



## Decision

**Matter of:** G2G, LLC

**File:** B-416502

**Date:** September 27, 2018

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Timothy M. Connelly, Esq., Tim Connelly Law PLLC, for the protester.  
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### DIGEST

Where an invitation for bids required submission of a bid guarantee, agency reasonably rejected protester's bid as nonresponsive where the bid bond was defective because it appeared to limit the liability of the corporate surety with respect to excess procurement costs in the event of contractor default.

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### DECISION

G2G, LLC, a service-disabled veteran-owned small business located in Rapid City, South Dakota, protests the rejection of its bid as nonresponsive under invitation for bids (IFB) No. 36C26318B0038, issued by the Department of Veterans Affairs (VA) for a construction project at the VA Black Hills Healthcare Center in Fort Meade, South Dakota. The protester challenges the agency's rejection of its bid for failing to submit a valid bid bond.

We deny the protest.

### BACKGROUND

The agency issued the IFB on March 19, 2018, as a service-disabled veteran-owned small business set-aside. The solicitation sought bids for the relocation of sterile processing services from the basement of Building 113 of the Healthcare Center to the first floor of the surgical suites in the same building; renovation of vacated surgical rooms on the second floor; and relocation of the endoscopy department to the second floor. IFB at 1, 9. Bidders were required to submit a bid guarantee with their bids in the amount of 20 percent of the bid price, or \$3 million, whichever was less. The IFB

included the Federal Acquisition Regulation (FAR) provision 52.228-1, Bid Guarantee which informed bidders that failure to furnish a bid guarantee in the proper form and amount, by the time set for bid opening, could result in the rejection of the bid. IFB at 8, 12.

The VA conducted bid opening on May 8, and G2G was the apparent low bidder. G2G submitted a bid bond as its bid guarantee on commercial forms furnished by the American Institute of Architects in lieu of a completed FAR standard form (SF) 24 bid bond. Of relevance here, G2G's submitted bid bond provided that in the event of the contractor's default (hereinafter referred to as paragraph 1):

[the surety] pays to the Owner [the VA] **the difference, not to exceed the amount of this Bond, between the amount specified in said bid and such larger amount for which the Owner may in good faith contract with another party to perform the work covered by said bid**, then this obligation shall be null and void, otherwise to remain in full force and effect.

Agency Report (AR) exh. 3, Protester's Bid Bond at 1 (emphasis added). The protester's submitted bid bond further provided (hereinafter referred to as paragraph 3):

When this Bond **has been furnished to comply with a statutory or other legal requirement in the location of the Project, any provision in this Bond conflicting with said statutory or legal requirement shall be deleted herefrom and provisions conforming to such statutory or other legal requirement shall be deemed incorporated herein**. When so furnished, the intent is that this Bond shall be construed as a statutory bond and not as a common law bond.

Id. (emphasis added).

In reviewing G2G's bid, the contracting officer noted that the surety's bond obligations to the government represented a significant departure from the bond obligations set forth in SF 24 and did not, for example, clearly obligate the surety to cover all excess procurement costs in the event of default by the contractor. The contracting officer determined that G2G's submitted bid bond was defective and informed G2G that its apparent low bid was rejected as nonresponsive for these reasons. More specifically, the contracting officer informed G2G that its submitted bid bond was inconsistent with the requirement of FAR § 52.228-1(e) which requires the surety to cover any excess procurement costs in the event of default. Protest exh. 2, VA Rejection Letter (June 7, 2018). This protest followed.

## DISCUSSION

A bid bond is a form of guarantee, which ensures that a bidder will not withdraw its bid within the period specified for acceptance and, if required, will execute a written contract and furnish required performance and payment bonds. See FAR § 28.001; American Artisan Prods., Inc., B-292380, July 30, 2003, 2003 CPD ¶ 132 at 4. The purpose of a bid bond is to secure the liability of a surety to the government by providing funds to cover the excess costs of awarding to the next eligible bidder in the event that the successful bidder defaults by failing to fulfill these obligations. See FAR § 52.228-1(d), (e); Paradise Constr., Co., B-289144, Nov. 26, 2001, 2001 CPD ¶ 192 at 2; Alarm Control Co., B-246010, Nov. 18, 1991, 91-2 CPD ¶ 472 at 2. When required by a solicitation, a bid bond or other bid guarantee is a material part of the bid with which there must be compliance at the time of bid opening. When a bidder submits a defective bid bond or uncertainty exists at the time of bid opening that the bidder has furnished a legally binding bond, the bid itself is rendered nonresponsive and generally requires rejection of the bid. FAR § 28.101-4(a); Alarm Control Co., supra.

A bidder's use of a commercial bid bond form, as here, rather than an SF 24 bid bond form is not per se objectionable, since the sufficiency of the bid bond does not depend on its form, but on whether it represents a significant departure from the rights and obligations of the parties as set forth in SF 24. Alarm Control Co., supra; Allgood Elec. Co., B-235171, July 18, 1989, 89-2 CPD ¶ 58 at 2. The determinative question is whether the bond establishes unequivocally at the time of bid opening that the bond is enforceable against the surety should the bidder fail to meet its obligations. If the agency cannot determine definitively from the bid bond documents that the surety would be bound, the bond is defective and the bid must be rejected. See, e.g., Collins Cos., B-274765, Dec. 27, 1996, 96-2 CPD ¶ 243 at 2; Techno Eng'g & Constr., Ltd., B-243932, July 23, 1991, 91-2 CPD ¶ 87 at 2.

Here, G2G does not dispute that its bid bond "limits the amount of reprourement costs to the difference in the G2G bid and a replacement contract," which is contrary to the requirement of FAR § 52.228-1(e) that allows the government to recover all costs attributable to the contractor's default.<sup>1</sup> Comments at 7, 10. Nonetheless, G2G argues that it submitted a valid bid bond with its bid, the rejection of which by the agency was improper. In support thereof, G2G contends that when read as a whole, its bid bond clearly established that the provisions of FAR § 52.228-1 are "deemed incorporated" into G2G's bid bond, and that paragraph 1, which impermissibly limited the surety's liability for reprourement costs, was "deemed deleted" under the terms of paragraph 3 of the bid bond. Id. at 8-9. According to the protester, the VA ignored the terms of its

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<sup>1</sup> The protester expressly conceded that "there is language in the G2G bond that could, if operative, potentially limit the amount of the indemnity here to the difference between the G2G bid, and a replacement contract," whereas the bid bond language in SF 24 and FAR § 52.228-1 allow for recovery of other types of costs, such as administrative costs, or the agency's cost to self-perform the contract. Comments at 7.

bid bond that when read together, unequivocally committed the surety to satisfy all the requirements of FAR § 52.228-1, including the obligation to pay all excess reprourement costs in the event of default.

We disagree with G2G that it furnished a legally enforceable bid bond at the time of bid opening. As noted above, the express terms of G2G's submitted bid bond limited the surety's liability to pay costs to the government in the event of default to "the difference, not to exceed the amount of this Bond, between the amount specified in said bid and such larger amount for which the Owner may in good faith contract with another party to perform the work." AR exh. 3, Protester's Bid Bond at 1. We have repeatedly noted that a bid bond is defective if it is submitted on a form that represents a significant departure from the rights and obligations of the parties as set forth in the IFB, which includes FAR § 52.228-1(e), and SF 24. See, e.g., Seither & Cherry Co., B-242220, Apr. 10, 1991, 91-1 CPD ¶ 365 at 2-3; Allgood Elec. Co., supra, at 3. Here, acceptance of G2G's bid bond would have obligated the VA to accept the surety's limited liability to pay reprourement costs in the event of default. In other words, the government would not receive full and complete protection in the event G2G fails to fulfill its obligations. On this basis, we find that the VA properly rejected G2G's bid as nonresponsive because G2G's bid bond was noncompliant with the solicitation requirements for a bid guarantee.

In reaching this conclusion, we also reject G2G's arguments that paragraph 3 of its bid bond incorporated by reference the "substance" of FAR § 52.228-1 into G2G's bid bond. Comments at 8. The protester insists that the limitation of the surety's liability to pay reprourement costs was "cured" upon incorporation of the requirements of FAR § 52.228-1; therefore, its bid bond was valid and enforceable. Id. at 10-11. However, the VA contends that the broad reference to "a statutory or other legal requirement in the location of the [p]roject" in paragraph 3 of G2G's bid bond was ambiguous and could be interpreted to exclude the solicitation's bid guarantee requirements as set forth in FAR § 52.228-1. Legal Memorandum at 8-10. While the VA acknowledges that no "magic words" are required to incorporate by reference the solicitation requirements into G2G's bid bond, the agency points out that the phrase "statutory or legal requirement" lacks specificity and/or references to the solicitation or FAR requirements. Legal Memorandum at 9-10.

Based on our review, we find that the language used in paragraph 3 of G2G's bid bond does not provide clear or unambiguous evidence of G2G's intent to incorporate by reference the solicitation requirements for a bid guarantee to include the requirements of FAR § 52.228-1. For instance, it is not clear from the face of the protester's bid bond what is meant by the phrase "to comply with a statutory or other legal requirement in the location of the [p]roject" accordingly, this phrase may be subject to more than one interpretation. Similarly, we cannot infer that the phrase "any provision in this Bond conflicting with said statutory or legal requirement shall be deleted herefrom and provisions conforming to such statutory or other legal requirement shall be deemed incorporated herein" indicates that FAR § 52.228-1, in whole or in part, is the "legal requirement" that should be "deemed incorporated" into G2G's bid bond. See, e.g., J.C.

Adams, Inc., B-252132, May 18, 1993, 93-1 CPD ¶ 394 at 3 (blanket offer of compliance with material terms of solicitation was not sufficient to cure bidder's use of its own bid form that was at variance with material terms of solicitation). At best, the protester's bid bond is ambiguous with respect to the liability of the surety to satisfy all the requirements of FAR § 52.228-1, and our Office will not convert ambiguous aspects of bid bonds into mere matters of form which can be explained away and waived. See Standard Roofing USA, Inc., B-245776, Jan. 30, 1992, 92-1 CPD ¶ 127 at 4. In sum, we agree with the agency that the liability of G2G's surety is uncertain such that the bid guarantee was defective, and we agree also that the protester's bid was properly rejected as nonresponsive.

The protest is denied.

Thomas H. Armstrong  
General Counsel