

- (2) A bank certified check, bank cashier's check, bank treasurer's check, or cash; or
- (3) Pledge of securities backed by the full faith and credit of the United States government or bonds issued by the State of Maryland.

3. Five bids were received on July 27, 1982. Appellant submitted the low bid of \$146,809.00. Richard F. Kline, Inc. submitted the next low bid of \$187,514.25.

4. Appellant's bid, however, was deemed irregular since the enclosed bid bond did not indicate a penal sum either by dollar amount or by a percentage figure.

5. Except for the blank penal sum, the bid bond submitted with Appellant's bid properly was executed on July 27, 1982 for Appellant by Andrew C. Barilla, its Vice-President, and for Fidelity and Deposit Company of Maryland (Fidelity) by J. Hunter Alfriend. The Power of Attorney issued by Fidelity on March 5, 1982, submitted with the bid bond, appointed Mr. Alfriend as its attorney in fact to execute bid bonds on Fidelity's behalf.

6. During the hearing in this appeal, Fidelity's representative testified that, when requested to do so by a contractor, its practice is to issue a fully executed bid bond with a blank penal amount to be filled in by the contractor at the time of bidding. (Tr. 14, 16-17).

7. Although the bid bond did not specify a penal sum, the amount of "Seventy-four hundred Dollars (\$7,400)" was filled in on the bid signature sheet (page 313) by Mr. Barilla in the space provided, at the time he signed and submitted the bid, as follows:

Enclosed herewith find certified cashier's or treasurer's check or bid bond in the amount of Seventy four hundred Dollars (\$7400) [written in script by Mr. Barilla] made payable to the "State of Maryland." This certified cashier's or treasurer's check or bid bond is a Proposal Guarantee (which is understood will be forfeited in the event the Form or Contract is not executed, if awarded to the undersigned), and is based on the aggregate amount of the bid submitted and covered by the table on the preceding page.

Mr. Barilla testified at the hearing that he was authorized by Fidelity to fill in the penal sum in the appropriate space on the bid bond, although he failed to do so when he submitted the bid. (Tr. 39). However, Mr. Barilla is not named in Fidelity's Power of Attorney, or any other document submitted with Appellant's bid, as having authority to execute bonds, or otherwise act on behalf of Fidelity.

8. On August 20, 1982, SHA notified Appellant by letter that its bid was rejected as nonresponsive because the bid bond did not total 5% of the bid submitted.

9. By letter dated August 24, 1982, Appellant apprised the SHA procurement officer that the failure to insert a penal sum on its bid bond, where the appropriate sum elsewhere was stated on its bid signature sheet, did not mandate rejection of its bid and acceptance of the next responsive bid.

10. By letter dated August 27, 1982, SHA again informed Appellant that its bid was considered nonresponsive because of the failure to furnish an enforceable bid bond.

11. Appellant formally protested the rejection of its bid by letter dated August 31, 1982. Appellant reiterated that identification of the amount of the bid bond of \$7,400 on the bid signature sheet together with the executed bid bond was sufficient to bind Fidelity. This, according to Appellant, justified acceptance of its bid.

12. By letter dated September 7, 1982, the SHA procurement officer issued his final decision denying the protest and concluding that Appellant's bid was nonresponsive because of the failure to furnish a bid bond in sufficient amount.

13. Appellant filed a timely appeal on September 16, 1982.

14. On December 10, 1982, the contract was awarded to Richard F. Kline, Inc., the second low bidder.

Decision

Md. Ann. Code, Art. 21, § 3-504 (1981 Repl. Vol., 1982 Supp.) provides as follows:

(a) Contracts exceeding \$25,000; surety. — Each bidder or offeror for a construction contract shall give a bid bond if the bid or offer exceeds \$25,000. Bid bonds may be required for any other procurement over \$25,000, as determined by the procurement officer. The bid bond shall be provided by a surety company authorized to do business in this State, or the equivalent in cash, or in a form satisfactory to the procurement officer.

(b) Amount. — The bid bond shall be in an amount equal to at least 5 percent of the amount of the bid or price proposal except that, for bids stating a rate but not a total cost, the bid bond shall be in an amount as determined by the procurement officer.

(c) Rejection of noncomplying bidder. — If the invitation for bids or request for proposals require [sic] that a bid bond be provided, a bidder or offeror that does not comply shall be rejected.

(d) Withdrawal of bid. — Once opened, bids or price proposals are irrevocable for the period specified in the invitation for bids or the request for proposal [sic] except as provided in § 3-202(h) of this article. However,

if a bidder or offeror is permitted to withdraw his bid or proposal before award because of a mistake in the bid or proposal, no action shall be taken against his bid bond.
(Underscoring added.)

This language makes the submission of a bid bond in the amount of 5% of the bid price a material requirement of an invitation for bids. Kennedy Temporaries, MSBCA 1061, July 20, 1982; The Tower Building Corporation, MSBCA 1057, April 6, 1982, p. 11, note 11. Failure to submit a required bid bond in accordance with the terms of an IFB, thus will result in the bid being rejected as nonresponsive. Compare Kennedy Temporaries,¹ supra; 11 C.J.S. Bonds § 13; Stearns, Law of Suretyship (5th Ed. 1951), §2.12; Baucom Janitorial Service, Inc., Comp. Gen. B-206353, April 19, 1982, 82-1 CPD ¶ 356; Newport Ship Yard, Inc., Comp. Gen. B-191703, May 25, 1978, 78-1 CPD ¶ 400; Wagner Moving and Storage, Comp. Gen. B-185725, 76-1 CPD ¶ 237; E. Sprague, Batavia, Inc., Comp. Gen. B-183082, April 2, 1975, 75-1 CPD ¶ 194; 38 Comp. Gen. 532 (1959).

A bid bond guarantees that the successful bidder will execute the contract and obviates the necessity of a lawsuit to recover any damages resulting from a repudiation of the bid. Board of Ed. of Carroll County v. Allender, 206 Md. 466, 476, 112 A.2d 455, 460 (1954). The issue here thus concerns whether the bond furnished was sufficient to obligate the surety to pay damages in the maximum amount of 5% of the bid price in the event that Appellant repudiated its bid. Compare Dialist Co. v. Pulford, 42 Md. App. 173, 179, 399 A.2d 1374, 1379 (1979).

The bid bond furnished by Appellant and executed by its surety did not contain a penal sum. While the surety, by issuing a signed, blank bid bond, may have intended to be liable for the \$7,400 amount which Appellant wrote on its bid form but omitted from the bond, the absence of a penal sum on the bond raised a question as to the legal liability of the surety. This ambiguity was not resolvable by looking to the bid form. Although the bid form specified that a bid guarantee of \$7,400 was being provided, that form was not executed by a person having power of attorney to bind the surety.

The only means available to verify the validity of Appellant's bid bond was to contact the surety after bid opening. This would have placed the surety in the enviable position of being able to assess its potential liability after having had access to the competitive bids. Such a procedure would have given the low bidder "two bites at the apple" and, concomitantly, an advantage over its competitors. See The Tower Building Corporation, supra; Total Carpentry Ltd., Comp. Gen. B-205198.2, March 25, 1982, 82-1 CPD ¶ 284. For this reason, the SHA procurement officer reasonably rejected Appellant's bid as nonresponsive.

¹In Kennedy, where the bid bond specified a penal sum less than the amount prescribed by statute, we specifically determined that the Legislature intended that a bidder's failure to provide a bid bond in the required amount is a material error fatal to further consideration of the bid.

In so ruling, we recognize that the Comptroller General of the United States has reached a contrary result under similar facts. For example, in Comp. Gen. B-174754, 51 Comp. Gen. 508 (1972) a bidder submitted a required bid bond which also omitted the penal sum. The Comptroller General stated that:

" . . . the sufficiency of the submitted bond is to be ascertained by two criteria. First, the surety must have intended to be obligated for a sum certain and, second, such intent must be objectively manifested."

The intent of the surety was said to be sufficiently manifested by the issuance of a signed and sealed bond form referencing the IFB. In this regard, it was assumed that a surety would not sign a blank bid bond without knowledge of the amount of its obligation. However, while the Comptroller General may have been satisfied as to the adequacy of the bond in the foregoing protest, we are not convinced that the legal liability of the surety is so clear under such facts as to require a procurement officer to rely on the sufficiency of the bond for protection.

Appellant also maintains that the regulations permit waiver of the bid bond error and acceptance of Appellant's low bid in the State's best interest because of the substantial savings involved. Notwithstanding that there would be a significant monetary savings to the State in a particular procurement, acceptance of a low bid that materially deviates from the IFB requirements is fundamentally prejudicial to other bidders and detrimental to the competitive procurement system. Southland Construction Company, Comp. Gen. B-196297, March 14, 1980, 80-1 CPD ¶ 199. Maintenance of the integrity of the competitive procurement system is infinitely more in the public interest than a financial savings in an individual case. 34 Comp. Gen. 82 (1954); 44 Comp. Gen. 495 (1965). See Md. Ann. Code, Art. 21, § 1-201 (1981 Repl. Vol., 1982 Supp.). Consequently, the procurement officer rightly rejected Appellant's materially defective bid.

For the foregoing reasons, therefore, the appeal is denied.

In so doing we recognize that the Government's demand for an
immediate and complete cessation of all military activities in
the area of the conflict is a necessary condition for the
achievement of a just and lasting peace. The Government
is committed to the pursuit of a peaceful solution to the
conflict and to the promotion of the well-being of the
people of the area.

The Government of the United States is committed to the
achievement of a just and lasting peace in the area of the
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