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**Comptroller General
of the United States**

**United States General Accounting Office
Washington, DC 20548**

Decision

Matter of: South Atlantic Construction Company, LLC

File: B-286592.2

Date: April 13, 2001

Joel S. Rubinstein, Esq., Bell, Boyd & Lloyd, for the protester.
Gilbert J. Ginsburg, Esq., for Phoenix Contracting Services, Inc., an intervenor.
Joshua A. Kranzberg, Esq., and David H. Scott, Esq., U.S. Army Materiel Command,
for the agency.
Christina Sklarew, Esq., and Michael R. Golden, Esq., Office of the General Counsel,
GAO, participated in the preparation of the decision.

DIGEST

1. Protest that agency was required to reject bid for failure to satisfy bid guarantee requirement is denied where the amount of the contested bid guarantee was greater than the difference between that firm's bid and next low bid and agency properly decided to waive the requirement; fact that contested bid included inconsistent language regarding the amount of the bid guarantee did not require rejection.
2. Agency conclusion that award to bidder that proposed relatively high prices for 3 items and relatively low prices for 3 other items listed among 166 items in a solicitation for roofing repair work did not represent an unacceptable risk to the government is unobjectionable where the reasonableness of the estimated quantities to be ordered under the contract is not in question, all bidders (including the protester) had similarly inconsistent prices for some items, and the awardee's price is lower for the base year, for 2 of the 4 option years, and for the potential 5-year contract.

DECISION

South Atlantic Construction Company, LLC protests an award by the Army Materiel Command to Phoenix Contracting Services, Inc. under invitation for bids (IFB) No. DAAD05-00-B-7005 for roofing replacement and repairs. South Atlantic asserts that Phoenix's bid should have been rejected as nonresponsive, alleging that Phoenix submitted a defective bid bond and that its pricing was unbalanced.

We deny the protest.

The IFB, issued as a small business set aside, contemplated the award of a fixed-price requirements contract for roof repairs or replacement for any of the 2,272 buildings located at Aberdeen Proving Ground, Maryland during a 1-year base period with 4 option years. The work that might be required included replacement of existing roofs, either with the existing type of roof or a new type, as well as replacement of shingles or other types of repair work. The IFB included a government estimate of the quantities for the various types of work that would be needed.

The IFB required bidders to provide unit prices for 166 separate contract line item numbers (CLIN) for each year, resulting in a total of 830 CLINs for the potential 5-year life of the contract. Each CLIN contained estimated quantities. Bidders were to insert a unit price for each CLIN, which when multiplied by the estimated quantity, resulted in an extended price for each CLIN. The sum of the extended prices comprised the total bid price. Bidders were instructed to guarantee their bids with a bid bond equaling the lesser of either 20 percent of the bid amount or \$3,000,000.

The agency received five timely bids, of which two were rejected as nonresponsive for failure to acknowledge amendments. Among the three remaining bids, Phoenix's price of \$11,893,133.47 was the apparent low bid, while South Atlantic's \$12,185,607.02 bid was the second lowest. While reviewing Phoenix's bid, the contracting officer discovered several mathematical errors and pricing inconsistencies. When these were brought to Phoenix's attention, Phoenix declined to make any changes, verifying its bid as submitted. The contracting officer therefore corrected only certain obvious clerical (multiplication) errors in Phoenix's bid that are not at issue here. After these corrections were made, Phoenix's bid price was increased to \$11,972,424.75 but remained low.

After South Atlantic challenged Phoenix's bid as unbalanced,¹ the agency analyzed Phoenix's pricing to determine whether an award to Phoenix would likely result in paying unreasonably high prices. The agency applied Phoenix's unit prices to 15 actual delivery orders that had been placed under the previous contract and compared the resulting prices to the amounts that had been paid to the previous contractor. Although the engineer's report states that there were too many variables involved, and too little data, to produce a clear result, Agency Report, Tab I, Engineering Review of Phoenix's Prices, at 5, the contracting officer noted that the prices bid by Phoenix were in most cases very similar to the amounts actually paid under the previous contract. Agency Report, Tab J, Contracting Officer's Summary of Award, at 3. In addition, each bidder's unit prices were compared with the prices

¹ South Atlantic's initial protest challenging Phoenix's bid as unbalanced, filed before the agency had made the award, was dismissed by our Office as premature.

submitted by the other bidders. In comparing the 830 separate unit prices in each bid, the contracting officer noted that each bidder has some unit prices that could be considered unbalanced when viewed in relation to all the other prices bid for that particular item. The contracting officer concluded that Phoenix's pricing did not pose an unacceptable risk to the government and therefore should not be rejected. This protest followed.

South Atlantic alleges that the bid bond that was submitted with Phoenix's bid was deficient because it lists "conflicting penal sums." Protest at 2. The protester contends that although the bid bond indicates in one area that the penal sum is 20 percent of the bid amount (which would be \$2,378,626.69 or \$2,394,484.95, depending whether the initial or corrected amount is used), in another area it is expressed as "not to exceed \$600,000," which is clearly less than the 20 percent required by the IFB.

When required, a bid bond is a material part of the bid and by its terms must clearly establish the requisite liability of the surety or the bid must be rejected as nonresponsive. See Tom Mistick & Sons Inc., B-222326, Apr. 3, 1986, 86-1 CPD ¶ 323. The question presented where a bond contains any defect is whether the government materially obtains the same protection under the bond actually submitted as it would if the bond complied with the solicitation in all respects. Id. In this regard, the Federal Acquisition Regulation (FAR), § 28.101-4(c)(2), provides that noncompliance with a solicitation requirement for a bid guarantee generally shall be waived when the amount of the bid guarantee, while less than required, is equal to or greater than the difference between the affected bid and the next low acceptable bid.

Here, South Atlantic argues that the bond was not valid in any amount because of the inconsistency within the bid regarding the amount of the bid guarantee. We disagree. The bond provided a penal sum of 20 percent of the bid amount, limited to a \$600,000 maximum, and we see no reason that even an inconsistency within the bid (concerning whether the bid guarantee was even higher than that maximum) would lead to a conclusion that the bond was not valid for the \$600,000 amount. In addition, the contracting officer properly determined that Phoenix's bid was acceptable, even though its bid guarantee was limited to \$600,000, because that amount was greater than the \$213,182.27 difference between Phoenix's bid and South Atlantic's bid. Centex-Great Southwest Corp., B-258578, Jan. 17, 1995, 95-1 CPD ¶ 19 at 2.

Next, South Atlantic protests that Phoenix's bid should be rejected as nonresponsive because its pricing is unbalanced. The protester identifies six CLINs for which it alleges Phoenix's prices are significantly overstated or understated.

Section 15.404-1(g) of the FAR provides that unbalanced pricing exists where the price of one or more contract line items is significantly over- or understated as indicated by the application of cost or price analysis techniques. FAR § 15.404-

1(g)(2) requires that offers with separately priced line items or subline items be analyzed, using cost or price analysis techniques, to determine if the prices are unbalanced and, if an offer is found to be unbalanced, the contracting officer must consider whether the contract award will result in paying unreasonably high prices for contract performance. An offer may be rejected if the contracting officer determines that the lack of balance poses an unacceptable risk to the government. FAR § 15.404-1(g)(3).

Here, the agency analyzed Phoenix's bid and concluded that the firm's pricing did not pose an unacceptable risk. Under an evaluation of bid prices based on the estimated quantities, Phoenix's bid offers the lowest price for the base year and 2 of the 4 option years, as well as offering the lowest overall price. Because the agency expects to order the repair and replacement requirements in the amounts estimated in the IFB, and Phoenix has offered the lowest price for the performance of that work, it was reasonable for the agency to conclude that, notwithstanding individual prices that may have been inflated or understated in some instances, Phoenix's bid did not present an unacceptable risk to the government.²

The agency points out that the six CLINs at issue represent a relatively small fraction of the 166 items listed for each year of the contract, and that the impact of any over- or underpricing among them would be unlikely to result in an unacceptable level of risk in the total bid. Further, of the six CLINs at issue, three are alleged to be overpriced and three underpriced. The agency notes that one of the apparently overpriced CLINs is for a type of roofing membrane that is among the least frequently utilized,³ and the other two allegedly overpriced CLINs are also listed in the IFB in relatively low estimated quantities. In short, the contracting officer reasonably determined that the impact of Phoenix's understated and overstated pricing was likely to be minimal.

In addition, a review of the other submitted bids—including South Atlantic's own bid—shows that each bidder submitted some individual prices that were far removed from

² Although South Atlantic disagrees with a statement in the agency report that characterizes certain CLINs as infrequently ordered, and describes some hypothetical repair scenarios under which Phoenix's price would be higher, each of these scenarios includes unsupported quantities that exceed the annual quantity estimated in the IFB, and thus these scenarios provide no valid basis for evaluating the awardee's bid. South Atlantic did not raise any timely challenge to the quantities listed in the IFB prior to bid opening. Under our Regulations, protests based upon alleged improprieties in a solicitation which are apparent prior to bid opening shall be filed prior to bid opening. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1).

³ The IFB includes an estimated quantity for this CLIN of only 1,000 square feet per year.

the amounts bid by the others, i.e., were apparently unbalanced in some way. In the circumstances presented here, we see no basis to conclude that the protester's pricing structure presented any lower risk than the awardee's, and we see no basis to question the contracting officer's conclusion that Phoenix's prices did not pose an unacceptable risk to the government.

The protest is denied.

Anthony H. Gamboa
General Counsel