MARIS

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

FILE: B-206413.3 DATE: February 28, 1983

MATTER OF: Consolidated Services, Inc.

DIGEST:

1. Defects in an Affidavit of Individual Surety do not affect bid responsiveness. The affidavit is a document separate from the bid bond itself and serves solely as an aid to the Government in determining the responsibility of an individual surety.

2. A contracting officer's failure to continue her investigation into the adequacy of individual sureties' net worths does not demonstrate fraud or bad faith on the contracting officer's part where she determined, under Defense Acquisition Regulation § 10-102.5(ii), that the net worths of the sureties were sufficient even if assets which were in question were excluded.

3. The release of sureties by the making of a new bond is not effected until the new bond is executed and accepted. Therefore, a protester's allegation that original sureties were released by an attempted substitution of a new bid bond is without merit where the record shows that the contracting officer did not accept a substitute bond offered by the bidder for her consideration.

4. The concept of "two bites at the apple" refers to a situation in which a bidder, after bid opening, has an opportunity to make an otherwise nonresponsive bid responsive. It thus does not apply to a bid which is responsive on its face.

Consolidated Services, Inc. protests the award of a contract to K. P. Services Co. by the Department of the Air Force under invitation for bids (IFB) No. F11602-81-B-0046. The procurement was a small business set-aside for food services.

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Consolidated contends that K. P.'s bid is nonresponsive because the bid bond and an Affidavit of Individual Surety accompanying the bid were altered without the sureties' consent. Consolidated also asserts that K.P.'s bid is unacceptable because its bid bond is inadequate, and it improperly attempted to correct the inadequacy by substituting a new bond for the old one after bid opening. We deny the protest.

Alteration of Bid Bond and Affidavit of Individual Surety

Consolidated states that it has been "reliably reported" that the bid bond submitted by K. P., as well as the Affidavit of Individual Surety submitted by one of the sureties, were altered without the sureties' consent. As Consolidated points out, a bid accompanied by an altered bid bond without evidence in the bid that the sureties agreed to be bound by the changes is not accompanied by a proper bond and therefore is nonresponsive. Baucom Janitorial Service, Inc., B-206353, April 19, 1982, 82-1 CPD 356.

The Air Force reports that its examination of the documents in question revealed no alterations to the bid bond itself, but did show that the date on one Affidavit of Individual Surety apparently was changed from "2 11 82" to "Jan 11, 1982." Our own examination of the documents confirms the agency's position.

The Air Force argues that the alteration to the Affidavit of Individual Surety does not affect the responsiveness of K.P.'s bid. We agree.

The Affidavit of Individual Surety is a document separate from the bid bond itself and serves solely as an aid to the Government in determining the responsibility of an individual surety. See 52 Comp. Gen. 184 (1972). Therefore, the presence of defects in the affidavit does not affect bid responsiveness. Jets Inc., B-194017, April 16, 1979, 79-1 CPD 269.

As we have previously noted, K.P.'s bid bond itself is proper on its face. K.P.'s bid is therefore responsive to the solicitation's bonding requirement. CWC Inc., B-209383, October 19, 1982, 82-2 CPD 347.

Net Worths of Sureties

Consolidated also argues that K.P.'s bid is unacceptable because the individual sureties' actual net worths are inadequate. As Consolidated recognizes, the adequacy of the sureties' net worths is a matter of responsibility which may be established anytime before contract award. Clear Thur Maintenance, Inc., B-203608, June 15, 1982, 61 Comp. Gen. ___, 82-1 CPD 581. Because of the essentially subjective business judgments involved, we do not review affirmative responsibility determinations except in cases of fraud or bad faith by procuring officials, or misapplication of definitive responsibility criteria. CWC Inc., supra.

There is no definitive responsibility criterion involved here, nor does Consolidated specifically allege fraud or bad faith on the part of procuring officials. Consolidated does argue, however, that the contracting officer could not have reached a proper affirmative responsibility determination in this case because she cut short her investigation into the sureties' net worths, leaving important questions concerning their integrity and the adequacy of their assets unanswered. If this assertion is intended to demonstrate fraud or bad faith on the part of the contracting officer, we find it to be without merit.

The Air Force reports that the contracting officer did initially have some questions concerning the adequacy of the sureties' net worths. She ended her investigation into these matters, however, after learning that under Defense Acquisition Regulation § 10-102.5(ii), the net worth of a surety may be considered adequate even though it is less than the amount required by the IFB, if it at least equals the difference in price between that bid and the next low acceptable bid. See Western Roofing Service; Rite-Way Contractors, Inc., B-186017, September 29, 1976, 76-2 CPD 291. Using this standard, the contracting officer determined that the net worth of each individual surety was adequate even if the assets in doubt were excluded. It is apparent that she found no reason to question the integrity of the sureties.

Thus, the record discloses nothing to support an allegation of fraud or bad faith on the part of the contracting officer here. While Consolidated obviously does not agree

with her determination concerning the sureties' responsibility, we reiterate that we consider such a finding a matter of business judgment which we do not review.

Substitution of Sureties

Consolidated contends that the Air Force improperly permitted K.P to substitute a new bid bond with two new sureties for the bond originally submitted with its bid. Consolidated relies on our decision in Clear Thru Maintenance, Inc., supra, where we held that after bid opening, a bidder may not be permitted to substitute an acceptable individual surety for one deemed unacceptable. Our rationale was that such a substitution would affect the joint and several liability of the sureties, the principal factor in determining the bid's responsiveness to the bid guarantee requirement.

The contracting officer states that on April 16, 1982, she called K.P. because she had questions concerning the net worths of the sureties. She admits that she told K.P. it could have the alternative of either submitting more information about, or providing a replacement for, one of the sureties. K.P. subsequently mailed a new bid bond, executed by two new sureties, to the contracting officer. The contracting officer nevertheless states that substitution of the sureties was never made since she learned that it would not be permissible to do so.

Consolidated asserts that since the contracting officer offered K.P. an opportunity to replace the sureties, and K.P. accepted the offer by forwarding a new bid bond, the sureties on the original bond would have a valid basis to argue that they had been released. Consolidated contends that by their actions, K.P. and the contracting officer effected a novation of the surety agreement.

What the contracting officer offered K.P. an opportunity to do, however, was replace one of the sureties, not both of them. Thus K.P. technically cannot be said to have accepted the contracting officer's offer. Further, consent by a creditor to the assumption of the debt by a third party or parties generally does not in itself effect a

novation. 15 S. Williston, A Treatise on the Law of Contracts, § 1873B (3d ed. 1962). There is a legal presumption that the substitute paper is not taken in discharge but is received as collateral security for the payment originally undertaken. Id.

Further, while a new contract made by the creditor to take the place of a former one ordinarily discharges the sureties on the old contract, a new bond does not necessarily take the place of the old one. 72 C.J.S. Principal and Surety § 155 (1951). However, if the intention is clearly otherwise, the new bond will be held to release the sureties on the first one. Id. In any event, the release of a surety by the making of a new bond is not effected until the new bond is executed and accepted. Id.

We do not believe the facts support a finding that the contracting officer accepted the new bond as a replacement for the one submitted with K.P.'s bid, thereby releasing the sureties on the original bond. Although Consolidated has submitted its own memoranda of two conversations with the contracting officer which indicate that she told Consolidated the sureties had been replaced, the protester admits that this alone could not discharge the original sureties. Rather, as Consolidated recognizes, the relevant consideration is what transpired between the contracting officer and K.P.

The record shows that while the contracting officer initially offered K.P. the opportunity to replace one of the sureties, she subsequently told a superior she was considering such a replacement and was informed that the propriety of such an action was questionable. She was instructed that legal approval should be obtained first.

K.P. did forward a new bid bond, but characterized the new sureties only "as additional sureties for your consideration." After the contracting officer received the new bond in the mail, she called K.P. and stated that she was "running everything through legal review per instructions from [her superior]." The legal review confirmed that substitution could not be allowed. At no time in between did she inform K.P. that she was accepting the new bond as a replacement for the old one.

Thus, the contracting officer knew at the time she received K.P.'s new bond in the mail that substitution would require legal approval, and she so informed K.P. This approval was specifically denied, and the contracting

officer then made a determination as to the acceptability of the original sureties, apparently without ever having considered the acceptability of the sureties on the new bond. The contracting officer's actions simply are not consistent with a finding that she released the original sureties by acceptance of the substitutes.

Consolidated questions the accuracy of the contracting officer's record of her phone call to K.P., in which she says she told K.P. that legal review was necessary. Consolidated notes that a portion of the memorandum is typed, but that the reference to legal review is added in handwriting at the end. It therefore asserts that the latter probably was not written until after K.P. filed its protest. The contracting officer denies this and states that the handwritten portion of the memorandum was recorded on the same day as the typewritten portion.

The protester has the burden of affirmatively proving its case. Harris Corporation, B-200321.2, June 9, 1981, 81-1 CPD 468. In view of the contracting officer's denial, and the lack of any evidence in the record to support the protester's bare allegation, we consider the allegation purely speculative and therefore without merit. See American Marine Decking Systems, B-203748, July 8, 1981, 81-2 CPD 23.

Consolidated believes that certain documents which the Air Force declined to release in response to the protester's Freedom of Information Act request should provide further support for its position. The Air Force has supplied copies of these documents to our Office, and we have reviewed them. See Radiation Systems, Inc., B-194492.2, July 3, 1979, 79-2 CPD 6. Our review discloses nothing to support Consolidated's protest. In fact, one of the documents, a reply to the contracting officer's request for legal review of Consolidated's protest, reflects the Staff Judge Advocate's understanding that substitution of sureties had not been allowed.

Consolidated also argues that merely by offering K.P. the opportunity to replace a surety, the contracting officer gave K.P. "two bites at the apple." The "two bites at the apple" concept refers to a situation in which a bidder, after bid opening, has an opportunity to make its

otherwise nonresponsive bid responsive. See 38 Comp. Gen. 532 (1959); Veterans Administration re Welch Construction Inc., B-183173, March 11, 1975, 75-1 CPD 146. Our concern in such cases is to prevent a bidder from deliberately submitting a nonresponsive bid in order to gain the opportunity of deciding whether or not to have its bid rejected after bid prices have been exposed. Id. That concern is not present here since as we have previously noted, K.P.'s bid bond is proper on its face and its bid is therefore responsive.

Further, the concern we expressed in Clear Thru, supra, regarding substitution of sureties was not that such a substitution would allow the bidder to decide whether to make its nonresponsive bid responsive. Although the sureties there had been found unacceptable, their acceptability was held to be a matter of responsibility, not responsiveness. Rather, our decision reflects the fundamental rule of advertised bidding that a bidder may not change a material aspect of its bid after bid opening. See S. Livingston and Son, Inc., 54 Comp. Gen. 593 (1975), 75-1 CPD 24. While it is arguable that K.P. attempted to make such a change here, this change was never accomplished because the contracting officer did not accept the new bond K.P. offered.

The protest is denied.

Milton J. Socolar

for Comptroller General
of the United States