Martinez

The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Pioneer Construction Co., Inc.

File: B-227948

Date: September 18, 1987

DIGEST

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

DECISION

Pioneer Construction Co., Inc., protests the rejection of its bid to alter the dental operating rooms at the Naval Dental Clinic in Philadelphia, Pennsylvania, under invitation for bids No. N62472-84-B-0149, issued by the Naval Facilities Engineering Command. Pioneer contends that the Navy improperly rejected its low bid as nonresponsive because of an alteration in the penal amount of Pioneer's bid bond; Pioneer asserts that it had obtained permission from the bonding company to increase the penal sum of the bond prior to bid opening. The Navy rejected the bid as nonresponsive because there was no indication that the surety had consented to the alteration.

We deny the protest.

The invitation required that all bids of $25,000 or greater be accompanied by a bid bond in the amount of 20 percent of the bid price, or $3 million, whichever was lesser. The bid bond submitted by Pioneer stated that the penal sum of the bond was 20 percent of the bid price, not to exceed a typewritten penal sum of $70,000. The "70" in the thousands box was typed over a whited-out area, with the original amount, according to a later-furnished statement by the bonding company, having been "50." There was nothing in the bid documents or the bond itself to indicate at the time the bids were opened that the surety had agreed to the corrected amount.

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Pioneer 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 change. However, Pioneer states that because its surety was aware of and gave Pioneer verbal permission to change the penal sum amount, Pioneer's bid should be deemed responsive and Pioneer awarded the contract. Pioneer has furnished a letter from its surety to support the protest.

There is no legal merit to Pioneer's position. Under surety law, no one incurs a liability to pay a debt or perform a duty for another unless expressly agreeing to be bound. Ameron, Inc., B-218262, Apr. 29, 1985, 85-1 C.P.D. ¶ 485.1/ A material alteration to a bid bond made without the surety's consent thus would discharge the surety from liability, so that any material alteration, such as in the penal amount, necessarily raises a questiond whether the surety has any obligation under the bond. Montgomery Elevator Co., B-210782, Apr. 13, 1983, 83-1 C.P.D. ¶ 400.

Moreover, an invitation's requirement for the submission of a valid bid bond requires compliance at the time of 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 curing or refusing to cure the defect. Montgomery Elevator Co., B-210782, supra.

Here, the change in the penal amount of the bond from $50,000 to $70,000 clearly was material, thus bringing into question whether the surety was obligated under the altered bond. 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, post-bid-opening statements explaining how or why the alteration occurred may not be used to cure the defect in the bid bond. See Ameron, Inc., B-218262, supra, and

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1/ Pioneer states it understands that our decision in Ameron was overruled by the United States Court of Appeals. Pioneer's understanding is incorrect, however. Although our decision that an alteration in the penal amount of Ameron's bid bond, without any evidence of the surety's consent to the change, rendered the bid nonresponsive, has been the subject of a series of court cases, our finding on the merits has not been questioned. See Ameron, Inc. v. U.S. Army Corps of Engineers, 607 F. Supp. 962 (D.C. N.J. 1985); 610 F. Supp. 750 (D.C. N.J. 1985); 787 F.2d. 875 (3rd Cir. 1986); 809 F.2d 979 (3rd Cir. 1986).

cases cited therein. Therefore, Pioneer's bid properly was rejected by the Navy as nonresponsive.

The protest is denied.

Harry R. Van Cleve
General Counsel