

**DECISION**



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

**FILE:** B-214098.2

**DATE:** September 18, 1984

**MATTER OF:** United Food Services, Inc.

**DIGEST:**

1. Bidder is requested to list its affiliates only for the purpose of assisting in determining whether bidder is small business. Bidder was found to be small business despite allegation that bidder failed to disclose its affiliates in bid. Thus, bidder's alleged failure was of no consequence.
2. The question of the acceptability of individual sureties is one of responsibility, which our Office will not review except in limited circumstances not present here.
3. Several stockholders of a corporation may serve as sureties on the corporation's bid bond provided the stockholders comply with applicable regulatory restrictions.
4. Air Force reports that low bid had lower price for base year work and higher price for option years' work because low bidder was incumbent contractor and would not incur "phase-in" costs associated with new contractor. Also, Air Force reports that it is reasonably certain that the final cost to the government will be awardee's low bid price. Thus, the bid is not materially unbalanced.
5. Award date was unavoidably delayed by protest so as to shorten contract performance period for first year by 3 months. Nevertheless, award to bidder evaluated as low under original performance period is not improper even though bidder was not low on bid evaluation based on shorter period and even though cost of resolicitation may be less than difference between protester's bid and contract price. Bid prices have been exposed, and the protest was the major cause of the delayed award.

United Food Services, Inc. (United), protests against contract awards under invitations for bids (IFB) Nos. F65501-83-B-0205 and F65501-84-B-0004, small business

set-asides, issued by Elmendorf Air Force Base (Air Force), Alaska, for mess attendant services.

On March 30, 1984, due to the expiration of the existing contracts, the Air Force awarded these contracts notwithstanding the pendency of the protest. Awards were made to Food Services International (FSI) under IFB-0205 and Mid-East Food Services (MEFS) under IFB-0004 after these companies were found to be responsible.

United contends that the bids of MEFS and FSI were nonresponsive because the bidders did not disclose their business affiliates. United also contends that these bidders' individual sureties were unacceptable. Finally, United argues that MEFS's bid was materially unbalanced and that on the actual award date, United, rather than MEFS, was the low bidder. The protest is dismissed in part and denied in part.

#### Disclosure of Affiliates

The Air Force reports that both MEFS and FSI were found to be small businesses by the Small Business Administration (SBA) notwithstanding United's allegation about these companies' affiliates. Since a bidder is requested to list its affiliates only to allow a determination as to whether a bidder is a small business and since the awardees were found to be small businesses, any deficiencies in the bidders' representations about their affiliations were of no legal consequence.

#### Acceptability of Sureties

United notes that FSI's sureties (Mr. Mark D. Hurst and his wife, Mrs. Susan D. Hurst) own the company and argues that Defense Acquisition Regulation (DAR), § 10-201.2(e), reprinted in 32 C.F.R. pts. 1-39 (1983), prevents more than one stockholder from serving as FSI's individual surety. That regulation reads:

"Stockholders as Sureties. On any bond of which a corporation is the principal obligor, a stockholder of that corporation is acceptable as cosurety on the bond; provided, that his net worth exclusive of his stock holdings or other interests, such as loans, in the corporation is equal to the amount for which he justified and provided further, that such fact is expressly stated in his affidavit of justification."

The question of the acceptability of an individual surety is one of responsibility, not responsiveness. See Inland Service Corporation, B-211202, Apr. 20, 1983, 83-1 C.P.D. ¶ 425. But we have also recognized that a bid is nonresponsive where either the required bond is not submitted or the submitted bond contains a deficiency which detracts from the joint and several liability of the sureties on the bond. Fitts Construction Co., Inc., 62 Comp. Gen. 615 (1983), 83-2 C.P.D. ¶ 190. Although the DAR, § 10-201.2(e), above, uses the words "stockholder" and "surety" in the singular form, nowhere in that regulation is there an express prohibition against using more than one stockholder as a surety. Moreover, the title of this DAR section uses these words in the plural form. Further, we are unaware of any other statute or regulation which would preclude several stockholders of a corporation from serving as the corporation's sureties. Consequently, we cannot agree with United's argument. Also, our examination of FSI's bid bond reveals that the sureties certified that the assets, liabilities and net worth listed in the affidavits did not include any financial interest in the assets of the principal (meaning FSI). Consequently, we find that FSI's bond was proper on its face and did not detract from the joint and several liability of the sureties.

Finally, United alleges that neither FSI's nor MEFS's individual sureties disclosed their other outstanding bond obligations. We have held that the contracting agency may consider the continuing failure of an individual surety to disclose outstanding bond obligations as a factor in determining the responsibility of the bidder. See Dan's Janitorial Services, Inc., 61 Comp. Gen. 592 (1982), 82-2 C.P.D. ¶ 217. There is no evidence in the record that either FSI's or MEFS's sureties on this or other procurements have a continuing pattern of nondisclosure of outstanding bond obligations. Moreover, the Air Force found that the companies were responsible. Our Office does not review affirmative determinations of responsibility unless the protester shows fraud on the part of the procurement officials or the solicitation contains definitive responsibility criteria which allegedly have not been applied. Kingshead Corporation, B-207817, July 1, 1982, 82-2 C.P.D. ¶ 10. Neither exception applies here. Therefore, we dismiss this ground of protest.

#### Unbalanced Bid

United alleges that MEFS's bid should have been rejected for being materially unbalanced because MEFS's

price for the base period was less than its prices for each of the two option years. The IFB specifically provided that the option prices were to be evaluated for award purposes. United argues that there is no rational basis for the lower price in the first year and that MEFS apparently has taken unfair advantage of likely delays in the award process by underbidding the initial months of performance.

Our Office has recognized that unbalanced bidding entails two aspects. The first is a mathematical evaluation of the bid to determine whether each bid item carries its share of the cost of the work plus profit, or whether the bid is based on nominal prices for some work and enhanced prices for other work. The second aspect--material unbalancing--involves an assessment of the cost impact of a mathematically unbalanced bid. A bid is materially unbalanced if there is a reasonable doubt that award to the bidder submitting the mathematically unbalanced bid will result in the lowest ultimate cost to the government. Consequently, a materially unbalanced bid may not be accepted. Reliable Trash Service, B-194760, Aug. 9, 1979, 79-2 C.P.D. ¶ 107.

The Air Force reports that each of MEFS's bid items carried its share of the cost of the work. The contracting officer attributed the lowness in price to the fact that MEFS was the incumbent contractor and would not face startup expenses normally associated with the phase-in of a new contract. Also, the Air Force advises that there is no reason to doubt that award to MEFS will not result in the lowest cost to the government. Based on our review of the record, we cannot question the Air Force's position. Therefore, we deny this basis of protest.

#### Timing of Award to MEFS

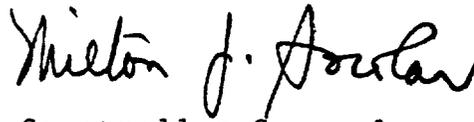
Since award was not made in time for the contemplated start date for performance of January 1, 1984, because of United's protest, and performance did not begin until April 1, 1984, United argues that it was the low evaluated bidder as of that time.

Even though United was the lowest bidder by using the April 1, 1984, start date instead of the original January 1, 1984, start date, this does not affect the award to MEFS. The solicitation provided that the low bidder

would be determined on the basis of the prices bid for 12 months, plus options, beginning with the January 1984 monthly bid price, not with the monthly prices beginning in April. On this basis, MEFS was the low evaluated bidder. It would have been improper for the Air Force to have evaluated bids to overcome the unforeseen delay in the award of the contract caused by the filing of United's protest. See Maintenance Pace Setters, Inc., B-208768.3, Oct. 31, 1983, 83-2 C.P.D. ¶ 514. In that decision, we recognized, however, that award should be made on the basis of the most favorable cost to the government measured by the work actually to be performed and that if award under an IFB's evaluation scheme would not result in the lowest cost to the government, the procuring agency generally should cancel the invitation and resolicit its requirements under evaluation criteria that assure a proper award. However, the general rule should not apply here even though the government's cost of resolicitation may be less than the difference between the protester's bid and the contract price. The prices of all bids have been exposed, and a major cause in the delay of the award was United's decision to protest to our Office. In these circumstances, award to MEFS was not improper.

Finally, United also protests that these awards were made in disregard of its protest. However, the Air Force made an appropriate determination to proceed with awards notwithstanding the protest and notified our Office of its decision. We therefore have no basis to object to these awards for this reason.

The protest is dismissed in part and denied in part.

*for*   
Comptroller General  
of the United States