DECISION | **THE COMPTROLLER GENERAL OF THE UNITED STATES** WASHINGTON, D.C. 20548

24222

FILE: B-209613 DATE: February 7, 1983

MATTER OF: Geronimo Service Co.

DIGEST:

1. Failure of a bidder to sign a bid bond in the capacity of principal constitutes a minor informality that can be waived where the unsigned bond is submitted with a signed bid.

2. Solicitation is construed to permit bidder to utilize individual sureties, rather than corporate sureties, in support of a bid bond, despite the fact that the solicitation does not specifically state that such sureties may be used.

3. Where protester does not rebut agency's substantive response to allegation concerning financial ability of individual sureties to support bid bond, protester has not met burden of proof.

4. A surety's financial ability to provide performance and payment bonds after contract award involves matter of contract administration not cognizable under Bid Protest Procedures.

5. Because an award must be made in accordance with the terms of the solicitation, agency properly evaluated prompt-payment discounts even though Defense Acquisition Regulation was amended to preclude such evaluation.

Geronimo Service Co. (Geronimo) protests the proposed award of a contract by the Navy to Quality Building Maintenance Company (Quality), the low bidder under invitation for bids (IFB) No. N62474-82-B-3162, for janitorial services at the Terminal Island Naval Complex, Long Beach, California. Geronimo argues that Quality's bid was nonresponsive to the IFB and improperly evaluated. We dismiss the protest in part and deny it in part.

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Bids were opened on October 5, 1982. Quality submitted a required bid guarantee, which was underwritten and signed by individual sureties, but not signed by Quality. The sureties submitted affidavits detailing their individual net worth and outstanding obligations. With its bid, Quality offered a prompt-payment discount, which was to be evaluated under the IFB. Geronimo did not offer a discount. Geronimo's bid was low without evaluating the prompt-payment discount; however, the evaluated discount made Quality's bid low. The procurement regulations pertaining to consideration of prompt-payment discounts were changed after the solicitation was issued, but before bid opening, directing agencies to no longer consider such discounts in evaluating bids. See Defense Acquisition Circular No. 76-36, June 30, 1982, amending Defense Acquisition Regulation (DAR) § 2-407.3 (1976 ed.). Geronimo had notified the Navy of this change and urged amendment to the solicitation. The Navy did not respond to this request and Quality's discount was considered.

Geronimo contends that award to Quality would be improper because Quality's bid guarantee was defective in that the bid bond lacked the signature of a Quality representative and the bond was underwritten by individual sureties rather than by a corporate surety, contrary to the IFB. Geronimo also takes issue with the ability of Quality's individual sureties to cover their financial obligations in support of the bond, in that the outstanding bid and performance guarantees of one surety exceed its net worth. Further, even if the bid bond is considered acceptable, the total potential liabilities of performance and payment bonds are beyond the capacity of Quality's individual sureties. Geronimo adds that the individual surety affidavits should not be accepted at face value.

Geronimo's final contention is that Quality's prompt-payment discount should not be considered because of the recent DAR change. Geronimo states that it notified the Navy of the change, well prior to bid opening, in sufficient time to amend the solicitation, but that the Navy did not so amend to reflect the change. In this regard, the Navy defends its decision by stating that the solicitation was "already in process" before the DAR was changed and that further amendment revising the bid form and bidding instructions would have caused "an undue delay."

Geronimo maintains that the absence of the bidder's signature on the bid bond is not waivable because it is contrary to the bid bond instructions (standard form (SF) 24) and DAR § 10-201.2(d) (1976 ed.). The Navy correctly states our position that the failure of a bidder to sign a bid bond in the capacity of principal constitutes a waivable minor informality where the unsigned bond is submitted with a bid. Forest Service Request for Advance Decision, B-186926, July 21, 1976, 76-2 CPD 66. Quality's owner did sign the bid and, therefore, the absence of the signature on the bid bond has no bearing on the propriety of the award. See General Ship and Engine Works, Inc., B-184831, 55 Comp. Gen. 422 (1975), 75-2 CPD 269.

As to whether individual sureties can underwrite the bid bond, the IFB contains the following pertinent provisions in section 00001, "BIDDING INFORMATION":

> "13. NOTICE OF BID GUARANTEE: * * * A bid guarantee shall be in the form of a firm commitment, such as a bid bond, postal money order, certified check, cashier's check, irrevocable letter of credit or in accordance with Treasury Department regulations, certain bonds or notes of the United States. * * *
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> "13.1 Bid Guaranty: To assure the execution of the contract and the performance and payment bonds, each bidder shall submit with its bid a guaranty bond (Standard Form 24) executed by a surety company holding a certificate of authority from the Secretary of the Treasury as an acceptable surety, or other security as provided in paragraph 11 of Section 00001. Security shall be in the sum of 20 percent of the largest amount for which award can be made under the bid submitted * * *."

Geronimo correctly states that neither these provisions nor any others in the IFB specifically state that individual sureties may underwrite bid bonds. However, subparagraph 13.1 does state that other security "as provided in paragraph 11 of Section 00001" is acceptable. While paragraph 11 does not deal with bid guarantees, it is reasonable to conclude that the citation actually refers to paragraph 13 in section 00001. This is because paragraph 13 does deal with security other than bonds, and subparagraph 13.1, as quoted above, contains a monetary requirement covering security in general, not just bonds. In this regard, paragraph 13 does provide for bid guarantees to be "in the form of a firm commitment, such as a bid bond, postal money order, certified check, cashier's check" (emphasis supplied). This paragraph appears to provide flexibility in the acceptability of the commitments in support of a bid guarantee. Further, we have held that solicitations must be interpreted as a whole, construed in a reasonable manner and, whenever possible, giving effect to each word, clause, or sentence. Target Corp., B-205283.2, August 24, 1982, 82-2 CPD 170. Therefore, the language in subparagraph 13.1 dealing with corporate sureties appears to be directed only to bidders using corporate sureties, and we find that individual bid bond sureties are acceptable to support Quality's bid bond.

Geronimo questions the financial ability of the individual sureties to meet their potential liablities. The Navy responded in detail to Geronimo's specific allegations and concluded that its investigation was consistent with procurement regulations and that the sureties were financially capable of supporting the bond. Geronimo did not rebut this Navy response. A protester has the burden of affirmatively proving its case. Diesel-Electric Sales & Service, Inc., B-206922, July 27, 1982, 82-2 CPD 84; Keco Industries, Inc., B-204719, July 6, 1982, 82-2 CPD 16. By choosing not to rebut the Navy's responses, Geronimo has not affirmatively proved its case or met its burden of proof.

As to the ability of the sureties to meet the requirements of the performance and payment bonds, it must be pointed out that performance and payment bonds are required only after contract award. These are matters of contract administration not cognizable under our Bid Protest Procedures. J and J Maintenance, B-202408, March 23, 1981, 81-1 CPD 219.

Geronimo's argument that Quality's prompt-payment discount was improperly considered in the evaluation is incorrect. The evaluation of discounts was provided for in the IFB and, therefore, had to be considered. It is well established that an award must be made in accordance with the terms of the solicitation. See Space Services International Corporation, B-207888.4, .5, .6, .7, December 13, 1982, 82-2 CPD 525, involving a similar evaluation of discounts after the DAR change.

If discounts should not have been considered, the proper course of action now would be to cancel the IFB and resolicit. The protester does not specifically advocate such action, but, even if it had, the protest would be untimely. Our Bid Protest Procedures state that protests initially filed with the contracting agency must be filed in our Office within 10 working days of initial adverse agency action. 4 C.F.R. § 21.2(a) (1982). Geronimo initially protested the inclusion of the discount evaluation clause to the Navy prior to bid opening. The Navy did not respond to this protest, and it was clear that there was no intention of canceling the solicitation. We have held that where an agency does not formally respond to a protest before bids are opened, the opening of bids constitutes initial adverse agency action. Ferguson-Williams, Inc.; Dunning Industries, Inc., B-208927, November 1, 1982, 82-2 CPD 394. Bids were opened on October 5, 1982. Geronimo did not file a protest with our Office until October 25, which is beyond the 10-day limit. Therefore, a protest advocating cancellation of the solicitation would be untimely.

The protest is dismissed in part and denied in part.

Milton J. Socolar
Comptroller General
of the United States