

McAuliffe 148782



Comptroller General
of the United States
Washington, D.C. 20548

Decision

Matter of: Regional Development Corporation--
Reconsideration; Ware's Van & Storage
Co., Inc.--Reconsideration

File: B-251299.2; B-251431.2

Date: March 16, 1993

Stanley L. Newman, Esq., and David E. Blum, Esq., Newman & Blum, for Regional Development Corporation.
James A. Calderwood, Esq., Zuckert, Scoutt & Rasenberger, for Ware's Van & Storage Co., Inc.
Lester Edelman, Esq., Office of the Chief of Engineers, Department of the Army, for the agency.
Susan K. McAuliffe, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Requests for reconsideration are denied where bids were properly rejected as nonresponsive due to the questionable enforceability of copies of required bid bonds submitted with the bids and protesters essentially raise same matters on reconsideration as were raised in original protests; protesters have not demonstrated that decision was based on an error of fact or law.

DECISION

Regional Development Corporation and Ware's Van & Storage Co., Inc. request reconsideration of our dismissal of their protests challenging the rejection of their bids under invitation for bids (IFB) No. DACW17-93-B-0015, issued by the U.S. Army Corps of Engineers, and IFB No. GS11P-93-YX-C-0008, issued by the General Services Administration, respectively. Each firm's apparent low bid under the respective solicitations was rejected as nonresponsive because the protester submitted only a copy of the required bid bond with its bid rather than the original document. We dismissed the protests because they failed to establish a basis for challenging the rejection of the bids; the protests did not include sufficient information to establish the likelihood that the agencies violated applicable procurement laws or regulations in rejecting the bids.

We deny the requests for reconsideration because the requests provide no basis for reconsidering our prior decisions.

In their requests for reconsideration, each protester argues that the submission of a copy of the required bid bond was sufficient to bind its surety and, alternatively, that the firm should be allowed an opportunity to cure the bond defect by submitting the original bid bond after bid opening. In support of their contentions, the protesters state that procurement laws and regulations (and the IFBs) are silent as to whether original bid bond documents were required to be submitted with the bid by bid opening and that the surety industry considers copies of original documents to have the full legal force and effect of the original documents. Ware's also states that there should be no question as to the veracity and enforceability of the bid bond copy because bidders are generally prohibited under federal law (e.g., 18 U.S.C. § 1001 (1988)) from submitting fraudulent statements to the government. Regional Development further contends that since the copy of the power of attorney submitted with the firm's copy of the bid guarantee shows its surety's letterhead and is dated before bid opening, the agency could determine with certainty that the bond was enforceable.

The determinative issue concerning the acceptability of a bid bond is whether, in the event of a default by the bidder, the contracting agency could be certain that the surety would be bound, based on the information in the possession of the contracting agency at the time of bid opening. Global Eng'g, B-250558, Jan. 11, 1993, 93-1 CPD ¶ 31; J T Roofing, Inc., B-245823, Oct. 8, 1991, 91-2 CPD ¶ 318. Determining whether the surety is clearly bound is essential because 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. Anderson Constr. Co.; Rapp Constructors, Inc., 63 Comp. Gen. 248 (1984), 84-1 CPD ¶ 279. If the agency cannot determine definitely from the documents submitted with the bid that the surety would be bound, the bid is nonresponsive and must be rejected. Id. In these circumstances, the bond deficiency is not a correctable minor informality, as the protesters suggest, and it may not be cured by submitting the original bond documents after bid opening because this would essentially provide the bidder with the option of accepting or rejecting the award by either correcting or not correcting the bond deficiency, which is inconsistent with the sealed bidding system. Bird Constr., B-240002; B-240002.2, Sept. 19, 1990, 90-2 CPD ¶ 234; G & A Gen. Contractors, B-236181, Oct. 4, 1989, 89-2 CPD ¶ 308.

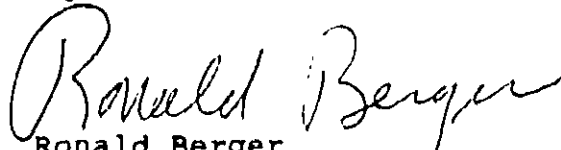
Photocopies and facsimile copies of bid bonds generally do not satisfy the requirement for a bid guarantee because there is no way for the contracting agency to be certain from examining the copies, other than by referring to the originals after bid opening, that there had not been alterations to which the surety had not consented, and that the surety's liability to the government, therefore, is secure. Executone Information Sys., Inc., B-246155, Oct. 21, 1991, 91-2 CPD ¶ 353; The King Co., Inc., B-228489, Oct. 30, 1987, 87-2 CPD ¶ 423.

We are not persuaded that reversal of our position that photocopies and facsimile copies of bonds are unacceptable is warranted. Regional Development contends that there is no statutory or regulatory requirement for original documents. However, the IFB specifically advised bidders (by incorporation of the provision at Federal Acquisition Regulation § 52.214-18) that facsimile copies of bid documents were not permitted and that bids were to be submitted on the appropriate forms and manually signed. We think this regulatory instruction against the use of copies of documents here applied equally to the bonds, certifications and other bid documents required by the solicitation. As to the allegation that photocopies of bid bonds are considered as a general matter to have the same enforceability as original documents within the surety industry, no evidence whatsoever has been presented to support this contention. We are not aware of such rule or practice.¹ Further, contrary to Regional Development's contention, the enforceability of a photocopied bid bond is not certain simply because it is submitted along with a photocopy of a power of attorney showing the letterhead of the surety company since this does nothing to cure the concern about possible unauthorized alterations to the bond document. Although acceptance of the protesters' apparent

¹Although Title 18 of the United States Code provides penalties for false statements to the government, this is not a substitute for sufficient certainty by a contracting agency at bid opening as to the enforceability of a bid bond. A bid bond is a form of security submitted to assure the government that a successful bidder will not withdraw its bid within the period specified for acceptance and, if required, will execute a written contract and furnish performance and payment bonds. See Federal Acquisition Regulation (FAR) § 28.001. The purpose of the bid bond is to secure the liability to the government for excess procurement costs in the event the successful bidder defaults by failing to execute the necessary contractual documents or to furnish the required payment and performance bonds. See FAR § 52.228-1(c); Techno Eng'g & Constr., Ltd., B-243932, July 23, 1991, 91-2 CPD ¶ 87.

low bids here might have resulted in a monetary savings to the government on these procurements, the maintenance of the integrity of the competitive bidding system is more in the government's best interest than the pecuniary advantage to be gained in a particular case. Executone Information Sys., Inc., supra; A. D. Roe Co. Inc., 54 Comp. Gen. 271 (1974), 74-2 CPD ¶ 194.

The requests for reconsideration are denied.


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