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DECISION



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

FILE: B-216647 **DATE:** May 7, 1985
MATTER OF: Allen County Builders Supply

DIGEST:

A bid bond is defective when no penal sum has been inserted on the bond, either as a percentage of the bid amount or as a fixed sum. Prior GAO cases to the contrary, including 51 Comp. Gen. 508 (1972), are hereby overruled.

Allen County Builders Supply (Allen County) protests the rejection of its bid under invitation for bids (IFB) No. F12617-84-B0021, issued by the Air Force for the repair of siding on a building located at Grissom Air Force Base, Indiana. The bid was rejected as nonresponsive because no penal sum had been entered on the bid bond accompanying the bid, as required by the IFB.

We deny the protest.

The IFB required each bidder to submit with its bid a bid bond in the amount of 20 percent of the total bid price. The bid bond penalty amount could be expressed either as a fixed sum or as a percentage of the total bid price. The solicitation cautioned, in compliance with the applicable Federal Acquisition Regulation, that failure to furnish a bid bond in the proper form and amount by the time set for bid opening might be cause for rejection of the bid. See 48 C.F.R. § 28.101-4 (1984).

When the bids were opened, Allen County was the apparent low bidder. However, when the Air Force conducted a technical evaluation of the bids, it discovered that Allen County's bid bond did not include any penal sum or percentage figure to indicate the amount of the bond, nor had the bond been signed by the principal. The Air Force contracting officer found Allen County's bid nonresponsive because of these deficiencies and rejected it. The protester argues that the deficiencies in the bid did not

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affect the bid in substance, but only in form, and contends it should have been granted an opportunity to cure such deficiencies.

The purpose of a bid bond is to assure that a bidder will not withdraw its bid within the time specified for acceptance; it secures the liability of a surety to the government in the event the bidder fails to fulfill its obligations. Hydro-Dredge Corp., B-214408, Apr. 9, 1984, 84-1 CPD ¶ 400. Thus, the sufficiency of a bid bond will depend on whether the surety is clearly bound by its terms; when the liability of the surety is not clear, the bond properly may be regarded as defective. Id.

When required, a bid bond is a material part of a bid and must therefore be furnished with the bid. Baucom Janitorial Services, Inc., B-206353, Apr. 19, 1982, 82-1 CPD ¶ 356. When a bidder supplies a defective bond, the bid itself is rendered defective and must be rejected as nonresponsive. Truesdale Construction Co., Inc., B-218094, Nov. 18, 1983, 83-2 CPD ¶ 591. As with other matters relating to the responsiveness of a bid, the determination as to whether a bid bond is acceptable must be based solely on the bid documents themselves as they appear at the time of bid opening. See Central Mechanical, Inc., 61 Comp. Gen. 566 (1982), 82-2 CPD ¶ 150.

While Allen County's bid bond was not signed by the principal, this constitutes a minor informality that can be waived where the unsigned bond is submitted with a signed bid, as was the case here. Geronimo Service Co., B-209613, Feb. 7, 1983, 83-1 CPD ¶ 130. However, the failure to indicate the penal amount of the bond presents a more serious problem.

Although the protester asserts that its intention was to submit a bid bond for the required 20 percent of the bid amount and for the surety to be bound thereby, it is not the bidder's intent which controls. The relevant inquiry, rather, is whether the surety's obligation has been objectively manifested on the bidding documents so that the extent and character of its liability is clearly ascertainable therefrom. See Hydro-Dredge Corp., supra. Here, we find that the requisite obligation could not be clearly created without inserting a specific penal sum or percentage in the place provided on the bond.

It is a general rule of the law of suretyship that no one incurs a liability to pay a debt or to perform a duty for another unless he expressly agrees to be so bound, for the law does not create relationships of this character by mere implication. See 44 Comp. Gen. 495 (1965). Therefore, in the event of default by the bidder in this case, the blank bond could be challenged by the surety, and the purpose of the bid bond would be defeated.

Moreover, we note that the language of the bid bond specifically refers to the liability of the surety as being "the above penal sum." The question presented in cases where bonds do not comply with invitation requirements is whether the government obtains the same protection in all material respects under the bond actually submitted as it would under a bond complying with the requirement. See Ameron, Inc. v. United States Army Corps of Engineers, Civ. No. 85-1064, slip op. at 10-11 (D.N.J. Mar. 27, 1985); General Ship and Engine Works, Inc., 55 Comp. Gen. 422 (1975), 75-2 CPD ¶ 269. Where no penal sum is inserted on the bond, no obligation in a sum certain is undertaken by the surety. Therefore the same protection simply is not afforded by a bond lacking a penal sum as would be provided by a fully completed bond. Accordingly, we conclude that the bid bond was defective here, and that the government was required to reject Allen County's bid as nonresponsive.

We note that although the Air Force originally rejected the protester's bid as nonresponsive because of the defective bid bond, it later concluded that Allen County's protest should be sustained in accordance with 51 Comp. Gen. 508 (1972), which permitted the penal sum of a bid bond to be inferred from a reference on the bond to the IFB number. No corrective action was taken, however, because the contract had already been performed.

While the Air Force's reliance on our prior decision was entirely proper, we have concluded that the decision should no longer be followed. We now hold that a bid must be rejected as nonresponsive where no penal sum has been inserted in the bid bond accompanying the bid. 51 Comp. Gen. 508, supra, and any other decisions to the same effect, are hereby overruled.

Comptroller General
of the United States

for
Michael J. Jackson

The protest is denied.

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