

(Anne Perry)



**Comptroller General  
of the United States**

Washington, D.C. 20548

**Decision**

**Matter of:** Drill Construction Company, Inc.

**File:** B-239783

**Date:** June 7, 1990

Joel D. Rosen, Esq., Hill Wallack & Masanoff, for the protester.  
Anne B. Perry, Esq., and John F. Mitchell, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

**DIGEST**

Submission of a bid bond in an insufficient penal amount renders the bid nonresponsive and the defect may not be corrected after bid opening.

**DECISION**

Drill Construction Company, Inc., protests the rejection of its low bid as nonresponsive under invitation for bids (IFB) No. DTFA05-90-B-50652 issued by the Federal Aviation Administration for the construction of two radio communications link repeater (RCL) facilities. Drill contends that although the solicitation required a bid bond of 20 percent of the bid price, and it only provided one equal to 10 percent of its bid, the effect was de minimis and should therefore be waived as a minor informality. We dismiss the protest without obtaining an agency report since it is clear from the record that the protest is without legal merit. 4 C.F.R. § 21.3(m) (1990).

The IFB required a bid bond in the amount of 20 percent of the bid price to accompany the bid package. According to Drill, at the April 19, 1990, bid opening it submitted the apparent low bid in the amount of \$167,500 with the apparent next low bid in the amount of \$185,000. On May 15, the contracting officer notified Drill that its bid was considered nonresponsive because the bid bond it submitted was only in the amount of 10 percent of its bid price, or \$16,750, and not the required 20 percent. Drill filed a protest in our Office on May 23 challenging the nonresponsiveness determination on the grounds that the bond was

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limited to 10 percent of the bid price by mistake, and that the effect was de minimis.

A bid guarantee is a material part of a bid and when a bond is required, it must be furnished with the bid package. HTP Enters., Inc., B-235200, Apr. 27, 1989, 89-1 CPD ¶ 418. The Federal Acquisition Regulation (FAR) requires the rejection of a bid that does not comply with the solicitation requirement of a bid guarantee. FAR § 14.404-2(i) (FAC 84-53). When a bidder supplies a defective bond, therefore, the bid itself is rendered defective and must be rejected as nonresponsive. HTP Enters., Inc., B-235200, supra. Furthermore, an offer to make the bid responsive by correcting the amount of the bond after bid opening may not be considered by the contracting activity. Id.

Drill concedes that it did not submit a bid bond in the proper amount, but argues that since its bid bond almost covers the difference between its bid price and that of the next lowest bidder the mistake should be waived as a minor informality pursuant to FAR § 28.101-4 (FAC 89-51) and FAR § 14.405.

FAR § 28.101-4 states that if the amount of the bid guarantee submitted is less than required, but is equal to or greater than the difference between the offer price and the next low acceptable offer, the contracting officer shall waive the noncompliance, unless to do so would be detrimental to the government's intent. This exception, however, does not apply here, since the bid bond submitted by Drill is \$759 less than the difference between its bid price and that of the next lowest bidder.

Drill argues, however, that despite the fact that its bid bond does not equal or exceed the difference between the bids, the difference between its bid bond and the difference between the bids is de minimis, and should therefore be waived anyway, especially in light of the fact that its surety agreed after bid opening to supply the correct bid bond amount. In support of its argument, Drill cites our decision in Arch Assocs., Inc., B-183364, Aug. 13, 1975, 75-2 CPD ¶ 106, wherein we held that a bid bond which was \$284 less than 20 percent of the price, which was the amount required by the IFB, could be waived as a minor informality under FAR § 14.405.

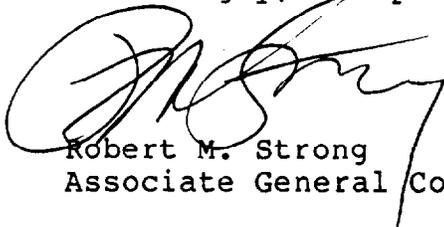
We disagree. FAR § 14.405 permits waiver when the informality "pertains to some immaterial defect in a bid or variation of a bid from the exact requirements of the invitation that can be corrected or waived without being prejudicial to other bidders." (Emphasis added.) The exact

requirements called for in the solicitation are for a bid bond in the amount of 20 percent of the bid price. Since the bid price was \$167,500 the exact requirement called for in the IFB was a bid bond in the amount of \$33,500. Drill's submission of a bid bond in half of the required amount was not a minor informality and we do not find this amount to be de minimis.

It is also of no effect that subsequent to bid opening Drill submitted a bid bond in the proper amount. A bond deficiency may not be corrected after bid opening; otherwise, a bidder would have the option of accepting or rejecting the award by either correcting or not correcting the bond deficiency, which is inconsistent with the sealed-bidding system. G&A General Contractors, B-236181, Oct. 4, 1989, 89-2 CPD ¶ 308.

Since we have determined that the bid bond submitted by Drill failed to comply with the requirement in the solicitation, and does not fit into either of the exceptions, we find that the rejection of Drill's bid as nonresponsive was proper.

Accordingly, the protest is dismissed.



Robert M. Strong  
Associate General Counsel