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

FILE: B-218262 **DATE:** April 29, 1985

MATTER OF: Ameron, Inc.

DIGEST:

A bid accompanied by an altered bond--where the maximum amount of the bond has been typed over a white-out without evidence in the bid documents or on the bond itself that the surety consented to the alteration--properly was rejected as nonresponsive.

Ameron, Inc. (Ameron), protests the award of a contract to Spiniello Construction Company (Spiniello) for raw water line improvements at the United States Military Academy in West Point, New York, under invitation for bids No. DACA51-85-B-0018, issued by the United States Army Corps of Engineers. Ameron contends that the Corps of Engineers improperly rejected its low bid as nonresponsive because of an alteration in its bid bond. Ameron filed suit in the United States District Court for the District of New Jersey (Civil Action No. 85-1064), and, on March 27, 1985, the court enjoined the Corps of Engineers and Spiniello from further performance of the contract until our Office issued a decision on Ameron's protest.

We deny the protest.

The invitation required the submission of a bid bond in the amount of 20 percent of the bid price, or $3 million, whichever is lesser. Bids were opened on January 9, 1985, and Ameron was the apparent low bidder with a bid of $1,033,000. Spiniello was the second low bidder with a bid of $1,255,000. Ameron's bid was determined to be nonresponsive because the bid bond had been altered without any evidence that the surety consented to the alteration. Consequently, by letter dated February 20, 1985, the contracting officer rejected Ameron's bid and awarded the contract, that same day, to Spiniello. Ameron filed its protest with our Office on March 1, 1985.

The bid bond in question (Standard Form 24) stated that the penal sum was 20 percent of the bid price, not to exceed a typewritten penal sum of $3,000,000. The "3" in the "Million(s)" box and the "000" in the "Thousands" box contained in the bid bond were typed over a whited-out area. In post-bid-opening affidavits submitted to our Office by the parties, it appears that the original typewritten not to exceed penal sum was $1,200,000 and that the alteration was made by a typist for the bonding company before the bond was signed.

Ameron concedes that the bond accompanying its bid was altered without any evidence in the bid documents or the bond itself that the surety agreed to the changes. Ameron argues that its failure to submit any evidence that the surety consented to the changes is a minor informality that the contracting officer should have waived or allowed Ameron to cure. Ameron buttresses its argument by pointing to the fact that 20 percent of its bid price is $206,600; therefore, "it made no difference how many 'million(s)' was the maximum amount of the bond." We disagree.

As the District Court noted in its opinion of March 27, 1985, we held in Montgomery Elevator Co., B-210782, Apr. 13, 1983, 83-1 C.P.D. ¶ 400, that an invitation's requirement for the submission of a bid bond involves a matter of responsiveness with which there must be compliance at bid opening and not later. The reason, in part, is that if the situation were otherwise, a bidder who failed to submit a valid bond could decide after bid opening whether or not to cause its bid to be rejected by submitting or refusing to submit the bond. Montgomery Elevator Co., B-210782, supra.

The submission of a materially altered bond can have the same effect as the failure to submit a bond altogether, because under surety law no one incurs a liability to pay a debt or to perform a duty for another unless expressly agreeing to be bound. 44 Comp. Gen. 495 (1965). An alteration in the bond thus raises a question whether the surety agreed to the altered terms. A material alteration to a bond, such as in the penal amount, made without the surety's consent discharges the surety from liability, and a material alteration thus necessarily raises a question whether the surety has any obligation under the bond. See Montgomery Elevator Co., B-210782, supra, and cases cited therein.

Here, the alteration was material because a change in the penal amount of the bond was made in both the "Million(s)" and "Thousands" boxes of the bond, while the

actual bond required had to be at least $206,000. Thus, a question arose as to whether the surety was obligated under the altered bond. See Montgomery Elevator Co., B-210782, supra. Since the determination as to whether a bid and the accompanying bond is acceptable must be based solely on the bid documents themselves as they appear at the time of bid opening, the post-bid-opening affidavits explaining how the alteration occurred may not be used to cure the defect in the bid bond. See Hydro-Dredge Corporation, B-214408, Apr. 9, 1984, 84-1 C.P.D. ¶ 400; Central Mechanical, Inc., B-206555, Aug. 18, 1982, 82-2 C.P.D. ¶ 150. Therefore, Ameron's bid was properly rejected as nonresponsive.

The protest is denied.

Harry R. Van Cleve

Harry R. Van Cleve
General Counsel