J. Melody

The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Professional Coatings--Reconsideration

File: B-224222.2

Date: March 4, 1987

DIGEST

1. General Accounting Office recommendation that acceptability of low bidder's proposed bid bond sureties be determined based on information current at time of award is based on well-established standard for determining responsibility that applies equally to all bidders, and thus is not unfair to bidders who may have proposed sureties that were acceptable at time of bid opening.

2. Fact that recommendation may allow protester to benefit from award delay attending protest resolution is unobjectionable where recommendation was necessitated by agency's improper rejection of protester's bid as nonresponsive, and there is no reason to assume protest was not filed in good faith.

DECISION

Professional Coatings requests reconsideration of the recommendation in our decision, T&A Painting, Inc., B-224222, Jan. 23, 1987, 66 Comp. Gen. ___, 87-1 C.P.D. ¶ ___, in which we denied T&A's protest under Department of the Navy invitation for bids (IFB) No. N62766-85-B-2170 for painting services. Although we denied the protest, which challenged the Navy's methods in determining T&A's individual sureties to be unacceptable, we found that the Navy improperly had rejected T&A's bid as nonresponsive, without considering current information on the sureties. As surety acceptability in these circumstances relates to bidder responsibility, which may be demonstrated up until the time of award, and award was withheld pending our decision, we recommended that the Navy consider current information on the sureties' finances before determining whether to reject T&A's bid. Professional Coatings was the next low bidder under the IFB.

We affirm our decision.

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Professional Coatings bases its reconsideration request on the grounds that allowing T&A's sureties' acceptability to be judged at this late date (1) is unfair to other bidders on the procurement who submitted bid bonds with acceptable individual sureties at the time of bid opening; and (2) compromises the integrity of the competitive process by essentially letting T&A use the protest process to "buy more time" for its sureties to become acceptable.

Professional Coatings' first argument simply ignores the import of our decision, and the well-established standard on which it was based, that is, surety acceptability is a matter of responsibility which may be established up until the time of award. See, for example, Clear Thru Maintenance, Inc., 61 Comp. Gen. 456 (1982), 82-1 C.P.D. ¶ 581. The fact that certain bidders' bid bond sureties here may have been acceptable at the time of bid opening does not operate to change the standard and make bid opening the time by which the sureties must be acceptable. As the same time limits apply to all bidders, we see nothing inherently unfair in determining the acceptability of T&A's sureties based on the most current information available prior to award.

We also do not agree that our recommendation compromises the integrity of the competitive process. Professional Coatings is correct that T&A possibly will benefit from the award delay attending our consideration of its protest. This possible benefit derives not from the mere filing of the protest, however, as Professional Coatings suggests, but from our conclusion that the Navy improperly rejected T&A's bid as nonresponsive instead of determining surety acceptability as a matter of T&A's responsibility, based on then-current information. In other words, had the Navy determined the acceptability of T&A's sureties in the proper timeframe initially, we would not have recommended a new acceptability determination. Under these circumstances, and because we find no basis for assuming that T&A did not protest in good faith (rather than merely to "buy more time"), we do not believe there is anything improper in T&A possibly benefiting from the situation here.

Professional Coatings cites our decision in Clear Thru Maintenance, Inc., 61 Comp. Gen. 456, supra, in support of the proposition that surety acceptability should be treated as a matter of bid responsiveness, to be determined at bid opening. Specifically, Professional Coatings relies on the holding in that decision that surety acceptability is only "technically" a matter of the bidder's responsibility and, thus, need not be referred to the Small Business Administration (SBA) for a certificate of competency review

even when the bidder is a small business. If surety acceptability is only technically a responsibility matter, Professional Coatings reasons, then there is no reason not to treat it like a matter of responsiveness.

Professional Coatings' reliance on the cited case is misplaced. The holding in issue was addressed solely to whether a small business nonresponsibility determination based on surety unacceptability need be referred to the SBA, not the issue of the proper timing of such a determination. We characterized an unacceptable surety determination as only a "technical" responsibility matter in deciding that it does not constitute a bidder nonresponsibility determination that must be referred to the SBA; we did not hold or imply that surety acceptability must be determined at bid opening. Indeed, elsewhere in Clear Thru Maintenenance, Inc., we specifically noted that surety acceptability is a matter of bidder responsibility that may be established up until the time of award.

Our decision is affirmed.

Harry R. Van Cleve
General Counsel