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DECISION

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

FILE: B-210782 **DATE:** April 13, 1983

MATTER OF: Montgomery Elevator Co.

DIGEST:

A bid accompanied by a materially altered bid bond--where the penal amount has been typed over a white-out without evidence in the bid documents or on the bond itself of the surety's consent to be bound by the changes--is nonresponsive.

Montgomery Elevator Co. protests the Air Force's rejection of its bid under invitation for bids No. F41800-83-B-0009. The Air Force rejected the bid as nonresponsive because Montgomery submitted a bid bond which had been altered without any indication of consent to the change by the surety. We summarily deny the protest.

The invitation--to acquire the repair, alteration and maintenance of passenger elevators--required a bid bond or other security in the form of 20 percent of the bid price or $3,000,000, whichever is less. The penal amount could be expressed either as a percentage of the bid price or in dollars and cents. The bond submitted by Montgomery stated that the penal sum was 20 percent of the bid price not to exceed a typewritten penal amount of $280,681.00, in which the "80" (the third and fourth numerals to the left of the decimal point) had been typed over a whited-out area. There was nothing in the bid documents or the bond itself to indicate the surety, American Insurance Company, had agreed to the corrected amount.

According to Montgomery, the two digits were altered to reflect a last-minute change in a subcontractor's quotation that changed the bid amount, and the alteration merely made the penal amount 20 percent of the new price. Montgomery explains that the person who signed the bond as the surety's attorney-in-fact is a Montgomery employee authorized by the surety to execute bonds without advance notice to the surety. Montgomery asserts this employee could have executed a new bid bond form, but changing the two digits was faster than retyping the form.

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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. See 38 Comp. Gen. 532 (1959).

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. An alteration in the bond thus raises a question whether the surety agreed to the altered terms. See 44 Comp. Gen. 495 (1965). A material alteration to a bond, such as in the penal amount, made without the surety's consent discharges the surety from liability, 3A C.J.S. Alteration of Instruments § 46 (1973), and a material alteration thus necessarily raises a question whether the surety has any obligation under the bond.

In view of those considerations, in a similar case involving an altered penal amount without evidence in the bid or in the bond that the surety agreed to the altered bond's terms, we held that the bid was nonresponsive. Baucom Janitorial Service, Inc., B-206353, April 19, 1982, 82-1 CPD 356. Although the bidder submitted an affidavit from the surety stating that the alterations took place with the surety's pre-bid opening consent, the affidavit did not cure the bidding defect because the nonresponsive bid could be made responsive after bid opening through change or explanation of what was intended.

Montgomery argues that our Baucom decision is bad law. Montgomery basically attempts to draw a distinction between cases where a bidder fails to submit a bond or submits one that is invalid on its face, and cases where the bidder submits a bond that is valid on its face but raises a suspicion that the surety is in a position to disavow the bond. While in the first case the bidder would have to take some action to obtain a valid bond, in the second case the bond itself, Montgomery argues, is valid unless disavowed by the surety, and the issue of whether the surety agreed to the terms of the bond simply is a question of fact. Montgomery suggests that to resolve the factual question the contracting officer need only contact the surety and ask if the apparent alterations had been approved in advance.

Montgomery also argues that the altered amount is not material since the bond still states that the penal amount is 20 percent of the bid price. Montgomery contends that the dollar amount thus is no more than a mechanical computation of the percentage. Finally, Montgomery alleges that the awardee's bid bond also contained a whited-out area and suggests that if Montgomery's bid must be rejected, then the awardee's bid should have been rejected also.

We find no legal merit to the protester's position.

The protester's argument would permit the circumvention of the principle that a bidder should not be able to determine after bid opening whether to have its bid rejected by either submitting or refusing to submit a valid bond. As this case pointedly shows, a bidder's own employee may have a power-of-attorney to execute bonds on behalf of the surety or may be in a position to influence the surety's decision whether or not to disavow an altered bond.

The purpose of a bond is to secure the liability of a surety to the Government in accordance with the terms of the bond, so that 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 General Ship and Engine Works, Inc., 55 Comp. Gen. 422 (1975), 75-2 CPD 269. As stated above, a surety is discharged from liability on a bond if a material term of the bond was altered without its consent, and an altered bond, without contemporaneously-furnished evidence that the surety agreed to the altered terms, simply does not afford the Government the desired protection. The burden on the bidder to submit evidence of agreement, or to prepare a new bond, is slight, and is not enough to justify endorsing a situation with the potential for bidders to submit altered bonds and then determine after bid opening whether to have their bids rejected.

Concerning the materiality of the alteration to Montgomery's bond, we note that the surety could have expressed the penal amount merely as a percentage of the bid price without rendering Montgomery's bid nonresponsive. See Southern Plate Glass Co., B-188872, August 22, 1977, 77-2 CPD 135. The fact is that the surety did not do so, but instead stipulated a specific amount beyond which it would not assume liability. If the bid bond noted the

actual bid price, and the altered penal amount equaled 20 percent of that price, then we might agree the alteration to the penal amount would be immaterial. Absent a reference in the bond to the bid price, however, there is no way of knowing whether the altered figure does represent the maximum amount of liability to which the surety agreed, or whether the surety agreed only to a lesser liability, and thus is discharged from any liability by the bidder's unilateral alteration. Therefore, we do not agree that the alteration was immaterial.

In contrast, the alleged alteration to the awardee's bond involves a correction of typographical errors in the section describing the work to be performed. The bond apparently is proper and unaltered in all other respects, e.g., it correctly identifies the principal and the invitation by number, and includes an appropriate penal amount. The correction in issue is immaterial since it does not raise a question as to the obligation the surety undertook. See J.W. Bateson Company, Inc., B-189848, December 16, 1977, 77-2 CPD 472.

The protest is summarily denied.

for Milton J. Socolar
Comptroller General
of the United States