



Comptroller General  
of the United States

Washington, D.C. 20548

# Decision

**Matter of:** Joseph B. Fay Co.  
**File:** B-241769.2  
**Date:** March 1, 1991

Carl L. Vacketta, Esq., and Michael W. Clancy, Esq., Pettit & Martin, for the protester.  
Coralyn Mann, Esq., and Dean L. Grayson, Esq., Arent, Fox, Kintner, Plotkin & Kahn, for Excavation Enterprises, Inc., an interested party.  
Roberta M. Truman, Esq., Federal Bureau of Prisons, Department of Justice, for the agency.  
Catherine M. Evans and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

## DIGEST

Protest of rejection of bid as nonresponsive due to allegedly defective bid bond is denied where bond referenced standard bidding form number instead of solicitation number, incorrect bid opening date, and generic description of work, rendering uncertain the enforceability of the bond against the surety in case of default on subject contract.

## DECISION

Joseph B. Fay Co. protests the rejection of its bid under invitation for bids (IFB) No. 100-459-0-CO, issued by the Federal Bureau of Prisons, Department of Justice, for preliminary site work for the federal correctional institution to be located near Cumberland, Maryland. Fay alleges that the agency improperly determined that Fay's bid bond was defective and that its bid therefore was nonresponsive.

We deny the protest.

The IFB required the submission of a bid bond in the amount of 20 percent of the bid. The bid submitted with Fay's bid correctly identified the project as involving construction work. However, it referenced as the solicitation number "SF-1442," which is not a solicitation number but the designation for the standard government form on which the IFB was issued. The bond also referenced August 8, 1990, as the bid opening date; August 8 was the opening date prior to an

amendment changing the date to August 29. Finding that the bid bond did not adequately identify the solicitation, the agency determined that it was uncertain whether the surety had bound itself under that solicitation, and therefore rejected Fay's bid as nonresponsive.

Fay contends that, since its bid bond was stapled to the bid and referenced the first amended bid opening date as well as the nature of the work, there could be no doubt that the bond was intended to cover this IFB; Fay notes that the contracting officer expressly acknowledged his understanding that the bond was so intended. Fay concludes that, since the contracting officer understood that the bond was in fact submitted in connection with this IFB, it was improper for the agency to find the bond defective.

The submission of a required bid bond is a material condition of responsiveness with which a bid must comply at the time of bid opening. Blakelee, Inc., B-239794, July 23, 1990, 90-2 CPD ¶ 65. Where a bond is alleged to be defective, the issue is whether the surety has sufficiently manifested its intention to be bound under the IFB so that the bond would be enforceable by the government in the event of default. Expert Elec., Inc., B-228569, Nov. 6, 1987, 87-2 CPD ¶ 459. 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. Blakelee, Inc., B-239794, supra.

The solicitation number referenced in a bid bond is a material element of the bond directly affecting its acceptability. Expert Elec., Inc., B-228569, supra. Whether a bid bond is acceptable even if it cites an incorrect solicitation number depends upon the circumstances, Blakelee, Inc., B-239794, supra; where there are clear indicia on the face of the bond to identify it with the correct solicitation, the bond is acceptable. Id. However, the presence of a correct bid opening date along with a generic description of the project are not by themselves enough to overcome the presence of an incorrect solicitation number. Fitzgerald & Co., Inc.-- Recon., B-223594.2, Nov. 3, 1986, 86-2 CPD ¶ 510. Where the bid bond does not sufficiently identify the solicitation, the fact that the bond is enclosed in the same envelope with the bid does not show that the bond was in fact issued for that solicitation. Fletcher & Sons, Inc., B-224233.2, Oct. 30, 1986, 86-2 CPD ¶ 499.

Here, there were not sufficient indicia on the face of the bond to identify it to the IFB. Fay's bond listed the bid opening date as August 8, a date that had been superseded by amendment to the IFB, and described the project generically as "construction." Fay argues that the August 8 date clearly


identifies the IFB because it was at one time the scheduled bid opening date. However, even assuming arguendo that the August 8 date is entitled to the same weight as an actual bid opening date, as indicated above, the presence of that date plus the general description of the work as construction do not sufficiently identify the IFB to render the bond enforceable under the above standard. See Fitzgerald & Co., Inc.--Recon., B-223594.2, supra.

Further, the fact that Fay's bid bond was stapled to its bid does no more to identify the bond with this IFB than enclosing the bid bond in the same envelope with the bid, the situation in Fletcher & Sons, Inc., B-224233.2, supra. We stated there that there was no assurance of the surety's intent to be bound merely because the bid and the bond were enclosed in the same envelope, because the protester inadvertently could have enclosed a bid bond in the wrong envelope. Fay argues that its stapling of the bond to the bid makes its situation materially distinguishable from Fletcher. We disagree; Fay inadvertently could have stapled the bid bond to the wrong bid just as easily as another bidder could have inserted a bid bond into the wrong envelope. The fact remains, moreover, that, whether or not Fay considered the bond to cover its performance under this IFB, and for this reason submitted the bond attached to its bid, there still is not adequate evidence that the surety intended to be bound to provide security for a contract awarded under this IFB.

Fay correctly notes that we have held that a bid bond was acceptable where there were no other ongoing solicitations to which the bond could have referred. See, e.g., Kirila Contractors, Inc., 67 Comp. Gen. 455 (1988), 88-1 CPD ¶ 554; 39 Comp. Gen. 60 (1959). Those decisions are not applicable to the facts of this case. In Kirila, the erroneous solicitation number on the bid bond was an obvious typographical error, the incorrect number referred to a different solicitation issued by the same contracting activity, and the bid opening date stated on the bond referred to the correct solicitation. In 39 Comp. Gen. 60, we found that, although the bond stated the incorrect bid opening date, it identified the procurement as one to "furnish magnetic recording tape to the Bureau of Census," and there was only one such procurement ongoing at the time. Here, in contrast, Fay's bond listed the number of the standard government bidding form in place of the solicitation number, not another Bureau of Prisons solicitation number; identified the work only as construction, not as construction at a particular site or for a particular agency; and listed the bid opening date as August 8 instead of August 29. Thus, the bid bond could have been prepared in connection with any federal agency's solicitation for construction that had a scheduled bid opening date of August 8, leaving significant doubt as to the surety's intent.

We conclude that the agency reasonably determined that Fay's bid bond did not sufficiently identify the solicitation to make the bond enforceable against Fay's surety. Absent the necessary indication on the face of the bond, neither the fact that the protester may have intended the bond to cover the subject IFB, nor the fact that the contracting officer understood that the bond was intended to cover the subject IFB adequately establish the enforceability of the bond. Expert Elec., Inc., B-228569, supra.

The protest is denied.

  
for James F. Hinchman  
General Counsel