



The Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

Matter of: Kinetic Builders, Inc.

File: B-223594

Date: September 24, 1986

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### DIGEST

As a general rule, a bid bond which erroneously references another solicitation number is materially defective in the absence of other objective evidence which clearly establishes at the time of bid opening that the bond was intended to cover the bid for which it was actually submitted. If uncertainty exists that the bond is enforceable by the government against the surety, the bond is unacceptable and the bid must be rejected as nonresponsive.

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### DECISION

Kinetic Builders, Inc. (Kinetic), protests the proposed award of a contract to Fitzgerald & Company, Inc. (Fitzgerald) under invitation for bids (IFB) No. F08620-86-B0019, issued by the Department of the Air Force. The procurement is for the construction of a weather facility. Kinetic complains that the agency has improperly determined that Fitzgerald's bid is responsive despite the fact that the accompanying bid bond was materially defective.

We sustain the protest.

### BACKGROUND

The IFB required the submission of a bid bond or other suitable bid guarantee in the amount of 20 percent of the bid. Bids were opened on June 24, 1986. Fitzgerald was the apparent low bidder, but submitted a bid bond which referenced another solicitation number (IFB No. "F08620-86-B0051" instead of IFB No. "F08620-86-B0019"). The Air Force ultimately determined that the incorrect solicitation number on the bond was only a minor defect which did not render the bid nonresponsive, since IFB No. F08620-86-B0051, as erroneously referenced, was a solicitation for building alteration with an amended bid opening date of July 17, three weeks

later. In the Air Force's view, the fact that the bond referenced a June 24 bid date and was executed on that date was sufficient evidence that the bond was intended to cover IFB No. F08620-86-B0019, and not IFB No. F08620-86-B0051. Kinetic, the second low bidder, then protested the Air Force's determination to this Office.

Kinetic asserts that Fitzgerald's bid should be rejected as nonresponsive and the award made to itself because the incorrect solicitation number referenced in the bond created a material defect in the bond which rendered it unacceptable. We agree.

#### ANALYSIS

The submission of a required bid bond is a material condition of responsiveness with which there must be compliance at the time of bid opening. Baucom Janitorial Service, Inc., B-206353, Apr. 19, 1982, 82-1 CPD ¶ 356. When a bond is alleged to be defective, the determinative question is whether the bond is enforceable by the government against the surety notwithstanding the defect. See J.W. Bateson Co., Inc., B-189848, Dec. 16, 1977, 77-2 CPD ¶ 472. If uncertainty exists at the time of bid opening that the bidder has furnished a legally binding bond, the bond is unacceptable and the bid, therefore, must be rejected as nonresponsive. See A & A Roofing Co., Inc., B-219645, Oct. 25, 1985, 85-2 CPD ¶ 463.

With respect to the effect of an erroneous solicitation number referenced in a bid bond, we held in Custodial Guidance Systems, Inc., B-192750, Nov. 21, 1978, 78-2 CPD ¶ 355, that a bid bond was enforceable by the government against the surety even though it contained the incorrect solicitation number where the error was obviously clerical in nature (the transposition of two digits--"19145" instead of "19154"), the bond correctly stated the scheduled bid opening date, the agency conducted only one bid opening on that date, and the incorrect number was for a prior procurement for which bonds were not required and in which the bidder had not submitted a bid. We analogized the situation in Custodial Guidance to earlier cases which held that erroneously dated or undated bid bonds--which nevertheless were identifiable with the only invitation outstanding for a particular procurement--were only technically defective and could be enforced against the surety. See 39 Comp. Gen. 60 (1959); B-160659, June 9, 1967; B-159209, June 23, 1966. Therefore, we found in Custodial Guidance that since the erroneous

solicitation number had apparently created no confusion as to the bid covered by the bond, the defect would not affect the enforceability of the bond by the government against the surety.

We reached a different result in A & A Roofing Co., Inc., B-219645, supra. There, the bond was materially defective because it referenced not only the wrong solicitation number but also the wrong bid opening date, and there was no other objective evidence of the intent of the surety to provide a bond on the bid in question. Significantly, the solicitation number and date entered on the bond specifically and accurately identified another solicitation for the same kind of work at the same facility, the bid opening for which had been only 11 days earlier than that of the protested procurement. Since, given the existence of the other solicitation, it was uncertain at the time of bid opening whether the surety had consented to be bound on the solicitation for which the bond was actually submitted, the bond was materially defective requiring rejection of the bid as nonresponsive.

We believe that our holding in A & A Roofing, rather than that in Custodial Guidance, is more applicable to the facts here. It is undisputed that IFB No. F08620-86-B0051, as erroneously referenced in Fitzgerald's bond, was an on-going solicitation for building alteration with an original bid opening date of June 12, 1986, later amended to June 25, and then to July 17. Fitzgerald's bond typically identified the work to be performed in general terms as "Construction," which, in our view, reasonably refers to building alteration under IFB No. F08620-86-B0051 as well as to weather facility construction under IFB No. F08620-86-B0019. Thus, apart from the June 24 date referenced in the bond<sup>1/</sup>, there are no other indicia in the bond to identify it with IFB No. F08620-86-B0019. Moreover, unlike the facts in Custodial Guidance, the erroneous solicitation number does not involve a mere transposition of digits, and we cannot regard the insertion of "-B0051" instead of "-B0019" as only a minor clerical error.

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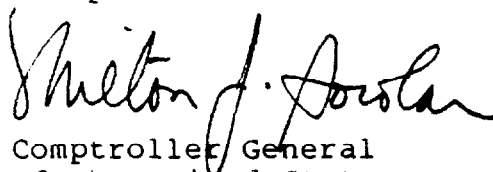
<sup>1/</sup> The Air Force states that there was one other bid opening at the activity on June 24, but that Fitzgerald did not submit a bid.

Although the surety's agent in this case has stated after bid opening that it had made a typographical error in the bond with regard to the solicitation number and has consented to a correction, thereby indicating that the bond was intended to cover Fitzgerald's bid under IFB No. F08620-86-B0019, the fundamental rule remains that a nonresponsive bid cannot be made responsive by actions taken to correct a defective bond after bid opening. Truesdale Construction Co., Inc., B-213094, Nov. 18, 1983, 83-2 CPD ¶ 591. Therefore, it is also immaterial that facts subsequent to bid opening have established that Fitzgerald submitted a bid in response to IFB No. F08620-86-B0051 on the July 17 opening date, which included a bid bond executed on that date by the same surety. A bond must be determined to be enforceable at the time of bid opening, and not afterwards.

Because the erroneous solicitation number created uncertainty at the time of bid opening as to the enforceability of the bond, not overcome by other objective evidence, the bond was unacceptable. Accordingly, by separate letter of today, we are recommending to the Secretary of the Air Force that Fitzgerald's bid be rejected as nonresponsive and that award be made to Kinetic, the apparent remaining low bidder, if the firm's bid is otherwise proper and the firm is determined to be a responsible prospective contractor.

Since we have recommended that Kinetic be awarded the contract, we will not allow the firm to recover its claimed costs of filing and pursuing the protest, including attorney's fees. 4 C.F.R. § 21.6(e) (1986); see also EHE National Health Services, Inc., 65 Comp. Gen. 1 (1985), 85-2 CPD ¶ 362.

The protest is sustained.

*for*   
Comptroller General  
of the United States