



## Decision

**Matter of:** Leeward Construction Corporation

**File:** B-420504

**Date:** March 3, 2022

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### DIGEST

Protest alleging that the agency abused its discretion in rejecting a bid as nonresponsive for failing to provide a compliant bid bond based on prior GAO decisions finding that the identical commercial bid bond used by the protester was inconsistent with applicable legal requirements is dismissed as legally and factually insufficient. Procuring agencies do not abuse their discretion when they reasonably rely on prior GAO decisions with respect to identical legal issues where there are no intervening changes in controlling or persuasive authority or compelling, distinguishing legal or factual circumstances.

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### DECISION

Leeward Construction, Inc., of Honesdale, Pennsylvania, protests the exclusion of its bid as non-responsive under invitation for bids (IFB) No. W912BU22B0003, which was issued by the Department of the Army, U.S. Army Corps of Engineers, for safety modifications to the General Edgar Jadwin Dam in Wayne County, Pennsylvania. Leeward contends that the Army abused its discretion by rejecting the protester's bid bond as inconsistent with the IFB's requirements.

For the reasons that follow, we dismiss the protest because it fails to state legally or factually sufficient bases of protest.

### BACKGROUND

The IFB, which was issued on October 27, 2021, and subsequently amended twice, sought bids for the removal of "riprap" (or stone facing) on the upstream face of the

General Edgar Jadwin Dam and installing of geosynthetic liner. See Req. for Dismissal at 1; *id.*, exh. No. 1, IFB, at 1, 3. Relevant here, the IFB incorporated in full text Federal Acquisition Regulation (FAR) provision 52.228-1, Bid Guarantee, which provides:

- a) Failure to furnish a bid guarantee in the proper form and amount, by the time set for opening of bids, may be cause for rejection of the bid.
- b) The bidder shall furnish a bid guarantee in the form of a firm commitment, *e.g.*, bid bond supported by good and sufficient surety or sureties acceptable to the Government, postal money order, certified check, cashier's check, irrevocable letter of credit, or, under Treasury Department regulations, certain bonds or note of the United States. The Contracting Officer will return bid guarantees, other than bid bonds, (1) to unsuccessful bidders as soon as practicable after the opening of bids, and (2) the successful bidder upon execution of contractual documents and bonds (including any necessary coinsurance or reinsurance agreements), as required by the bid accepted.
- c) The amount of the bid guarantee shall be 20 percent of the bid price or \$3,000,000, whichever is less.
- d) If the successful bidder, upon acceptance of its bid by the Government within the period specified for acceptance, fails to execute all contractual documents or furnish executed bond(s) within 10 days after receipt of the forms by the bidder, the Contracting Officer may terminate the contract for default.
- e) In the event the contract is terminated for default, the bidder is liable for any cost of acquiring the work that exceeds the amount of its bid, and the bid guarantee is available to offset the difference.

Req. for Dismissal, exh. No. 1, IFB at 20-21 (*quoting* FAR provision 52.228-1).<sup>1</sup>

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<sup>1</sup> Our decisions have repeatedly recognized that a bid including a bid bond materially different from the requirements of FAR provision 52.228-1 and the provisions of Standard Form (SF) 24, Bid Bond (see FAR 53.228(a)) must be rejected as nonresponsive. See, *e.g.*, *Hamilton Pacific Chamberlain, LLC*, B-410955, Mar. 30, 2015, 2015 CPD ¶ 114; *Star Brite Constr. Co., Inc.*, B-255206, Feb. 8, 1994, 94-1 CPD ¶ 89; *Allgood Elec. Co.*, B-235171, July 18, 1989, 89-2 CPD ¶ 58; see also FAR 14.404-2(j) ("When a bid guarantee is required and a bidder fails to furnish the guarantee in accordance with the requirements of the invitation for bids, the bid shall be rejected" absent inapplicable exceptions set forth in FAR section 28.101-4.).

The IFB did not specify any particular form that bidders were required to use for their respective bid bonds. Leeward utilized American Institute of Architects (AIA) Document A310 – 2010, Bid Bond.<sup>2</sup> Relevant here, the AIA form provides that in the event of the offeror's default, the surety:

[P]ays to the Owner 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 may in good faith contract with another party to perform the work covered by said bid, then this obligation shall be null and void, otherwise to remain in full force and effect.

Req. for Dismissal, exh. No. 5A, Leeward Bid at 8.

The AIA form further provides 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 the Bond shall be construed as a statutory bond and not as a common law bond.

*Id.*

The Army subsequently received six timely bids in response to the IFB; Leeward submitted the lowest bid of \$3.887 million. Req. for Dismissal, exh. No. 4, Bid Abstract at 1. The Army, however, found Leeward's bid nonresponsive because the bid bond submitted on the AIA form included "limitations which differ 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." Req. for Dismissal, exh. No. 6, Notice of Nonresponsive Bid at 1. Specifically, the contracting officer explained that Leeward's bid bond limited the liability of the surety in the case of the protester's default to "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 may in good faith contract with another party to perform the work covered by said bid." *Id.* (quoting bid bond). In support of the agency's decision that this limitation was inconsistent with the FAR's requirements, the contracting officer relied on prior GAO decisions in *Pacific Dredge and Constr., LLC*, B-418900, Sept. 18, 2020, 2020 CPD ¶ 299, and *G2G, LLC*, B-416502, Sept. 27, 2018, 2018 CPD ¶ 328, which found the AIA form inconsistent with these requirements. *Id.* This protest followed.

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<sup>2</sup> The other five bidders used the SF 24 Bid Bond form. See, e.g., Req. for Dismissal at 4.

## DISCUSSION

Leeward challenges the Army's determination that the submitted bid bond was inconsistent with the FAR. Specifically, the protester points to the savings clause of its bid bond that any provision of the bond conflicting with any statutory or legal requirement "shall be deemed deleted herefrom and provisions conforming to such statutory or other legal requirement shall be deemed incorporated herein." Protest at 2 (*quoting* bid bond). Leeward further contends that its bid bond in fact is consistent with FAR provision 52.228-1's requirements, and that the agency's interpretation is an abuse of discretion because the penal value of the bid (20 percent of \$3.887 million, or \$777,491) is less than the price premium associated with the next lowest bidder's \$5 million bid (which was approximately \$1.112 million higher than Leeward's lower-priced bid). The protester contends that the agency will incur a significant price premium by not making award to Leeward. *Id.* at 3-4.

The Army requests dismissal of the protest as legally and factually insufficient. Specifically, the agency points to our recent decisions in *Pacific Dredge and Construction, LLC, supra*, and *G2G, LLC, supra*, in which our Office denied protests challenging nonresponsiveness determinations based on the identical AIA 310 bid bond form used by Leeward. The agency contends that our Office has already decided that the AIA bid bond form at issue fails to meet the requirements of FAR provision 52.228-1 and that the savings clause is insufficient to remedy the bond's apparent limitation on the surety's liability only to the costs of a reprocurement contract. Therefore, the Army argues it properly found the identical bid bond form used by Leeward nonresponsive. We agree.

In *Pacific Dredge and Construction, LLC* and *G2G, LLC* we considered an agency's rejection of bids as nonresponsive when the bidders used the same commercial bid bond form with the same default and savings clauses as the bid bond submitted by the protester here. As in this case, the protesters argued that any improper 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. *Pacific Dredge and Constr., LLC, supra* at 4 (*citing* *G2G, LLC*). As we explained, however, the savings clause language did not provide clear or unambiguous evidence of the bidders' intent to incorporate by reference the solicitation requirements for a bid guarantee consistent with the obligations set forth in FAR provision 52.228-1. *Pacific Dredge and Constr., LLC, supra* at 4; *G2G, LLC supra* at 4. 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 explained that our Office will not convert ambiguous aspects of bid bonds into mere matters of form which can be explained away and waived. *Id.*

In responding to the agency's request for dismissal, Leeward essentially expresses its disagreement with our prior decisions and argues that they are not dispositive because the "GAO Decisions are not binding upon the Agency," and "at most" are "authoritative pronouncements." According to the protester, it was unreasonable for the agency to

reject an AIA A310 Bid Bond based solely on the prior GAO decisions in *Pacific Dredge and Construction, LLC* and *G2G, LLC* because the agency's decision "is not based upon any subsequent case law or authoritative precedent from a Court of proper jurisdiction." Resp. to Req. for Dismissal at 1-2.

The protester's argument that the Army unreasonably relied on GAO's decisions in *Pacific Dredge and Construction, LLC* and *G2G, LLC* because they are not binding judicial precedent is without merit.

While the protester is generally correct that GAO's decisions are recommendations to procuring agencies, and, therefore, technically not binding on agencies, such fact does not mean that our Office will cast aside prior decisions made with respect to identical legal issues. Although our decisions are not binding legal precedent and the associated judicial principle of *stare decisis* does not directly apply, GAO generally applies similar principles in order to promote clarity and certainty for the procurement community. Indeed, a "bid protest is an adjudicative process," and the decisions of the Comptroller General of the United States "in bid protest cases have resulted in a uniform body of law applicable to the procurement process upon which the Congress, the courts, agencies, and the public rely." GAO-18-510SP, Bid Protests at GAO: A Descriptive Guide, at 1, 4. Ignoring prior decisions and potentially reaching conflicting legal decisions would create material uncertainty and would be inconsistent with the critical role and purpose of our forum.

Disregarding our prior decisions interpreting identical legal issues--without intervening changes in controlling or persuasive authority or compelling, distinguishing legal or factual circumstances--is also antithetical to the Competition in Contracting Act's mandate that our bid protest forum provide for the inexpensive and expeditious resolution of protests. 31 U.S.C. § 3554(a)(1). Repetitive litigation of identical legal issues--absent a compelling basis for revisiting prior legal decisions--only increases the costs and delays the resolution of protests. Thus, the protester's disagreement with our prior decisions addressing the identical legal issues, without more, fails to state a legally or factually sufficient basis of protest.

Next the protester argues that the facts of this case are distinguishable from those of *G2G, LLC* and *Pacific Dredge and Construction, LLC* in two critical ways. Leeward first argues that it reasonably relied on oral advice of the contract specialist that indicated that the AIA form would be accepted. Such allegation, however, fails to state a legally or factually sufficient basis of protest. First, Leeward does not actually allege that the contract specialist in fact stated that the AIA form would be accepted. Rather, the protester attests that, in response to its inquiry of whether "there were special bid bond forms," the contract specialist merely said "no." Protest, exh. D, Decl. of Leeward Admin. Assistant ¶ 6; see also *id.* (attesting in response to the protester's inquiry if the government would accept the AIA bid bond form that the contract specialist responded that "Leeward just needed to make sure a bid bond was included"). We have explained that a bidder's use of a commercial bond form, as here, rather than the SF 24 bid bond form is not *per se* objectionable, since 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. Thus, the contract specialist's direction that there was no specific form required was not inaccurate, and it was the protester's responsibility to ensure the form that it used met the FAR's requirements. As addressed above, we have previously found that the AIA form used did not meet the FAR's requirements.

In any event, even assuming that the contract specialist explicitly or implicitly indicated that the AIA form would be accepted, we have explained that oral advice given by representatives of the contracting officer is not binding on the government and a bidder relies on oral explanations of the solicitation at its own risk. *Orion Constr. Co., Inc.*, B-294014, June 30, 2004, 2004 CPD ¶ 136 at 3; *Red Fox Indus. Inc.--Recon.*, B-225696.2, Mar. 18, 1987, 87-1 CPD ¶ 307 at 2; *cf. Pacific Dredge and Constr., LLC, supra* at 5 (denying protest based on alleged prior course of dealing with respect to the acceptability of the AIA bid bond form because "a past course of dealing between a bidder and the procuring agency cannot affect the responsiveness of a bid").

In this regard, the protester also contends that the IFB was ambiguous with respect to what bid bond forms would be acceptable, and, in light of the protester's pre-bid submission inquiry, the government should have known of the ambiguity and amended the IFB. This argument, however, is an untimely challenge to the terms of the solicitation. Our Bid Protest regulations require that a protest based upon alleged improprieties in a solicitation that are apparent prior to the closing time for receipt of initial bids or proposals be filed before that time. 4 C.F.R. § 21.2(a)(1). A patent solicitation ambiguity exists where the solicitation contains an obvious, gross, or glaring error. *Shertech Pharmacy Piedmont, LLC*, B-413945, Nov. 7, 2016, 2016 CPD ¶ 325 at 4 n.2. It is an offeror's affirmative obligation to seek clarification of a patent ambiguity prior to the first due date for submissions responding to the solicitation following introduction of the ambiguity into the solicitation. 4 C.F.R. § 21.2(a)(1); *International Bus. Machines Corp.*, B-417596.10, Mar. 17, 2021, 2021 CPD ¶ 127 at 15. Here, if Leeward believed that the IFB was ambiguous for failing to include sufficient information as to the required form of the bid bond, it had an affirmative obligation to challenge the terms of the IFB prior to the bid submission deadline.<sup>3</sup>

The protester further argues that this case is distinguishable from *G2G, LLC* because, notwithstanding any limitations on the face of the bid bond, it is apparent that the penal value of the bond, \$777,491, will be subsumed by any anticipated procurement costs based on the value of the other bids received in response to the IFB. This argument, however, is irrelevant to the primary concern with the AIA form addressed in *G2G, LLC*.

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<sup>3</sup> To the extent Leeward argues that the contract specialist failed to adequately address its request for clarification, such an argument similarly would be untimely. In this regard, when an agency fails to clarify a patently ambiguous term or solicitation provision, or otherwise satisfactorily resolve a firm's questions, a firm is required to protest its concerns prior to the next closing date. *International Bus. Machines Corp., supra* at 17.

Specifically, we explained that the primary ambiguity with respect to the surety's limitation of liability in the AIA form is that it appears to expressly limit the government's recovery to replacement contract costs, while FAR provision 52.228-1 and the SF 24 generally permit the government to recover additional costs beyond replacement contract costs, including, for example, administrative costs or the agency's cost to self-perform the contract. *G2G, LLC, supra* at 3 n.1. As explained in *G2G, LLC*, the FAR provides the government with the flexibility to use the indemnification to reimburse its costs of securing substitute performance generally, while the AIA bid bond's limitation of liability appears to restrict the government's options only to reprocurement via another contractor. Thus, we do not find that the protester's argument is sufficient to distinguish our prior decision on this issue.

The protester's third principal argument in opposition to dismissal is that the agency abused its discretion by rejecting Leeward's bid because award to the next highest bidder will result in a significant price premium to the government. We find no merit to the argument. We have routinely rejected arguments that an offeror should be allowed to correct its bond because the government would save money. The importance of preserving the integrity of the competitive bidding system outweighs the possibility that the government might realize monetary savings if a material deficiency in a bid is corrected or waived. *Harvest Constr. Co.*, B-267513, Nov. 16, 1995, 95-2 CPD ¶ 226 at 3 n.1; *cf.* FAR 28.101-4(c)(2) (allowing for waiver of a noncompliant bid guarantee if "[t]he amount of the bid guarantee is less than required, but is *equal to or greater than the difference* between the offer price and the next higher acceptable offer") (emphasis added). Thus, the protester's argument on this point fails to state a legally or factually sufficient basis of protest.

Finally, Leeward alleges disparate treatment on the part of the agency because it ostensibly allowed another bidder to correct an apparent mistake, while not similarly allowing Leeward to resolve any concerns with its proposed bid bond. Specifically, the second lowest bidder quoted a "unit price" of \$61.71 for the estimated quantity of 31,000 square yards of geotextile and a total "estimated amount" of \$191,301. Req. for Dismissal, exh. 5B, Mohawk Valley Materials Inc. Bid, at 5.

The unit price, however, was clearly in error, because a unit price of \$61.71 times 31,000 units would result in a total price of \$1,913,010, not the quoted price of \$191,301. The contracting officer determined that the other bidder misplaced the decimal point since only a unit price of \$6.171 would result in the total quoted price of \$191,301. Req. for Dismissal, exh. 4, Formal Bid Abstract, at 1-2; *see also id.* (reflecting the other five bidders, including Leeward, for the geotextile line item bid unit prices between \$5 - \$9, and total prices between \$155,000 - \$279,000). We find no merit to the protester's allegation that the contracting officer disparately treated bidders.

As addressed above, the FAR requires that "[w]hen a bid guarantee is required and a bidder fails to furnish the guarantee in accordance with the requirements of the invitation for bids, the bid shall be rejected." FAR 14.404-2(j). In contrast, the FAR expressly contemplates the correction of clerical mistakes, including the "[o]bvious

misplacement of a decimal point.” FAR 14.407-2(a)(1). Thus, the protester’s allegation that the contracting officer disparately treated offerors by failing to allow correction of a deficiency with Leeward’s bid bond--an action prohibited by the FAR--while allowing for the correction of an apparent clerical mistake in the second lowest offeror’s bid--an action expressly contemplated by the FAR--fails to state a legally or factually sufficient basis of protest.

The protest is dismissed.

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