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**Comptroller General
of the United States**

**United States General Accounting Office
Washington, DC 20548**

Decision

Matter of: Armstrong Elevator Company

File: B-292864.2

Date: April 13, 2004

Roy S. Armstrong for the protester.

Mark R. Warnick, Esq., General Services Administration, for the agency.

Katherine I. Riback, Esq., and David A. Ashen, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

In a sealed bid procurement which required the submission of a bid guarantee in the amount of 20 percent of the bid price, agency properly rejected protester's bid as nonresponsive, where the bid included a bid guarantee that stated that the penal sum amount was limited to 20 percent of the bid price, but the liability limit of the surety was limited to an amount that was significantly less than 20 percent of the bid price.

DECISION

Armstrong Elevator Company protests the rejection of its low bid as nonresponsive under invitation for bids (IFB) No. GS06P03GYC0014, issued by the General Services Administration (GSA) for elevator modernization in a federal building in Des Moines, Iowa. Armstrong's bid was found nonresponsive due to a defective bid bond.

Armstrong contends that its bid bond contained an obvious typographical error that should have been waived by the agency.

We deny the protest.

The IFB provided for award of a fixed-price contract, for a base year and three 1-year options, for the performance of elevator modernization. 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 solicitation provided that failure to provide a bid guarantee in the required form and amount, by the time set for bid opening, could be cause for the rejection of the bid. IFB at 11. The agency received five bids in response to the solicitation. The bids of the first and second low apparent bidders were determined to be nonresponsive. The next low apparent bid, submitted by Armstrong, was for a total bid amount of \$1,750,000.

Upon review of Armstrong's bid, however, the agency noticed that while the bid bond submitted as Armstrong's guarantee stated that the "penal sum" of the bond was "20%," the requisite amount, the "liability limit" specified for the listed corporate surety was only "\$44,425," an amount significantly lower than the required 20 percent (\$350,000) of the total bid price. Armstrong Bid, Standard Form 24, Bid Bond. The agency then rejected Armstrong's bid as nonresponsive for failure of the bid bond to comply with the essential requirements of the solicitation. Subsequently, by letter dated January 6, Armstrong furnished a "corrected" bid bond in which the surety's liability limit was specified as \$21,859,000. The agency nevertheless made award to Mid-American Elevator Company, at a total bid price of \$2,053,354, and this protest to our Office followed.

Armstrong contends that the liability limit of only \$44,425 in the bid bond as initially submitted was a typographical error that should have been waived by the agency as a minor informality, thereby avoiding the government the higher cost associated with the next highest bid.

A bid guarantee is a form of security ensuring that a bidder will, if required, execute a written contract and furnish payment and performance bonds. Federal Acquisition Regulation (FAR) § 28.001; American Artisan Prods., B-292380, July 30, 2003 CPD ¶ 132 at 4. When 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. Paradise Constr. Co., B-289144, Nov. 26, 2001, 2001 CPD ¶ 192 at 2. When required by a solicitation, a bid guarantee is a material part of the bid and a valid guarantee must be furnished with the bid in order for it to be responsive. Hugo Key & Son, Inc.; Alco Env'tl. Servs., Inc., B-251053.4, B-251053.5, July 15, 1993, 93-2 CPD ¶ 21 at 3, *aff'd*, B-251053.6, Sept. 27, 1993, 93-2 CPD ¶ 192. Where the liability limit of the surety, as specified in the bid bond, is less than the penal sum required by the IFB, the bid should be rejected as nonresponsive, unless the waiver provisions of FAR § 28.101-4(c) are applicable. Wagner Moving and Storage, B-185725, Apr. 8, 1976, 76-1 CPD ¶ 237; *see* Professional Restoration Servs., Inc., B-232424, Jan. 9, 1989, 89-1 CPD ¶ 13 at 2.

The test in these cases is whether the government can enforce the bond against the surety in the event the bidder fails to execute the required contract documents and deliver the required bonds. Professional Restoration Servs., Inc., *supra*. We find that because the liability limit specified was inconsistent with, and for a sum less than, the penal sum required by the IFB, Armstrong's bid guarantee was, at best, ambiguous concerning the enforceable amount of the bid guarantee. Wagner Moving and Storage, *supra* (bid is nonresponsive where bid bond included the penal sum specified by the IFB, but surety's liability limitation was limited to an amount less than that required by the IFB); *cf.* Professional Restoration Servs., Inc., *supra* (bid bond is enforceable against a corporate surety that specifies an intent to be bound to

the penal sum by correctly completing the liability limit portion of the bid bond form, even though the penal sum was left blank).¹ Since none of the waiver provisions in FAR § 28.101-4(c) were applicable, we find that the agency properly rejected Armstrong's bid as nonresponsive.

Armstrong's later submission of a "corrected" bid bond raising the surety's liability limit does not alter the fact that the bid was nonresponsive. The determination as to whether a bid is acceptable must be based solely on the bid documents themselves, as they appear at the time of bid opening. Drill Constr. Co., Inc., B-239783, June 7, 1990, 90-1 CPD ¶ 538 at 2. Thus, the offer after bid opening to change the surety's liability limit could not cure the defect.

As for Armstrong's assertion that the agency would realize a significant cost savings with the acceptance of its bid, notwithstanding the defective bid bond, we note that the public interest in strictly maintaining the sealed bidding procedures required by law outweighs any monetary advantage which the government might gain in a particular case by a violation of those procedures. Cherokee Enters., Inc., B-252948, B-252950, June 3, 1993, 93-1 CPD ¶ 429 at 4.

The protest is denied.

Anthony H. Gamboa
General Counsel

¹ Armstrong notes that the total underwriting limitation of its surety is \$21,859,000, as shown in the publicly available Department of the Treasury's Listing of Approved Sureties (Department Circular 570). The protester contends that the total underwriting sum of its surety should take precedence over the amount that the surety listed as its liability limitation for this bid. However, whatever the total underwriting limitation of Armstrong's surety, the bid bond that was submitted with Armstrong's bid and which referenced the specific solicitation here specified that the maximum liability of the surety under this solicitation was only \$44,425; while the surety could have accepted a higher potential liability with respect to this particular solicitation, the bid bond submitted with Armstrong's timely bid indicated that it did not.

