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

FILE: B-214408 **DATE:** April 9, 1984

MATTER OF: Hydro-Dredge Corporation

DIGEST:

An agency properly may reject a bid as nonresponsive based on the submission of an inadequate bid bond where, although the penal amount shown on the bond is sufficient, a power of attorney accompanying the bid bond indicates that the surety's attorney-in-fact who signed the bond has authority to bind the surety on bonds only up to a fraction of the amount required.

Hydro-Dredge Corporation protests the rejection of its bid under invitation for bids (IFB) No. DACW45-83-B-0129, issued by the U.S. Army Corps of Engineers, Omaha District, for removal of hazardous waste material from the Re-Solve Inc. Superfund site near Dartmouth, Massachusetts. The protester contends that the Corps improperly determined that its bid bond was defective. We deny the protest.

The IFB required each bidder to submit with its bid a bid bond in the amount of 20 percent of its total bid price or $3 million, whichever was less. The bid bond penalty amount could be expressed either in dollars and cents or as a percentage of the total bid price. The solicitation cautioned 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.

The Corps received eleven bids, and after preliminary review, rejected five as nonresponsive. Hydro-Dredge's bid in the amount of $4,243,150 was the lowest of those bids initially considered responsive. The bid was accompanied by a bid bond on Standard Form 24 naming Hydro-Dredge as principal and The Aetna Casualty and

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Surety Company as surety. The bond indicated that the penal amount was 20 percent of the bid price and was signed on behalf of Aetna by Louise J. Calandro, who was identified as "Attorney-in-Fact." There was no indication on the face of the bond that Aetna's commitment as surety was limited to a specific amount. Attached to the bond, however, was an Aetna power of attorney form indicating that Ms. Calandro only had authority to sign on behalf of Aetna bonds not exceeding $100,000. The Corps determined that the bid bond was not sufficient because the power of attorney did not indicate that Ms. Calandro had authority to bind Aetna on a bond for 20 percent of Hydro-Dredge's bid price ($848,630). The Corps therefore proposes to reject Hydro-Dredge's bid as nonresponsive and to award the contract to Cecos Environmental, Inc. at a price of $4,561,026.

The protester contends that despite the apparent $100,000 limitation on Ms. Calandro's authority to sign bonds on behalf of Aetna, that company in fact would be liable on the bond as written since Ms. Calandro had actual authority to bind Aetna on a bond for a full 20 percent of Hydro-Dredge's bid price. In support of this contention, the protester submits copies of Aetna's underwriting memoranda which indicate that, prior to bid opening, Aetna's New York office had approved the issuance of a bond for this project in an amount equal to 20 percent of the protester's bid price, estimated at that time to be $5 million. The memoranda also indicate that the New York office contacted Ms. Calandro at Aetna's Boston office, apparently with instructions to issue such a bond. In addition, the record contains post-bid opening statements by Aetna indicating that Ms. Calandro did have actual authority to sign the bond on Aetna's behalf and promising that the company would stand by the bond as written and would not raise lack of authority as a defense to its obligation. Aetna said that due to inadvertence the power of attorney attached to the bond was "incorrect in form."

The protester also contends that the bid and the bid bond must be read as a whole and that, when all of the facts and circumstances surrounding the execution of the bid bond are considered, it is clear that Aetna intended to issue a bond in the required amount. This manifest intent, suggests the protester, should prevail over the ostensibly insufficient power of attorney. The protester states that in determining the intent of the surety it is permissible to consider evidence extrinsic from the bid

documents themselves and cites a number of our decisions as authority for this view. See, e.g., 40 Comp. Gen. 314 (1960); B-175355, April 11, 1972. The protester adds that, as the intended beneficiary of Aetna's promise to Hydro-Dredge to act as its surety, the government would be able to enforce the terms of the bond against Aetna.

Finally, the protester notes that this Office has declined to adopt an overly technical interpretation of bid bond requirements and refers us to a number of decisions where bid bonds were considered sufficient despite irregularities or deficiencies. See, e.g., General Ship and Engine Works, Inc., 55 Comp. Gen. 422 (1975), 75-2 CPD 269. In any event, says the protester, the power of attorney submitted in this case may be reformed to coincide with the attorney-in-fact's actual authority.

A bid bond is a type of security that assures that a bidder will not withdraw its bid within the time specified for acceptance and, if required, will execute a written contract and furnish payment and performance bonds. See Defense Acquisition Regulation (DAR) § 10-101.4. The purpose of a bid bond is to secure the liability of a surety to the government in the event the bidder fails to fulfill these obligations. Montgomery Elevator Co., B-210782, April 13, 1983, 83-1 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. Truesdale Construction Co., Inc., B-213094, November 18, 1983, 83-2 CPD 591. The underlying principle is that, under the law of suretyship, no one incurs a liability to pay the debts or to perform the duties of another unless that person expressly agrees to be bound. Andersen Construction Co.; Rapp Constructors, Inc., B-213955; B-213955.2, March 9, 1984, 63 Comp. Gen. ____, 84-1 CPD ____.

When required, a bid bond is a material part of a bid and therefore must be furnished with the bid. 38 Comp. Gen. 532 (1959); Baucom Janitorial Services, Inc., B-206353, April 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. Atlas Contractors, Inc., B-209446, March 24, 1983, 83-1 CPD 303, reversed on other grounds sub nom Hancon Associates--Request for Reconsideration, B-209446.2, April 29, 1983, 83-1 CPD 460. 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., B-206555, August 18, 1982, 82-2 CPD 150. It is not proper to consider the reasons for the nonresponsiveness, whether due to mistake or otherwise. A.D. Roe Company, Inc., 54 Comp. Gen. 271 (1974), 74-2 CPD 194.

In this case, reading all of the bid documents together, we believe the attached power of attorney at best created uncertainty with respect to the attorney-in-fact's authority to bind the surety on a bond for a full 20 percent of the protester's bid price; at worst, the power of attorney indicated that the surety's attorney-in-fact was acting in excess of her authority. Even if the bond were binding on Aetna for the maximum $100,000 of Ms. Calandro's authority to sign--and we express no view with respect to this possible construction of the bid documents--the bond was nevertheless insufficient since the difference between the protester's and the next low bid was greater than this amount. See DAR § 10-102.5(ii). Under these circumstances, the agency properly rejected the protester's bid based on the submission of an inadequate bid bond. See B-179107, October 26, 1973 (bid properly rejected where $97,472 bond was required, but accompanying power of attorney indicated that attorney-in-fact could bind the surety only on bonds up to $25,000); see also Total Carpentry Ltd., B-205198.2, March 25, 1982, 82-1 CPD 284 (bid properly rejected where power of attorney indicated that attorney-in-fact could bind the surety only on bonds indemnified by the Small Business Administration (SBA) and the bond submitted did not have SBA indemnification).

We recognize that Ms. Calandro may in fact have had actual authority to bind Aetna on a bond for the full required amount. This circumstance is not helpful to the protester, however, since the issue here is not the actual scope of Ms. Calandro's authority, but whether it appeared from the face of the bid documents that Ms. Calandro's signature on behalf of Aetna was authorized. Based solely on those documents, it seems that it was not. In order to establish otherwise, cooperation from the surety--the very party to be bound--is required. In any event, since the responsiveness of a bid must be determined solely from the bid documents, the fact that extrinsic evidence--even though in existence at the time of bid opening--may establish that the attorney-in-fact's signature was authorized,

is of no consequence. For the same reason, the surety's post-bid opening assurances that the bond as issued was authorized are likewise irrelevant.[1]

Finally, in arguing that the power of attorney submitted with the bid bond may be "reformed" to reflect the true intent of the parties, the protester essentially is requesting that it be allowed to correct a mistake in its bid. Mistake in bid procedures may not be used, however, to make responsive an otherwise nonresponsive bid. See B.K. Instrument, Inc., B-212162, November 30, 1983, 83-2 CPD 627.

We deny the protest.

for Milton J. Socolar
Comptroller General
of the United States

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[1] We acknowledge that some of our prior cases involving allegedly defective bid bonds have referred to post-bid opening statements of the surety in the course of determining that the bond, as submitted was acceptable. See, e.g., 40 Comp. Gen. 314 (1960); B-175355, April 11, 1972, both involving the omission of a penal sum. A close reading of these cases, however, will reveal that the post-bid opening statements of the sureties were not dispositive; rather, it was clear from the bid documents alone that the sureties knew the scope of their obligations and fully intended to be bound.