



Comptroller General
of the United States

Washington, D.C. 20548

21732

Decision

Matter of: Apex Services, Inc.

File: B-255118

Date: February 9, 1994

Timothy H. Power, Esq., for the protester,
Gary B. K. T. Lee, Esq., for Aloha Painting Co., Inc., an
interested party.
Gregory H. Petkoff, Esq., Department of the Air Force, for
the agency.
Peter A. Iannicelli, Esq., and Linda C. Glass, Esq., Office
of the General Counsel, GAO, participated in the preparation
of the decision.

DIGEST

Where bids for indefinite delivery, indefinite quantity contract were stated as multipliers rather than dollar amounts, contracting officer properly exercised discretion in deciding not to waive protester's inadequate bid guarantee where contracting officer reasonably determined that protester's bid guarantee was less than the difference between the value of the protester's and the awardee's next-higher bid to the government.

DECISION

Apex Services, Inc. protests the rejection of its bid as nonresponsive under invitation for bids (IFB) No. F64605-93-B-0024, issued by the Department of the Air Force for painting and related services. Apex contends that its bid was improperly rejected on the basis of an inadequate bid bond.

We deny the protest.

Issued on July 19, 1993, the IFB was for surface preparation, repairs, and repainting of industrial buildings and housing units on Hickam Air Force Base, Hawaii. The IFB solicited bids for an indefinite delivery, indefinite

quantity contract for a base period of 1 year with options for 2 additional years. The IFB stated that a minimum of \$50,000 of work would be ordered and that the maximum work ordered during each of the base and option periods would be \$2 million. The work to be performed would be described in delivery orders issued under the contract.

The IFB did not request fixed prices for the contract work, but instead included a list of services that might be required and the agency's estimated unit price for each service. Bids were to state prices for each listed service in terms of a single "coefficient" or multiplier for the base and each option period by which the agency's scheduled prices would be multiplied to determine the actual price for each delivery order.¹ The IFB stated that the lowest-priced bid would be determined by adding together the coefficients bid for the base period and both option periods and that the contract would be awarded to the lowest-priced, responsive bidder.

Eight bids were received by the August 19, 1993, bid opening. Apex submitted the lowest-priced bid, and Aloha Painting Co., Inc. the second-lowest. The IFB required a bid bond in the amount of \$25,000, but Apex's bid included only a \$10,000 certified check as its bid guarantee. Therefore, the contracting officer determined Apex's bid bond to be insufficient, rejected Apex's bid, and awarded the contract to Aloha on September 22. On September 28, Apex filed its protest in our Office contending that the contracting officer should have waived the bond's noncompliance and accepted Apex's bid.

Apex acknowledges that its bid guarantee was less than the required amount, but argues that the contracting officer was required to waive the noncompliance of its bid guarantee in accord with provisions of the Federal Acquisition Regulation (FAR). Apex contends that the contracting officer should have accepted its bid in accord with FAR § 28.101-4(c)(2) because the amount of its bond is greater than the difference between its bid price and Aloha's next-higher bid price.

¹The IFB advised bidders to show the multiplier as a decimal. For example, if a bidder wanted to bid the same price as the scheduled unit prices, the multiplier would be shown as 1.000; if a bidder wanted to discount the scheduled prices by 10 percent, the multiplier would be shown as .900.

A bid guarantee is a material part of a bid and when a 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 that contains 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 exceptions specified in the FAR, FAR §§ 14.404-2(j) and 28.101-4. Among the FAR exceptions is the one relied on by Apex that permits acceptance of a nonconforming bid bond so long as the amount of the bond is greater than the difference between the low and second-low bids. While the FAR provides that the contracting officer may waive noncompliance with a bid guarantee requirement in certain circumstances, the FAR does not require that the contracting officer do so. See Santurce Constr. Corp., 70 Comp. Gen. 133 (1990), 90-2 CPD ¶ 469.

Here, the IFB required bids to be expressed in terms of multipliers for the base and option years of the contract, rather than in terms of prices (*i.e.*, dollars and cents), and did not contain any estimate of the amount of work that would be required during any contract period. The IFB stated only that a minimum of \$50,000 and a maximum of \$2 million of work would be ordered during the base and each option period. The absence of prices and estimates in the IFB makes it difficult to compare Apex's and Aloha's bid prices for the basic contract period in order to determine whether the above FAR exception can be applied.² Although precise calculation of bid prices is impossible in such circumstances, our Office has recognized in previous cases, most notably Haag Elec. and Constr., Inc., *supra*, and Kato Corp.--Recon., B-250605.2, Mar. 19, 1993, 93-1 CPD ¶ 246, several different methods of estimating bid prices for comparison purposes.

In Haag Electric, we used the IFB's minimum order amount as our mathematical base and calculated the difference between the two low bids using two different methods. In the first calculation, we multiplied the minimum order amount by each bid's stated multiplier and subtracted to compute the difference between bids. In the second calculation, we estimated the value of each bid to the government by

²It is well established that only the minimum order amount for the basic contract period should be considered when calculating the difference between bids for purposes of determining whether a deficient bid bond can be waived. See, *e.g.*, Haag Elec. and Constr., Inc., 70 Comp. Gen. 180 (1991), 91-1 CPD ¶ 29, and American Roofing and Metal Co., Inc., and Port Enters., Inc., a Joint Venture, B-239457, Aug. 24, 1990, 90-2 CPD ¶ 153.

dividing each bid's multiplier into the minimum order amount to determine how much work, based upon the IFB's scheduled prices, each bidder would perform; again, we subtracted one from the other to compute the difference in dollar amounts of contract value represented by each bid. Because both calculations showed that the difference between bids was considerably less than the low bidder's otherwise deficient bid bond, we held that the contracting officer should have waived the insufficient bid bond.

In Kato, we concluded that a third formula was the most logical method for computing the difference between the two low bids. We determined the value of work the low bidder would perform if only the minimum amount were ordered under the contract (the minimum order divided by the bidder's multiplier); then we calculated how much more it would cost to have that same value of work performed by the second-low bidder (the value of work performed by the low bidder for the minimum order times the second-low bidder's multiplier). While the second Haag Electric formula simply compares the total services each bidder would provide the government based on each bidder's coefficient, the Kato approach computes how much the government actually would have to pay the bidders for the same work. The Kato formula represents the cost difference that the bond should cover.

Here, the contracting officer used Haag Electric as a model of how to calculate the difference between bid prices. The contracting officer determined that the difference between Apex's and Aloha's bids in terms of value to the government was more than the amount of the bid guarantee submitted by Apex using the second Haag Electric method described above and rejected Apex's bid as nonresponsive because of its inadequate bid guarantee.³

³The second Haag Electric methodology essentially shows the value of services the Air Force could purchase off the IFB's scheduled price list if it spent the minimum amount (\$50,000) with each bidder. Thus, ordering \$50,000 of work from Apex would allow the Air Force to purchase \$90,909 of scheduled services (that is, \$50,000 minimum order divided by Apex's .550 coefficient = \$90,909). Ordering \$50,000 of work from Aloha would allow the Air Force to purchase only \$80,386 of scheduled services (that is, \$50,000 minimum order divided by Aloha's .622 coefficient = \$80,386). This computation results in a difference in contract dollar value of \$10,523, \$523 more than the \$10,000 bid guarantee submitted by Apex.

Apex contends that the contracting officer should have used Kato, rather than Haag Electric, as a model for comparing bid prices. Apex advises that, under the Kato method, the difference in putative bid prices is only \$6,545-- significantly less than Apex's \$10,000 bid guarantee and argues that the contracting officer erred by not waiving the bond's noncompliance and accepting Apex's bid.⁴ We do not agree.

Using the minimum order amount to determine the adequacy of bid guarantees, the Kato formula generally is the most accurate way to determine the differences between bid prices where bids are stated as multipliers. It shows how much more it would cost to have the second-low bidder do the exact same amount of work and, therefore, best estimates the loss an agency would suffer in the event the low bidder reneges on its bid.⁵ In all probability, contracting agencies will order greater amounts of services than the minimum order quantities specified in these indefinite delivery, indefinite quantity type of contracts. Consequently, other methods, including the Haag Electric calculations, can be reasonable ways of comparing bid prices. The best that can be said of any of the various computations is that they offer the contracting officer a rough measure of bid prices for comparison purposes in

⁴Following the Kato example, the minimum order of \$50,000 represents Apex's putative bid price. The value of scheduled work the Air Force would receive if the minimum of \$50,000 of work were ordered from Apex would be \$90,909. Next, multiplying Apex's \$90,909 worth of services by Aloha's .622 multiplier results in Aloha's putative bid price of \$56,545.

⁵In this regard, the FAR states that the amount of a bid guarantee requirement should be adequate to protect the government from loss should the successful bidder fail to execute all contractual documents. FAR § 28.101-2. The apparent reason for the FAR § 28.101-4(c)(2) exception is that a surety's liability on a bid bond is generally the difference between the low and the next-low bid. See Haag Elec. and Constr., Inc., supra.

making a waiver determination. As previously stated, depending upon the circumstances and the needs of the government, contracting officers have discretion to waive or not waive inadequate bid guarantees. See Santurce Constr. Corp., supra.

Accordingly, in our opinion, the contracting officer did not abuse his discretion and reasonably relied upon the Haag Electric evaluation method in the present case. The protest is denied.



Robert P. Murphy
Acting General Counsel