



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Universal Coatings, Inc.

File: B-278700

Date: March 4, 1998

Peter J. Ippolito, Esq., Hillyer & Irwin, for the protester.
Joseph J. Cox, Esq., and Pat M. Falcigno, Esq., Department of the Army, for the agency.

Charles W. Morrow, Esq. and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Bid bond which mistakenly included language that stated that payment on the bond was contingent upon the bidder entering into the identified contract, instead of the standard condition that payment is contingent on the bidder submitting the bid on the identified solicitation, is nevertheless clearly enforceable against the surety in the event the bidder declines to execute the contract and provide acceptable performance and payment bonds, in view of the fact that the bond otherwise made clear the surety's intent to be bound.

DECISION

Universal Coatings, Inc. protests the rejection of its bid under invitation for bids (IFB) No. DACA51-97-B-0043, issued by the United States Army Corps of Engineers, for reroofing certain buildings at the Defense Logistics Agency Depot, Warren, Ohio. Universal contends that the Corps improperly determined its bid to be nonresponsive due to a defective bid bond.

We sustain the protest.

Section 000700, paragraph 105, of the IFB required each bidder to submit a bid guarantee, in the form of a bid bond or other security, in the amount of 20 percent of the bid price or \$3,000,000, whichever is less, and noted that the failure to furnish a bid guarantee on a standard form (SF) 24 in the proper form and amount by the time set for opening of bids may be cause for rejection of a bid. Paragraph 109 of the same section required the contractor to furnish a performance bond on SF 25 and a payment bond on SF 25A within 10 days of award.

At bid opening, the Corps received 14 bids. Universal submitted the low bid of \$818,500, which was accompanied by a bid bond issued by Amwest Surety Insurance Company on an SF 24-type form generated by the surety's bonding agent.

The computer-generated form was identical to the government's SF 24, except for language in the section entitled "CONDITIONS." The standard language in this section of the SF 24 states:

The Principal has submitted the bid identified above.

However, the language in this section contained in Universal's bid bond stated:

The Principal has entered into the contract identified above.

The submitted SF 24 was entitled "Bid Bond" and in all other respects used the term "bid," for example, "Bid Price," "Bid Identification," and "Bid Date." Additionally, the submitted SF 24 properly identified this IFB in the appropriate section of the form.

The Corps concluded that the language on the computer-generated SF 24 created a condition that rendered the bid bond unenforceable. By this language, according to the Corps, the surety would be relieved of liability under the bond should Universal refuse to enter into the contract. Therefore, the Corps rejected Universal's bid as nonresponsive. This protest followed. Award has been withheld pending our decision.

It appears that, in generating the bid bond, the "Conditions" language was mistakenly taken from the corresponding section of the SF 25. Universal submitted a letter from the agent, along with a corrected SF 24, confirming that the surety intended to bind itself unconditionally in accordance with the standard terms of the SF 24 for this IFB. Universal contends that the erroneous language was a minor defect that did not render the bid bond unenforceable against the surety and that the error could not reasonably be construed to void the surety's responsibility, given the nature of the error and the remaining terms expressed on the submitted SF 24.

A bid guarantee is a form of security ensuring that the bidder will not withdraw a bid within the period specified for acceptance, and will execute a written contract and furnish required bonds within the time specified in the bid. Federal Acquisition Regulation (FAR) § 28.001. A bond is a written instrument executed by a principal party, *i.e.*, the bidder or contractor, and a surety or sureties to ensure fulfillment of the principal's obligations to a third party, *i.e.*, the government. *Id.* A bid bond holds the surety liable to the government for the excess costs of awarding to the next eligible bidder in the event that the principal bidder fails to fulfill the obligations of its bid. Johnson Controls, Inc., B-270036, Jan. 19, 1996, 96-1 CPD ¶ 94 at 2.

The submission of a required bid bond is a material condition with which a bid must comply at the time of bid opening to be responsive. The sufficiency of a bid bond depends on whether the surety is clearly bound by its terms; where the liability of the surety is not clear, the bond is defective. If at the time of bid

opening it is uncertain whether the bidder has furnished a legally binding bond, the bid must be rejected as nonresponsive. R.P. Richards Constr. Co., B-260965, July 17, 1995, 95-2 CPD ¶ 128 at 2.

We think that Universal's bid bond clearly binds the surety to the bid bond obligations, notwithstanding the mistakenly inserted language. Except for this language, Universal's SF 24 is identical to the standard form and otherwise in the proper form and amount. For example, in the "OBLIGATION" clause the principal and surety acknowledge being firmly bound to the government for the penal sum denoted in the bid bond. Further, the bond in the "THEREFORE" clause acknowledges that the obligation is only void if the principal fulfills its expected obligations, that is, executing the contract and providing acceptable performance and payment bonds. Finally, the erroneous condition references a "contract identified above," although the bond in all other respects uses the term "bid" and only identifies this IFB for which Universal had submitted a bid.

Since the bid bond submitted was clearly intended to bind the surety in case the contract was not executed, it would be unreasonable to give legal effect to the obvious typographical error on the bid bond referencing the entering into of an unidentified contract, instead of the submission of a bid on an identified solicitation. Such an interpretation would render the bid bond a complete nullity, which is a result that could not be reasonably intended by the surety and which therefore should not affect the enforceability of the bond.¹ Thus, there is no basis to conclude that the surety could avoid the express purpose of the bond by resort to this language.

The Corps argued that the bid bond should be rejected because our decisions generally have found that conditions added in, or attached to, a bid bond limiting the surety's liability render the bond defective. See, e.g., ERC Gen. Contracting Servs., Inc., B-261404.2, Oct. 11, 1995, 95-2 CPD ¶ 170; LM Envtl., Inc., B-245388.3, June 30, 1992, 95-2 CPD ¶ 159; Cherokee Enters., Inc., B-252948, B-252950, June 3, 1993, 93-1 CPD ¶ 429. In each of the cited cases, the bid bond evidenced that the surety expressly intended to limit its obligation by attaching a rider or language in the SF 24 denoting criteria limiting the government's rights which had to be met if the bond was to be enforced. Here, it is apparent that the surety simply made a mistake in inserting the erroneous language from the SF 25, and the erroneous language, which would render the bond a nullity, was not intended to and in fact would not limit the surety's obligations under the bond. See Kirila Contractors, Inc.,

¹While it is true that a surety's liability is generally limited by the terms of its contract and that its liability will be measured by the conditions stated in the bond, 72 C.J.S. Principal and Surety § 76 (1987 ed.), bonds issued by a commercial surety should not be interpreted in a manner as to render the bond void. Stearns Law of Suretyship § 5.6 (5th ed. 1951); see also id. §§ 2.4, 5.1.

67 Comp. Gen. 455, 456 (1988), 88-1 CPD ¶ 554 at 2 (bid improperly rejected where sole defect was an obvious typographical error in the solicitation number of the bid bond).

Since the mistaken language in Universal's bid bond did not affect the bond's legal enforceability, it was in the nature of a correctable minor irregularity or an apparent clerical mistake that did not render Universal's bid nonresponsive. See Daley Corp.-Cal. Commercial Asphalt Corp., J.V., B-274203.2, Dec. 9, 1996, 96-2 CPD ¶ 217 at 4.

We recommend that the Corps make award to Universal, if otherwise eligible. We also recommend that the protester be reimbursed the reasonable costs of filing and pursuing the protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d)(1) (1997). The protester should submit its certified claim for such costs, detailing the time expended and the costs incurred, directly to the contracting agency within 60 days after receipt of this decision.

The protest is sustained.

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