

ENGROSSED SENATE
BILL NO. 242

By: Stipe of the Senate
and
Glover of the House

An Act relating to public buildings and works;
amending 61 O.S. 1991, Section 107, as last amended
by Section 1, Chapter 293, O.S.L. 1993 (61 O.S.
Supp. 1994, Section 107), which relates to the
Public Competitive Bidding Act of 1974; modifying
requirements for certain bid security documents;
requiring certain bid security documents; providing
for certain damages for the awarding public agency
under certain circumstances; providing for
returning bid security under certain circumstances;
providing for correcting mistakes before the time
and date for bid opening; prohibiting correction of
certain bids after bid opening; providing
procedures for correcting mistakes after bid
opening due to scrivener's error; requiring certain
record keeping; construing provisions; providing an
effective date; and declaring an emergency.

BE IT ENACTED BY THE PEOPLE OF THE STATE OF OKLAHOMA:

SECTION 1. AMENDATORY 61 O.S. 1991, Section 107, as last
amended by Section 1, Chapter 293, O.S.L. 1993 (61 O.S. Supp. 1994,
Section 107), is amended to read as follows:

Section 107. A. ~~Each bidder~~ To qualify for acceptance by the awarding agency, a bid on a public construction contract exceeding Thirteen Thousand Five Hundred Dollars (\$13,500.00) shall accompany his bid with must be accompanied by a bid security document in an amount equal to five percent (5%) of the total bid price. Bidders may satisfy such bid security requirement by providing one of the four following documents:

1. A certified check, drawn upon or a cashier's check ~~or bid bond equal to five percent (5%) of the bid, which shall be deposited with the awarding public agency as a guaranty; or~~ issued by a bank or savings and loan association insured by the Federal Deposit Insurance Corporation or any successor agency which at the time insures the deposits of banks and savings and loan associations. The check must be made payable to the State of Oklahoma or the awarding public agency;

2. An irrevocable bank letter of credit ~~containing such terms as may be prescribed by the Department of Central Services issued by a financial institution insured by the Federal Deposit Insurance Corporation or the Federal Savings and Loan Insurance Corporation for the benefit of the state, on behalf of the awarding public agency, in an amount equal to five percent (5%) of the bid. The awarding public agency shall deposit such irrevocable letter of credit with the Department of Central Services~~ issued to or for the benefit of the State of Oklahoma or the awarding public agency in such form as may be prescribed by the Department of Central Services. Should the Department of Central Services fail to prescribe a form, the bank letter of credit shall be sufficient if it is conditioned as provided in this section and permits the awarding public agency to draw against the same to the extent of the damages permitted by this section; or

3. A bid bond executed by the bidder, as principal, and by a commercial surety or insurance company authorized to transact business in Oklahoma, as surety, naming either the State of Oklahoma or the awarding public agency as the obligee.

Whether or not they so provide, the bid security documents shall be deemed:

- a. issued for the sole and exclusive benefit of the awarding public agency,
- b. conditioned that the bidder will enter into the construction contract, and
- c. providing the required contract bonds or their equivalent if awarded the contract.

~~B. The cost of republication of the notice to bidders, all actual expenses incurred by reason of the bidder's default and the difference between the low bid of the defaulting bidder and the amount of the bid of the bidder to whom the contract is subsequently awarded, but not to exceed the amount of the certified check, cashier's check, bid bond or irrevocable letter of credit may, at the discretion of the awarding public agency, be forfeited to the awarding public agency in the event the apparently successful bidder fails to execute the contract or fails to provide the required bonds or irrevocable letters of credit and insurance to the awarding public agency~~ In the event the successful bidder refuses to enter into the contract or fails to provide the required contract performance and payment bonds, or their equivalent, the damages which the awarding public agency may recover against the bid security document are as follows:

1. The cost of republication of notice to bidders if the contract is readvertised for bids;
2. The actual out-of-pocket expense incurred by the awarding public agency by reason of the default of the successful bidder; and

3. The difference between the bid of the defaulting successful bidder and the bid of the contractor to whom the contract is subsequently awarded.

In no event shall such recoverable damages exceed the amount of the bid security required in subsection A of this section.

~~C. Said certified or cashier's check, bid bond or irrevocable letter of credit shall be returned to the successful bidder on execution and delivery of the contract and required bonds or irrevocable letters of credit and insurance. Checks of unsuccessful bidders shall be returned to them in accordance with the terms of the proposal~~ The bid security provided by the unsuccessful bidders shall be returned to them in accordance with the terms of the bid documents or as soon as reasonably possible. The successful bidder's bid security document shall be retained by the awarding public agency until the successful bidder executes the contract and provides the required contract bonds or their equivalent.

D. A bidder may correct mistakes in a bid before the time and date set for bid opening by withdrawing or correcting the bid.

E. After the opening of bids, the representative of the awarding public agency shall examine all bids for mistakes. If after review by the awarding public agency a mistake is discovered, and that mistake is a result of an error in business judgment, the bid may not be withdrawn or corrected.

F. In cases of apparent mistakes due to scrivener's error and in cases where the representative of the awarding public agency has reason to believe that a scrivener's error may have been made, the representative of the awarding public agency shall request from the bidder a verification of the bid by calling attention to the suspected scrivener's error. A bidder may not seek relief from a scrivener's error after the bidder has verified the bid.

1. After the opening of bids, if a bidder alleges a scrivener's error, the awarding public agency shall permit a bidder to withdraw a bid if:

- a. a scrivener's error is evident on the face of the bid and the intended bid is not evident, or
- b. the bidder establishes by clear and convincing evidence that a scrivener's error was made.

2. Where a bidder fails or refuses to furnish evidence in support of a suspected or alleged scrivener's error, the representative of the awarding public agency shall consider the bid as submitted unless:

- a. the amount of the bid is so far out of line with the amounts of other bids received or with the amount estimated or determined by the awarding public agency as to be unreasonable, or
- b. there are other indications or errors so clear as to reasonably justify the conclusion that acceptance of the bid would be unfair to the bidder or other bona fide bidders.

G. Each agency shall maintain records of all determinations made in accordance with this section, the facts involved and the action taken in each case.

H. Nothing contained herein shall be construed so as to prevent the awarding public agency or the courts from exonerating the bidder and other parties to the bid security document from liability upon a timely showing that the bidder committed what the courts have determined under the common law to be an excusable bidding error and for that reason it would not be equitable to enforce the bid security.

SECTION 2. This act shall become effective July 1, 1995.

SECTION 3. It being immediately necessary for the preservation of the public peace, health and safety, an emergency is hereby

declared to exist, by reason whereof this act shall take effect and be in full force from and after its passage and approval.

Passed the Senate the 27th day of February, 1995.

President of the Senate

Passed the House of Representatives the ____ day of _____, 1995.

Speaker of the House of Representatives