



COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

B-179107

October 26, 1973

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Bouhan, Williams and Levy
Attorneys and Counselors at Law
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Attention: James H. Thomas, Esq.

Gentlemen:

Reference is made to your letters of July 5, 1973, and August 22, 1973, protesting on behalf of Echo Enterprises, Inc. (Echo) the rejection of Echo's low bid submitted in response to invitation for bids No. DACW21-73-B-0096, issued by the U. S. Army Engineer District Office, Savannah, Georgia, on June 6, 1973.

The instant invitation solicited bids for the construction of Peacock Creek Channel Improvements in Liberty County, Georgia. Standard Form No. 20 of the invitation provides:

"Each bidder shall submit with his bid a Bid Bond (Standard Form 24 Jun 1964) with good and sufficient surety or sureties acceptable to the Government, or other security as provided in Paragraph 4 of Instructions to Bidders (Standard Form 22) in the form of twenty percent (20%) of the bid price or \$3,000,000, whichever is lesser. The bid bond penalty may be expressed in terms of a percentage of the bid price or may be expressed in dollars and cents."

The relevant section of paragraph 4 of Standard Form 22, "Instructions to Bidders" states that:

"Where a bid guarantee is required by the invitation for bids, 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."

Bids were opened on June 28, 1973, at which time it was determined that, discounting a bid which was almost immediately

[Protest of Rejection of Low Bid]

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rejected as nonresponsive, the low bid was submitted by Echo at a total price of \$487,360. Upon examination of Echo's bid bond form and accompanying power of attorney several irregularities were discovered. Although the bid bond was signed by Bernard F. Williams, the power of attorney submitted with the bid appointed Richard D. Williams as representative of the surety, Great American Insurance Company. However, since it was quickly determined that Bernard Williams possessed precisely the same power of attorney authorizing him to execute bonds for the surety, the failure to include the correct power of attorney initially was waived as only a minor informality.

The contracting officer then determined that both Bernard and Richard Williams were limited by their respective powers of attorney, to executing bonds for no more than \$25,000. This was obviously insufficient to meet the 20-percent bond requirement which in Echo's case would have been \$97,472. Consequently the bid of Echo Enterprises, Inc., was declared nonresponsive and was rejected.

Further review of Bernard Williams' power of attorney which was received on June 29, 1973, led the Army Corps of Engineers to conclude in their Administrative Report of July 16, 1973, that Bernard Williams was only authorized to bind the surety in transactions "other than cases involving bid bonds."

In your letter of August 22, 1973, you claim that Echo's failure to attach a power of attorney sufficient to meet the 20-percent bond requirement like their failure to submit the power of attorney for the correct individual, was only a minor informality since a representative of Great American Insurance Company was present at the bid opening and did assure the contracting officer that his company could and would provide the necessary bid bond guarantee. Furthermore, in reference to the Corps Administrative Report you state that unlike the language used in the report the power of attorney did not limit the surety's authority to bind the surety to transactions "other than cases involving bid bonds." You also contend that since the provision in Standard Form 12, Instructions to Bidders, only provides that "failure to furnish a bid guarantee in the proper amount may be cause for rejection of the bid," Echo's bid was not required to be rejected and hence should not have been so treated.

Beginning with the decision in 38 Comp. Gen. 532 on February 5, 1959, our Office has consistently held that the bid bond requirements

in an invitation for bids must be considered a material part of the invitation and that the contracting officer cannot waive the failure to comply with the requirement but must reject as nonresponsive a bid not accompanied by the required bond. The following justification for this rule was stated at page 536 of that decision:

"* * * permitting waiver of a bid bond requirement stated in an invitation for bids would have a tendency to compromise the integrity of the competitive bid system by (1) making it possible for a bidder to decide after opening whether or not to try to have his bid rejected, (2) causing undue delay in effecting procurements and (3) creating by the necessary subjective determinations by different contracting officers inconsistencies in the treatment of bidders."

Shortly thereafter in two subsequent decisions we determined that submission of an insufficient bid bond, even when inadvertent, should result in rejection of the bid. See 39 Comp. Gen. 827 (1960) and D-140624, November 23, 1959. In those decisions our Office stated the following:

"* * * the language of the invitation clearly requires not merely the submission of a bid bond but of a bid bond in not less than the indicated amount. If the requirement for submission of a bid bond by the terms of the invitation is to be regarded as material it logically follows that the requirement as to the amount of the bid is equally material."

Although the deficiency in Echo's bid stemmed from Bernard Williams' lack of authority to legally bind the surety for the required amount, no valid reason exists that would justify a result different from our conclusions in those instances where the insufficiency is apparent on the bid bond itself. In a recent decision our Office held that when an agent exceeds his powers (as established by a power of attorney) in making an unauthorized contract, but the only difference between the contract as authorized and the contract as made is a difference in amount, the principal is liable upon the contract as authorized. See 51 Comp. Gen. 802 (1972). Since a surety's liability is thus limited by the actual extent of the agent's authority, it is clear that even if we assume the bond in question legally established the surety's liability for the \$25,000 amount, the bond was still insufficient to meet the 20 percent requirement.

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In view of the precedents thus established and consistently followed thereafter, and since all bidders are required to compete on an equal basis your contention that the \$25,000 bond limitation was, under the circumstances, only a minor and hence easily correctable defect must be rejected. In this connection the Armed Services Procurement Regulation, Section 10-102.5, clearly provides that except for certain enumerated situations, none of which are applicable here, noncompliance with the requirement in a solicitation that bids be supported by a bid guarantee will result in rejection of the bid.

As regards your claim that the power of attorney attached to Echo's bid did not limit the grant of authority to transactions "other than cases requiring bid bonds" and that the Corps Administrative Reports use of that language was erroneous, we think that while it is apparent that the phrase "other than cases requiring bid bonds" was not actually present in the power of attorney, it is equally apparent that said power of attorney did not even arguably authorize the execution of the type of bid guarantee that was required in this instance. Consequently, even if we disregard the monetary limitation, the power of attorney was inadequate to legally bind the surety and this defect alone would have required rejection of the bid.

Concerning use of the word "may" in the following bonding provision language "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," we held in L-166792(2), May 15, 1969, involving a similar provision, that the word "may" is a word of command which gives effect and meaning to an otherwise material invitation requirement. Therefore, your claim that use of the word "may" did not give Echo sufficient notice that a bid would be considered unresponsive for failing to meet the bonding requirement must be rejected.

In view of the foregoing reasons, we conclude that there is no legal basis upon which to determine that the action of the contracting officer in rejecting the bid of Echo Enterprises, Inc., was improper. Consequently, your protest is denied.

Sincerely yours,

Paul G. Dembling

For the Comptroller General
of the United States