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**Comptroller General
of the United States**

**United States Government Accountability Office
Washington, DC 20548**

Decision

Matter of: IMR Development Corporation

File: B-408585

Date: November 13, 2013

Theresa Case, IMR Development Corporation, for the protester.
Brian R. Reed, Esq., Department of Veterans Affairs, for the agency.
Paula A. Williams, Esq., and Edward Goldstein, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Contracting officer reasonably determined protester's bid bond in an amount less than the required 20 percent was unacceptable because the amount of the bid bond was less than the difference between protester's low bid and the second lowest bid.

DECISION

IMR Development Corporation, of Hollywood, Florida, protests the rejection of its bid as nonresponsive under invitation for bids (IFB) No. VA251-13-B-0227, issued by the Department of Veterans Affairs (VA) for building renovation services. The VA rejected IMR's bid because the penal sum of its bid bond was less than the 20 percent required by the solicitation and the discrepancy in the bid bond could not be waived.

We deny the protest.

The IFB required bidders to submit a bid guarantee, or bid bond, for 20 percent of the bid price or \$3 million, whichever was the lesser amount, and included Federal Acquisition Regulation (FAR) § 52.228-1, informing bidders that the failure to furnish a bid guarantee in the proper form and amount may result in the rejection of the bid unless it falls under one of the exceptions specified in FAR § 28.101-4. IFB at 14, 22.

Of the seven timely bids received, IMR submitted the apparent low bid of \$425,054.88 and Cannon Management Group (Cannon) submitted the second lowest bid of \$489,000.00. Contracting Officer Statement at 1; Agency Report (AR) exh. 2, Bid Abstract at 2. With its bid, IMR submitted a standard form (SF) 24 bid

bond identifying the penal sum as “20% of bid price”, but also included a “not to exceed” amount of “\$60,000.00.” AR exh.1, IMR’s Bid Bond.

In reviewing IMR’s bid, the contracting officer noted the discrepancy between the 20 percent of bid price (which was \$85,010.97) and the penal sum, expressed as “not to exceed” \$60,000.00. The contracting officer then considered whether the discrepancy in the bid bond amount could be waived under FAR § 28.101-4(c)(2) if the bid guarantee “is less than required, but is equal to or greater than the difference between the offer price and the next higher acceptable offer.” Since the contracting officer found that the penal sum of the bid bond was limited to \$60,000--an amount less than the difference between its bid of \$425,054.88 and Cannon’s bid of \$489,000.00 (a difference of \$63,945.12)--the contracting officer concluded that the defect with IMR’s bid bond could not be waived and rejected IMR’s bid as nonresponsive. Contracting Officer Statement at 2. This protest followed.

In challenging the agency’s determination that its bid bond was defective, the protester relies on information elsewhere on the SF 24 bid bond that indicates its corporate surety has a “liability limit of \$3,756,000.00” which, the protester maintains, covers “any claim the agency could possibly incur.” Protester’s Comments at 1. IMR also argues that the not to exceed amount of \$60,000 was in error and waivable as a clerical mistake. Id. at 2-3.

As a general matter, a bid guarantee ensures that a bidder will, if required, execute a written contract and furnish payment and performance bonds. Where the guarantee is in the form of a bid bond, it secures the liability of the surety to the government if the holder of the bond fails to fulfill these obligations. The guarantee is also available to offset the excess costs of awarding to the next eligible bidder in the event that the bidder awarded the contract fails to fulfill these obligations. The sufficiency of a bid guarantee depends on whether the surety is clearly bound by its terms. When the liability of the surety is not clear, the bond is defective. Centex-Great Southwest Corp., B-258578, Jan. 17, 1995, 95-1 CPD ¶ 19 at 2; Hugo Key & Son, Inc.; Alco Envtl. Servs., Inc., B-251053.4, B-251053.5, July 15, 1993, 93-2 CPD ¶ 21, aff’d, B-251053.6, Sept. 27, 1993, 93-2 CPD ¶ 192.

When required, a bid guarantee is a material part of a bid and must be furnished with the bid package. Centex-Great Southwest Corp., *supra*; Hugo Key & Son, Inc.; Alco Envtl. Servs., Inc., *supra*. Accordingly, noncompliance with a solicitation requirement for a bid guarantee generally renders the bid nonresponsive and requires rejection of the bid unless the deficiency can be waived under FAR §§ 28.101-4(a), (c).

In this case, although IMR’s bid bond indicated that the bond was for 20 percent of the bid price, it also provided that the penal sum of the bond was “not to exceed” \$60,000.00. At best, IMR’s bid was ambiguous regarding the extent of the surety’s

liability, and did not clearly establish that the surety would be liable for any amount exceeding the specific penal amount of \$60,000--less than that required by the IFB. As discussed above, the ambiguity regarding the adequacy of the bond amount could not be waived because the stated penal sum of the bond (\$60,000) was less than the difference between IMR's bid and the next low bid. Under these circumstances, the agency was not required to assume the risk that it would not receive the protection that the bid bond was to afford and the contracting officer properly rejected IMR's bid as nonresponsive. Tom Mistick & Sons Inc., B-222326, Apr. 3, 1986, 86-1 CPD ¶ 323.

In reaching this conclusion, we reject the protester's argument that the corporate surety's stated "liability limit" of \$3.7 million at the bottom of SF 24 represented the liability of the surety for this bond in the event of a default. Rather, the corporate surety's representation of its overall bonding limit, an amount based on the Department of Treasury's list of approved sureties,¹ did not negate or otherwise subsume the clear limitation of the stated penal sum of the bond, which was "not to exceed" \$60,000, where the terms of the bond provided that the principal and surety bound themselves solely to "the above penal sum." See SF 24. Finally, IMR's bid bond could not be corrected after bid opening since affording a bidder the option of accepting or rejecting the award by either correcting or not correcting a bond deficiency would be inconsistent with the sealed bidding system. See Bird Constr., B-240002, B-240002.2, Sept. 19, 1990, 90-2 CPD ¶ 234 at 2.

The protest is denied.

Susan A. Poling
General Counsel

¹ The instructions to SF 24 provide that corporations executing bonds as sureties must appear on the Department of Treasury's list of approved sureties and must act within the limitation listed therein. See SF 24, Instructions para. 4(a).