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Decision

Matter of: Pacific Dredge and Construction, LLC

File: B-418900

Date: September 18, 2020

Clinton D. Hubbard, Esq., Law Offices of Clinton D. Hubbard, for the protester.
Allison J. Carmody, Esq., Department of the Army, for the agency.
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participated in the preparation of the decision.

DIGEST

Protest challenging agency's rejection of bid as nonresponsive is denied because, notwithstanding prior dealing between the parties, agency reasonably rejected as defective a bid bond that limited the liability of the corporate surety with respect to excess procurement costs in the event of contractor default.

DECISION

Pacific Dredge and Construction, LLC, a small business of San Diego, California, protests the rejection of its bid as nonresponsive under invitation for bids (IFB) No. W912P720B0005, issued by the Department of the Army, United States Army Corps of Engineers (Corps) for dredging. The protester challenges the agency's rejection of its bid for failing to submit a valid bid bond.

We deny the protest.

BACKGROUND

On May 14, 2020, the Corps solicited bids for annual maintenance dredging of the Stockton deep water shipping channel in San Joaquin County, California. Req. for Dismissal, attach. 1, IFB at 4. The solicitation provided that award would be made in accordance with Federal Acquisition Regulation (FAR) provision 52.214-19, which sets forth that the government "will award a contract to the responsible bidder whose bid, conforming to the solicitation, will be most advantageous to the Government, considering only price and the price-related factors specified elsewhere in the solicitation." *Id.* at 10; FAR provision 52.214-19. The solicitation required bidders to submit pricing for each item in the pricing schedule in order to be considered

responsive. IFB at 10. The solicitation also required bidders to submit a bid guarantee, and included FAR provision 52.228-1, Bid Guarantee, which informed bidders that failure to furnish a bid guarantee in the proper form and amount could result in rejection of a bid. *Id.* at 4, 14, 16, 40.

The Corps conducted bid opening on June 15. Req. for Dismissal, attach. 4, Abstract of Bids. Pacific was the apparent low bidder. *Id.* Pacific submitted its bid guarantee on a commercial form furnished by the American Institute of Architects, in lieu of submitting a completed FAR standard form (SF) 24 bid bond. Agency Report (AR), Tab 1, Protester's Bid Package. Of relevance here, the bid bond submitted by Pacific provided that in the event of the contractor's default "[the surety] pays to the Owner [the Corps] the difference, not to exceed the amount of this Bond, between the amount specified in said bid and such larger amount for which the Owner [the Corps] may in good faith contract with another party to perform the work covered by said bid[.]" *Id.* at 9 (hereinafter referred to as the bond's "default clause"). Pacific's bid bond further provided that:

When this Bond has been furnished to comply with a statutory or other legal requirement in the location of the Project, any provision in this Bond conflicting with said statutory or legal requirement shall be deemed deleted herefrom and provisions conforming to such statutory or other legal requirement shall be deemed incorporated herein. When so furnished, the intent is that this bond shall be construed as a statutory bond and not as a common law bond.

Id. (hereinafter referred to as the bond's "savings clause").

In reviewing Pacific's bid, the contracting officer concluded that the default clause of Pacific's bid bond did not "provide the full range of protections" specified in FAR provision 52.228-1, which requires the surety to cover all excess procurement costs in the event of a default. AR, Tab 4, Bid Rejection Letter. The contracting officer informed Pacific that its bid was rejected as nonresponsive, noting that a prior decision of our Office "required" the government to reject Pacific's bid because in that decision our Office concluded that a bid bond submitted using the same commercial bid bond form submitted by Pacific here was ambiguous, and, therefore, defective. *Id.*, citing *G2G, LLC*, B-416502, Sept. 27, 2018, 2018 CPD ¶ 328. This protest followed.¹

¹ The Corps also rejected Pacific's bid as nonresponsive because its equipment list submittal included a "clamshell" dredge, which the contracting officer found did not adhere to the IFB's specified requirement for use of a hydraulic "cutterhead" dredge. AR, Tab 4, Bid Rejection Letter, citing IFB at 201. In responding to the protest, however, the Corps represented that after further review it concluded that the dredge bid by Pacific "is in fact a hydraulic dredge," and that "the equipment is not a basis to find the bid unresponsive." Contracting Officer's Statement (COS) at 3; see also Request for Dismissal at 4 ("[T]he Government withdraws its determination of nonresponsiveness pertaining to the equipment list.").

DISCUSSION

Pacific argues that the agency's rejection of its bid was improper because there is an established course of dealing between the parties, in which Pacific previously has submitted and the Corps previously has accepted the same commercial bid bond form the contracting officer rejected as defective here. The Corps disputes Pacific's contention that such an established course of dealing exists. The Corps further contends that even if such a course of dealing did exist, it would have had no bearing on the contracting officer's rejection of Pacific's bid because a bid's responsiveness must be determined solely from the face of the bid. For the reasons discussed below, we find no reason to sustain the protest.

A bid bond is a form of guarantee, which ensures that a bidder will not withdraw its bid within the period specified for acceptance and, if required, will execute a written contract and furnish required performance and payment bonds. See FAR 28.001; *Schrepfer Indus., Inc.*, B-286825, Feb. 12, 2001, 2001 CPD ¶ 23 at 2. The purpose of a bid bond is to secure the liability of a surety to the government by providing funds to cover the excess costs of awarding to the next eligible bidder in the event that the successful bidder defaults by failing to fulfill these obligations. See FAR provision 52.228-1(d)-(e); *G2G, LLC, supra* at 3; *Alarm Control Co.*, B-246010, Nov. 18, 1991, 91-2 CPD ¶ 472 at 1-2. When required by a solicitation, a bid bond or other bid guarantee is a material part of the bid with which there must be compliance at the time of bid opening. *Universal Coatings, Inc.*, B-278700, Mar. 4, 1998, 98-1 CPD ¶ 70 at 2. When a bidder submits a defective bid bond--or when uncertainty exists at the time of bid opening that the bidder has furnished a legally binding bond--the bid itself is rendered nonresponsive and generally requires rejection of the bid. FAR 28.101-4(a); *Schrepfer Indus., Inc., supra* at 2; *Alarm Control Co., supra* at 2.

A bidder's use of a commercial bid bond form, as here, rather than an SF 24 bid bond form is not *per se* objectionable because the sufficiency of the bid bond does not depend on its form, but on whether it represents a significant departure from the rights and obligations of the parties as set forth in SF 24. *G2G, LLC, supra* at 3; *Alarm Control Co. supra* at 2; *Allgood Elec. Co.*, B-235171, July 18, 1989, 89-2 CPD ¶ 58 at 1. The determinative question is whether the bond establishes unequivocally at the time of bid opening that the bond is enforceable against the surety should the bidder fail to meet its obligations. *Kemper Constr. Co., Inc.*, B-283286.2, Nov. 29, 1999, 99-2 CPD ¶ 98 at 3. If the agency cannot determine definitively from the bid bond documents that the surety would be bound, the bond is defective and the bid must be rejected. See *e.g., Id.; Universal Coatings, Inc., supra* at 2-3.

Our Office has consistently regarded language similar to the default clause in Pacific's bid bond as limiting the surety's liability to the difference between the bid amount and the replacement contract amount. Further, we have consistently found that such limitation differs significantly from the requirements of FAR provision 52.228-1, which permits recovery of all excess procurement costs, including, for example, the administrative costs of procurement or the costs of in-house government

performance. See e.g., *Alarm Control Co.*, *supra* at 2; *Seither & Cherry Co.*, B-242220, Apr. 10, 1991, 91-1 CPD ¶ 365 at 2; *Tolman Bldg. Maint.*, B-243654, Apr. 29, 1991, 91-1 CPD ¶ 422 at 2; *W.R.M. Constr., Inc.*, B-239847, Sept. 18, 1990, 90-2 CPD ¶ 227 at 2-3; *Johnson Controls, Inc.*, B-235517, Aug. 25, 1989, 89-2 CPD ¶ 177 at 1; *Allgood Elec. Co.*, *supra* at 2; *Johnson Constr. Co., Inc.*, B-224390, Sept. 10, 1986, 86-2 CPD ¶ 284 at 3.

In the *G2G* decision cited by the Corps, we considered an agency's rejection of a bid bond submitted using the same commercial bid bond form and containing substantively identical default and savings clauses as the bid bond submitted by Pacific here. *G2G, LLC, supra* at 2. There, the protester did not dispute that the default clause in its bid bond limited the amount of procurement costs the agency could recover in a manner contrary to the requirements of FAR provision 52.228-1(e). *Id.* at 3. *G2G* argued, however, that this limitation was corrected by the savings clause, which, by its terms of operation, "deemed deleted" from the bid bond the non-compliant default clause and "deemed incorporated" into the bid bond the requirements of FAR provision 52.228-1. *Id.* at 3-4. *G2G* maintained that, when read as a whole, the bid bond unequivocally committed the surety to satisfy all the requirements of FAR provision 52.228-1, including the obligation to pay all excess procurement costs in the event of default. *Id.* We disagreed.

As discussed in that decision, we found that the agency properly rejected *G2G*'s bid bond as defective because the bond's default clause represented a significant departure from the rights and obligations of the parties as set forth in FAR provision 52.228-1(e), and the bond's savings clause did not remedy this defect. *G2G, LLC, supra* at 4. We concluded that the savings clause language did not provide clear or unambiguous evidence of *G2G*'s intent to incorporate by reference the solicitation requirements for a bid guarantee consistent with the obligations set forth in FAR provision 52.228-1. *Id.* We found that, at best, the savings clause was ambiguous with respect to the liability of the surety to satisfy all of the requirements of FAR provision 52.228-1, and we noted that our Office will not convert ambiguous aspects of bid bonds into mere matters of form which can be explained away and waived. *Id.* (finding that "it is not clear from the face of the protester's bid bond what is meant by the phrase 'to comply with a statutory or other legal requirement in the location of the [p]roject accordingly, this phrase may be subject to more than one interpretation.'").

Pacific acknowledges that the commercial bid bond form it used to submit its bid bond here is the same commercial bid bond form containing substantively the same language at issue in our decision in *G2G*. Protest at 2. Pacific argues, however, that our decision in *G2G* is distinguishable because although it involved the same commercial bid bond form, that decision addressed the form's ambiguous savings clause "in isolation from the historical context of the parties' mutual understanding[.]" *Id.* Pacific maintains that, here, there is an established course of dealing between the parties whereby, both before and after issuance of our decision in *G2G, LLC*, Pacific has submitted and the Corps has accepted bid guarantees on the same commercial bid bond form the agency

now rejects.² *Id.*; Protest at attach. 5, Decl. of Pacific's Manager at 1; Comments at 1 and attachs. 8-9, Past Pacific Bid Bonds. In further support of its position, Pacific submitted a declaration from its bond agent, in which he represents that "[t]here is a long-established custom and practice, shared by the Federal government and [the Corps] on the one hand, and the contractor community on the other, that the [commercial bid bond form] language is fully sufficient for all FAR purposes[.]" Protest attach. 4, Decl. of Bonding Agent at 1-2.

We find unavailing Pacific's arguments that a course of dealing, if one exists, alters the meaning of the express terms of the default and savings clauses of its submitted bid bond. As discussed above, the responsiveness of a bid must be determined at the time of bid opening, and if the agency cannot determine definitively from the face of the bid documents that the surety would be bound, the bond is defective and must be rejected. *Kemper Constr. Co., Inc., supra* at 3; *Universal Coatings, Inc., supra* at 2-3. The test applied in determining the responsiveness of a bid is whether the bid as submitted is an unequivocal offer to perform the exact thing called for in the IFB; thus, if a bid is ambiguous with regard to a material IFB provision, such as a bonding requirement, it is nonresponsive. *Johnson Controls, Inc., supra* at 3.

In general, responsiveness must be determined solely from the face of the bid and materials submitted with the bid. *Handyman Exchange, Inc.*, B-224188, Jan. 7, 1987, 87-1 CPD ¶ 23 at 2. Accordingly, a past course of dealing between a bidder and the procuring agency cannot affect the responsiveness of a bid. *Golden Reforestation, Inc.*, B-230169, Feb. 25, 1988, 88-1 CPD ¶ 196 at 2. Moreover, the fact that the Corps may have previously accepted similarly defective bid bonds from Pacific, whether before or after issuance of our decision in *G2G, LLC*, does not prohibit the Corps from later invoking the legal requirements of competitive bidding, as it has here. *Arnold Business Forms Co.*, B-160858, Apr. 18, 1967, at 2 (finding that acquiescence "or oversights in connection with other invitations does not establish in law a 'course of dealing' whereby the government is thereafter estopped from invoking the legal requirements of competitive bidding."). An improper award under one or more IFBs does not justify a

² The Corps asserts that the single instance Pacific cites in support of its contention that there is an established course of dealing between the parties involved a different Corps' district office than the one involved here, and that this "lone instance is insufficient to create a reasonable expectation that the [Corps] would have to accept the flawed bid bond form in the future." Req. for Dismissal at 8.

repetition of the same error under a later IFB. *Id.*; *Inscom Electronics Corp.*, B-225858, Feb. 10, 1987, 87-1 CPD ¶ 147 at 3.

The protest is denied.

Thomas H. Armstrong
General Counsel