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**Comptroller General
of the United States**

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

Decision

Matter of: McGhee Construction, Inc.

File: B-293239

Date: February 5, 2004

Timothy S. Kerr, Esq., for the protester.

Mark R. Warnick, Esq., General Services Administration, for the agency.

Guy R. Pietrovito, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

In a sealed bid procurement which required the submission of a bid guarantee in the amount of 20 percent of the bid price, agency properly rejected protester's bid as nonresponsive, where the bid included a bid guarantee that stated that the penal sum amount was limited to 20 percent of the "Attached Bid" and the bid to which the bid guarantee was attached did not include prices for any line item; although protester timely modified the bid to provide line item pricing, because the bid guarantee referenced the attached, unpriced bid, the bid guarantee was ambiguous concerning the amount of the bid guarantee, and was therefore nonresponsive.

DECISION

McGhee Construction, Inc. protests the rejection of its low bid under invitation for bids (IFB) No. GS06P03GYC0030, issued by the General Services Administration (GSA) for construction services.

We deny the protest.

The IFB requested bids for construction services for the Federal Building and United States Courthouse in Sioux City, Iowa. The IFB included the "Notice of Price Evaluation Adjustment for Small Disadvantaged Business (SDB) Concerns" clause, Federal Acquisition Regulation (FAR) § 52.219-23, and provided for a 10-percent preference for bids of SDB concerns. The IFB also required the submission of a bid guarantee in the amount of 20 percent of the bid amount. Bid opening was scheduled for 3 p.m., October 23, 2003. Facsimile bids were not authorized but facsimile bid modifications were.

The IFB requested pricing for a number of contract line item numbers (CLIN), including a “base bid” for exterior and interior renovations, unit prices for various construction services (with identified estimated quantities), and a number of option for various services. Bidders were informed that the evaluated bid price would be the sum of the bidder’s price for the base bid, extended unit prices, and all options. The IFB further stated that the “[f]ailure to furnish prices for the Base Bid, all individual Unit Prices, and all Options will render the bid non-responsive.” IFB Schedule at 2.

GSA received four bids by the October 23 bid opening time. McGhee submitted its bid to the agency on October 21; McGhee entered the phrase “No Bid” for every IFB CLIN. With its bid, McGhee included a completed bid guarantee which provided a penal sum amount of 20 percent of the bid price but which also stated that the penal sum of the bond was an amount not to exceed “20% of Attached Bid.” On October 23, at 2:54 p.m. and 2:56 p.m. (prior to bid opening), McGhee submitted two facsimile modifications of its original bid; these bid modifications priced each CLIN. The facsimile transmission cover sheets for the bid modifications stated

Please disregard previously submitted bid, we are modifying our bid via fax. Please see attached Bid Schedule.

The bid modifications did not mention McGhee’s bid guarantee.

Because McGhee indicated that it was an SDB concern, it received the benefit of the 10 percent preference. As a result of the application of the SDB preference, McGhee’s last bid modification was found to be the apparent low bid.

GSA rejected McGhee’s bid as nonresponsive because the original bid did not price each CLIN, as required. The agency concluded that because the original bid indicated “no bid” for each CLIN, the original bid package was actually not a bid, and that McGhee’s facsimile bid modifications were in fact McGhee’s bid. Because facsimile bids were not authorized by the IFB, GSA stated that McGhee’s bid could not be considered.

However, in response to the protest, citing our decision in Ulysses, Inc.; Orlotronics Corp., B-187345, B-187356, Dec. 6, 1976, 76-2 CPD ¶ 464, GSA withdrew its determination that McGhee’s original bid could not be modified by facsimile to provide prices for each CLIN. In that decision, we found that where, as here, a solicitation authorized the modification of bids by facsimile, a bidder properly may use a facsimile transmission to provide prices for CLINs for which the original bid did not contain prices but stated “no bid.”

The agency had an additional reason that it considered McGhee’s bid to be nonresponsive. That is, the agency found that because McGhee’s bid guarantee limited the penal sum amount of its bid guarantee to an amount not to exceed

20 percent of the “Attached Bid” and because the attached bid contained no bid prices, McGhee’s bid guarantee was defective and its bid was nonresponsive.

McGhee protests the rejection of its bid, arguing that it timely submitted a signed bid with the required bid guarantee in accordance with the IFB requirements and timely modified that bid by facsimile, as specifically permitted by the IFB. McGhee also challenges the agency’s determination that its bid was nonresponsive to the bid guarantee requirement. Specifically, McGhee asserts that although its bid guarantee limited its penal sum amount to an amount not to exceed 20 percent of the attached bid, the term “attached bid” in the bid guarantee refers to its bid, as subsequently and properly modified to provide prices for each CLIN, and, therefore, its bid, as modified, provided an enforceable bid guarantee in the requisite amount, and was not nonresponsive to this requirement.

A bid guarantee is a form of security ensuring that a bidder will, if required, execute a written contract and furnish payment and performance bonds. FAR § 28.001; American Artisan Prods., Inc., B-292380, July 30, 2003, 2003 CPD ¶ 132 at 4. Where the guarantee is in the form of a bid bond, it secures the liability of the surety to the government if the holder of the bond fails to fulfill these obligations. Paradise Constr. Co., B-289144, Nov. 26, 2001, 2001 CPD ¶ 192 at 2. When required by a solicitation, a bid guarantee is a material part of the bid and a valid guarantee must be furnished with the bid in order for it to be responsive. Hugo Key & Son, Inc.; Alco Env’tl. Servs., Inc., B-251053.4; B-251053.5, July 15, 1993, 93-2 CPD ¶ 21 at 3, aff’d, B-251053.6, Sept. 27, 1993, 93-2 CPD ¶ 192. A bid which contains a guarantee insufficient in amount is nonresponsive and ordinarily cannot be accepted. Young Patrol Serv., Inc., B-210177, Feb. 3, 1983, 83-1 CPD ¶ 125 at 1. If at the time of bid opening it is uncertain whether the bidder has furnished a legally binding bond, the bid must be rejected as nonresponsive. FAR § 28.101-4(a); A & A Roofing Co., Inc., B-219645, Oct. 25, 1985, 85-2 CPD ¶ 463 at 3.

Here, we find that GSA properly rejected McGhee’s bid because the language “20% of the Attached Bid” in McGhee’s bid guarantee created at least an ambiguity concerning the penal sum amount of McGhee’s bid guarantee. Although it is true, as McGhee notes, that we have found that where, as here, the penal sum amount is expressed as a percentage of the bid price (and not as a specific amount), the upward correction of the bid after bid opening (due to a mistake in bid) did not render the bid guarantee amount inadequate, because the penal sum amount of the bid guarantee was increased by the bid correction. See Reynosa Constr., Inc., B-278364, Dec. 15, 1997, 97-2 CPD ¶ 165 at 2-3, recon. denied, B-278364.2, Apr. 28, 1998, 98-1 CPD ¶ 124 at 3. Unlike Reynosa, however, the protester here, in addition to stating its penal sum amount as a percentage of its bid price, also limited its penal sum amount of its bid guarantee to a percentage of the “attached bid.” As indicated by GSA, the bid to which the bid guarantee was actually attached was not priced but stated “no bid” for each CLIN. Thus, we agree with GSA that McGhee’s limitation of its penal sum amount to a percentage of the “attached” bid created significant doubts whether an upward increase in the penal sum amount by reason of its bid

modification would be enforceable against the surety. This is so because the language of the bid guarantee indicates that the bidder intended to restrict its penal sum amount to a percentage of the bid price expressed in the attached document without providing for possible subsequent changes in the bid price. Thus, at a minimum, McGhee's bid guarantee is ambiguous concerning the amount of the bid guarantee, and therefore must be rejected as nonresponsive. See Johnston Eng'g, Inc., B-258180, Dec. 16, 1994, 94-2 CPD ¶ 246 at 2-3; Cherokee Enters., Inc. B-252948, B-252950, June 3, 1993, 93-1 CPD ¶ 429 at 3.

The protest is denied.

Anthony H. Gamboa
General Counsel