is a closed vessel in which internal pressure is above or below atmospheric pressure, and pressure is obtained from an external source or from an indirect application of heat. NAVFAC MO-324, April 1990, incorporated by reference into the IFB.

Internal & External Inspections, type "B"--Hydrostatic Tests, and type "C"--Operational Tests. For these three line items, the IFB stated an estimate of 400 boilers and 700 unfired pressure vessels.

The Navy received six bids on bid opening day, June 7, 1991. Atlantic submitted the low bid at \$130,250, while Boiler Pressure Vessel Inspection Agency, Inc. submitted the next low bid at \$210,650. The remaining bids ranged from \$436,350 to \$895,500. The agency states that the government estimate for the solicited work was \$362,500.

By letter dated June 26, 1991, the contracting officer asked Atlantic to review its bid for accuracy and to verify its bid price because of its variance with the other bids. The letter also stated that the agency would entertain requests for remedial action, either to correct or withdraw the bid, in the event of a mistake.

On the same day, Navy personnel met with the protester's representative to discuss the notification letter, the solicitation requirements, and the protester's bid price. Among other things, the Navy specifically asked about Atlantic's bid of \$0.00 for item No. 0003, type "C"--Operational Testing of the estimated 700 Unfired Pressure Vessels.²

By letter dated July 1, 1991, Atlantic requested correction of its bid on the basis that it had misunderstood the solicitation requirement for type "C" operational testing.¹ Atlantic stated that it assumed that the present IFB did not require type "C" testing of the unfired pressure vessels, based upon its performance of a prior contract for inspection of the same equipment and upon an outdated Naval publication governing the inspections. Because its bid did not reflect any costs for type "C" testing, Atlantic requested an upward adjustment of its zero dollar bid to \$44 per unit for a total increase of \$30,800. Atlantic provided worksheets demonstrating that it had calculated only the costs of type "A" and type "B" inspections for the unfired pressure vessels.

²The second low bidder bid a \$35 unit price and a \$24,500 total price for this item.

³Atlantic also alleged that it had underestimated the number of man-hours needed to perform line item No. 0006, Code Compliance, for which it requested a total price increase in the amount of \$10,000. The Navy denied this request for correction.

By letter dated September 14, 1991, the Navy denied Atlantic's request for remedial action and rejected Atlantic's bid as "unreasonably low," citing Federal Acquisition Regulation § 14.404-2(f),⁴ However, the Navy has since advised us that the letter's reference to FAR § 14.404-2(f) was mistaken and that the actual basis for Atlantic's rejection was FAR § 14.406-3(g)(5).⁵ FAR § 14.406-3(g)(5)(ii) permits the rejection of a bid that is obviously erroneous, such that acceptance of the bid would be unfair to the bidder or other bona fide bidders. Zeta Constr. Co., Inc., B-244672, Nov. 5, 1991, 91-2 CPD ¶ 428; Martin Contracting, B-241229.2, Feb. 6, 1991, 91-1 CPD ¶ 121.

The protester contends that on July 2 and July 16 (after submitting the correction request), the protester's representative refused the agency's invitation to withdraw its bid, stating that Atlantic was able and willing to perform the contract at the uncorrected bid price. The protester thus asserts that the rejection of its bid as unreasonably low was, in effect, a determination that it was not responsible. Under the Small Business Act, whenever an agency determines a small business concern, such as Atlantic, is not responsible, the agency must refer the matter to the Small Business Administration (SBA) under certificate of competency (COC) procedures. FAR subpart 19.6.

Where it is clear that a mistake has been made, the bid cannot be accepted, even if the bidder verifies the bid price, denies the existence of a mistake, or seeks to waive an admitted mistake, unless it is clear that the bid, both as submitted and intended, would remain low. Suffield Serv. Co., B-245579, Jan. 13, 1992, 92-1 CPD ¶ ____; Alaska Mechanical, Inc., B-235252, Aug. 14, 1989, 89-2 CPD ¶ 137. Cf. Duro Paper Bag Mfg. Co., 65 Comp. Gen. 186 (1986), 86-1 CPD ¶ 6, aff'd, B-221377.2, Feb. 14, 1986, 86-1 CPD ¶ 165 (bidder can waive claimed mistake where it is not reasonably clear that a mistake has been made). Acceptance of such clearly erroneous bids would be unfair to other bidders.

⁴This regulation allows for the rejection of any bid if the contracting officer determines in writing that it is unreasonable as to price.

⁵Since, as discussed below, a valid basis for rejecting Atlantic's bid existed under FAR § 14.406-3(g)(5), the Navy's incorrect reference to FAR § 14.404-2(f) does not affect the merits of this protest. Allied Prod. Mgmt., Inc., B-235686, Sept. 29, 1989, 89-2 CPD ¶ 297; Jerry Eaton, Inc., B-233458, Jan. 24, 1989, 89-1 CPD ¶ 71.

See 51 Comp. Gen. 498 (1972); Panoramic Studios, B-200664, Aug. 17, 1981, 81-2 CPD ¶ 144; FAR 14.406-3(g)(5). Clearly erroneous bids subject to rejection include those based upon a misinterpretation of solicitation requirements. See, e.g., Gore's Security Agency, Inc., B-240969.2, Nov. 6, 1991, 91-2 CPD ¶ ____ (bid based upon wrong wage rate); Zeta Constr. Co., Inc., supra (bid based upon an incorrect roof design); Innovative Refrigeration Concepts, B-242515, Mar. 27, 1991, 91-1 CPD ¶ 332 (bid not based upon requirement for furnishing copper components); Martin Contracting, supra (bid not based upon requirement for asbestos removal).

Atlantic claimed in its request to correct the alleged mistake in bid, and has not disputed here, that it prepared its bid in disregard of the IFB requirement for type "C" testing of the unfired pressure vessels, which it did not believe was required.⁶ No computations for this testing appear on Atlantic's original worksheets. Thus, the record reasonably establishes that the protester did not take the IFB requirement for type "C" testing on the unfired pressure vessels into account in preparing its bid prices. Given that type "C" testing on unfired pressure vessels was expressly required by the IFB, Atlantic's bid is clearly erroneous.⁷ See Zeta Constr. Co., Inc., supra; Martin Contracting, supra.

While Atlantic now offers to stand by its initial bid, the record indicates that acceptance of Atlantic's bid may be prejudicial to the other bidders because it is not clear that as corrected Atlantic's bid would have been low. Atlantic did not and has not furnished any evidence in support of its asserted price of \$44 for the type "C" inspections on the unfired pressure vessels. Its worksheets reflect the absence of any calculations as to these inspections, and Atlantic has not clearly stated how it arrived at the \$44 figure. While bid correction based on \$44 would leave Atlantic's bid appreciably below the other bids and the government estimate, there is no probative evidence--nor can there be, since Atlantic never intended to

⁶Given the express IFB requirement for these tests, it is difficult to understand why Atlantic held this clearly erroneous belief, notwithstanding that a previous contract may not have required Atlantic to perform the type "C" testing on unfired pressure vessels.

⁷The agency properly denied correction of Atlantic's bid on the basis requested. A bidder cannot recalculate and change its bid to include factors that the bidder did not intend to include in the bid submitted. See Zeta Constr. Co., Inc., supra.

submit a price for performing type "C" testing for unfired pressure vessels--showing that the bid necessarily would have been low had the protester priced this item in the first place. That being so, acceptance of the bid would be unfair to the other bidders and its rejection was therefore proper under FAR § 14.406-3(g)(5).⁸ See Alaska Mechanical, Inc., supra; Veterans Admin.--Advance Decision, B-225815.2, Oct. 15, 1987, 87-2 CPD ¶ 362; Panoramic Studios, supra.

The rejection of a low bid as obviously erroneous is not a matter of bidder responsibility as contended by Atlantic. See Contract Servs. Co., Inc., B-225651, May 18, 1987, 87-1 CPD ¶ 521 (rejection of a bid because of a mistake is a separate issue from whether a bidder is responsible). Rejection of a bid because it is too low or below cost concerns bidder responsibility where there is no evidence of a mistake. See Omni Elevator Co., B-241678, Feb. 25, 1991, 91-1 CPD ¶ 207; Zimmerman Plumbing and Heating Co., B-211879, June 24, 1983, 83-2 CPD ¶ 16. However, where, as here, a bid is obviously erroneous, FAR § 14.406-3(g)(5) authorizes the agency to reject it without any consideration

'Atlantic's mistake in interpreting the requirement for type "C" testing should be contrasted with its mistake in forecasting the level of effort needed to accomplish the Code Compliance inspection line item. See footnote 3 supra. Unlike the type "C" testing situation, there is no indication that the mistake as to the Code Compliance was based on Atlantic's misinterpretation of the contract requirements, but was merely a judgmental error in the preparation of the bid for this item. A bidder can neither withdraw or correct its bid on the basis of such a claimed mistake in judgment. See Paul Schmidt Constr. Co., B-204009, Aug. 5, 1981, 81-2 CPD ¶ 99.

as to whether the bidder is responsible.⁹ Thus, Atlantic's bid was properly rejected and there was no requirement that the matter be referred to the SBA under COC procedures.

The protest is denied.


for James F. Hinchman
General Counsel

⁹This is so because accepting an erroneous bid relates to validity of the contract itself, see generally 36 Comp. Gen. 441, 444 (1956) ("[t]he general rule is that the acceptance of a bid with knowledge of error therein does not consummate a valid and binding contract"), whereas the consideration of a bidder's responsibility is an assessment of the firm's capability to perform the contract. See King Fisher Co., B-236687.2, Feb. 12, 1990, 90-1 CPD ¶ 177; FAR subpart 9.1.