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**Comptroller General
of the United States**

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

Decision

Matter of: Hamilton Pacific Chamberlain, LLC

File: B-410955

Date: March 30, 2015

Sean Milani-Nia, Esq., Fox Rothschild LLP, for the protester.
Tyler W. Brown, Esq., Department of Veterans Affairs, for the agency.
K. Nicole Willems, Esq., and Jennifer Westfall-McGrail, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

A bid bond is defective where no penal sum has been inserted on the bond, and the bond does not otherwise establish the intention of the surety to be bound in the required amount.

DECISION

Hamilton Pacific Chamberlain, LLC, of Waldorf, MD, protests the rejection of its bid under invitation for bids (IFB) No. VA246-14-B-1143, issued by the Department of Veterans Affairs (VA) for the upgrade of a heating, ventilation, and air conditioning (HVAC) system. The protester argues that the agency improperly rejected its bid as noncompliant with the bid guarantee requirements in the solicitation.

We deny the protest.

BACKGROUND

The IFB, issued on September 5, 2014, sought bids for the replacement and upgrade of an HVAC system at the Hunter Holmes McGuire VA Medical Center in Richmond, Virginia. The IFB, which was set aside for service-disabled, veteran-owned small businesses, contemplated the award of a fixed-price contract. IFB at 10, 13. The solicitation required bidders to submit a bid guarantee with their bids, in the amount of twenty percent of the bid price or three million dollars, whichever was less. IFB at 15.

The agency conducted a public bid opening on October 7, and eight bids were received. Contracting Officer's (CO's) Statement at 1. Hamilton Pacific

Chamberlain (HPC) was the apparent low bidder, with a bid of \$1,129,000. The protester had not entered an amount in the “Penal Sum of Bond” section of their bid bond (standard form (SF) 24), however, and the liability limit listed on the SF 24 (\$6,457,000) exceeded the upper limit of the attorney-in-fact’s authority to bind the surety, as indicated in the attached power of attorney (\$5,000,000). Id. As a result, the contracting officer rejected the protester’s bid, citing noncompliance with the bid guarantee requirements in the solicitation. Id. The protester learned that its bid had been rejected on December 16, 2014, and this protest followed.

DISCUSSION

The protester argues that the omission of the penal sum does not render the bid bond unenforceable because its surety is liable up to the amount authorized in the power of attorney. Comments on AR at 2. The agency argues that there is considerable uncertainty as to the agency’s ability to bind the surety for any amount because the liability limit listed on the bid bond exceeds the authority granted to the attorney-in-fact who signed the bid bond on behalf of the surety. Agency Report (AR) at 2.

The general rule is that a bid is nonresponsive and must be rejected when accompanied by a bid bond that does not include the penal sum. Kennedy Electric Company, Inc., B-239687, May 24, 1990, 90-1 CPD ¶ 499 at 1; See also; M/V Constructor Co., B-232572, Sept. 20, 1988, 88-2 CPD ¶ 272 at 1; F&F Pizano, B-219591, B-219594, July 25, 1985, 85-2 CPD ¶ 88 at 1; Allen County Builders Supply, B-216647, May 7, 1985, 85-1 CPD ¶ 507 at 1. The purpose of a bid bond is to assure that a bidder will not withdraw its bid within the time specified for acceptance; it secures the liability of a surety to the government in the event the bidder fails to fulfill its obligations. Allen County Builders Supply, supra. Thus, the sufficiency of a bid bond will depend on whether the surety is clearly bound by its terms; when the liability of the surety is not clear, the bond properly may be regarded as defective. Id.

In support of its argument that the failure to list the penal amount on the bid bond does not render its bid nonresponsive, the protester relies on a decision issued by our Office, in which we held that a bid bond was enforceable against a single corporate surety, despite the omission of the penal sum, where the bond otherwise established the intent of the surety to be bound for a sufficient penal sum. Professional Restoration Services, Inc., B-232424, Jan. 9, 1989, 89-1 CPD ¶ 13 at 1 (hereinafter referred to as PRSI).¹ As explained below, the protester’s reliance on

¹ In the PRSI decision, a bid bond with a penal sum of \$13,995 was required. Id. The liability limit listed on PRSI’s bid bond was \$13,000. Id. We sustained PRSI’s protest because we concluded that the liability agreement along with the authorized signature of the attorney-in-fact was sufficient to establish the intention of the

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PRSI is misplaced, and the general rule that a bid is nonresponsive and must be rejected when accompanied by a bid bond that does not include the penal sum applies in this case.

The protester contends that the facts in PRSI are analogous to the facts here in that in both instances, the protesters omitted the penal sums from their bid bonds, while including liability limits.² HPC's bid bond suffers from an additional problem not implicated in PRSI's protest, however, which clearly distinguishes it from the PRSI decision. Specifically, based on the language in the bid bond in PRSI, there was no reason to question whether the surety intended to bind itself up to the liability limit listed in PRSI's bid bond, but the same is not true with regard to HPC's bid bond. The liability limit in PRSI's bid bond was very close to the amount of the penal sum, and there was no indication that the attorney-in-fact signing the bid bond on behalf of the surety had exceeded the authority granted by the surety. See id. HPC's bid bond, on the other hand, included a liability limit that exceeded the authority vested in the attorney-in-fact who signed the bid bond by over a million dollars. AR, Exhibit

(...continued)

corporate surety to be bound for a penal sum in the amount of \$13,000. We also found the amount of the bond to be sufficient because, although shy of the full penal amount, it covered the difference between the bid price and the next higher acceptable bid. We noted in this connection that the Federal Acquisition Regulation (FAR) provides that noncompliance with bid guarantee requirements can be waived in certain situations, including situations in which the amount of the bid guarantee submitted is less than required, but is equal to or greater than the difference between the offer price and the next higher acceptable offer. FAR § 28.101-4(c)(2).

² In PRSI, we relied upon the following language in SF 24, which is the same language used in HPC's bid bond, to conclude that the surety intended to be liable for the listed liability limit:

We, the Principal and Surety (ies) are firmly bound to the United States . . . in the above penal sum. For payment of the penal sum, we bind ourselves . . . jointly and severally. However, where the sureties are corporations acting as co-sureties, we, the Sureties bind ourselves in such sum 'jointly and severally' as well as 'severally' only for the purpose of allowing a joint action or actions against any or all of us. **For all other purposes, each Surety binds itself, jointly and severally with the Principal, for the payment of the sum shown opposite the name of the Surety.** If no limit of liability is indicated, the limit or liability is the full amount of the penal sum. (Emphasis added.)

AR, Exhibit 4, HPC's bid at 3; Professional Restoration Services, Inc., supra at 1.

4, HPC's Proposal at 3-4. Additionally, the liability limit listed in HPC's bid bond (\$6,457,000) was vastly greater than the penal sum (\$225,800).³ Id.

As discussed above, the sufficiency of a bid bond will depend on whether the surety is clearly bound by its terms; when the liability of the surety is not clear, due to the omission of a penal sum, the bond properly may be regarded as defective. See Allen County Builders Supply, supra. Here, the omission of the penal sum called into question the enforceability of the bond. The uncertainty as to the bond's enforceability was compounded by the fact that the stated limit on the surety's liability exceeded the upper limit of the attorney-in-fact's authority to bind the surety. Under the circumstances here, we think that the contracting officer reasonably questioned the enforceability of the bond. Consequently, we find that the contracting officer reasonably rejected the protester's bid.

The protest is denied.

Susan A. Poling
General Counsel

³ The protester's bid price was \$1,129,000. The penal sum would have been twenty percent of the bid price or \$225,800--that is, \$6,231,200 less than the amount of liability listed in the liability limit portion of the bid bond.