



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Excavators, Inc.

File: B-232066

Date: November 1, 1988

DIGEST

A contracting agency may determine that an individual surety on a bid bond is unacceptable and, consequently, find the bidder nonresponsible where the individual surety failed to disclose outstanding bid bond obligations regardless of the actual risk of liability on them.

DECISION

Excavators, Inc., protests the rejection of its bid under invitation for bids (IFB) No. DACW03-88-B-0055, issued by the United States Army Corps of Engineers, Little Rock District, for access road embankment grading and repair, Norrell Lock and Dam, Arkansas River, Arkansas. The Corps rejected Excavators bid primarily because one of the individual sureties on its bid bond failed to disclose all outstanding bond obligations.

We deny the protest.

The IFB required each bidder to submit with its bid a bid guarantee (Standard Form 24) equal to 20 percent of the bid or \$3 million, whichever was less. Since Excavators was bonded by individual sureties, it was required to submit a completed Affidavit of Individual Surety (Standard Form 28) on each surety. Item 10 of the affidavit required individual sureties to disclose all other bonds on which they were obligated at the time they executed the bid bond.

At bid opening, on June 2, 1988, Excavators was the low bidder. The Corps investigated the acceptability of the individuals proposed by Excavators as sureties and discovered that one of the individual sureties, Edward L. Street, had failed to accurately list all of his outstanding bond obligations in Item 10 of the SF 28. The contracting officer also discovered evidence that Mr. Street

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had failed to do so on at least one other occasion on a contract awarded by the Corps' Vicksburg District. According to the agency, the results of that investigation also indicated that the assets of Mr. Street were in doubt. Finally, although Mr. Street had claimed a personal net worth of \$41,501,055.93 on the current SF 28, information received from the Corps' Fort Worth District indicated that the last corporate balance sheet submitted by Charter Marine Savings and Trust of which Mr. Street is sole shareholder listed assets at \$61,752 and liabilities of \$640,470.

Based on the investigation of Mr. Street, the contracting officer rejected Excavators' bid. The contract was subsequently awarded to GBS Corp., the second low bidder. The protester does not dispute the agency's conclusion concerning Mr. Street's failure to disclose his outstanding bond obligations or his financial status. It does, however, argue that its bid guarantee should be accepted since the bonds and the affidavits from the sureties were acceptable on their faces. In this regard, the protester maintains that any failure on the surety's part to list an outstanding bond obligation should be waived as a minor informality.

A bid guarantee's purpose is to secure the liability of a surety to the government in the event that the bidder fails to fulfill its obligation to execute a written contract and to provide payment and performance bonds. The sufficiency of a bid guarantee depends on whether a surety is clearly bound by its terms. When the liability of the surety is not clear, the guarantee may be regarded as defective, and the bid rejected as nonresponsive. When, as here, a required bid bond is found to be proper on its face, the bid itself is responsive. Such a bid bond is proper "on its face" when it has been duly executed by two individual sureties whose affidavits indicate that they both have net worths at least equal to the penal amount of the bond, and the bid bond contains no obvious facial defects, such as submission of a blank bid bond, or markup or alteration of the bond without evidence of surety approval. Transcontinental Enterprises, Inc., B-225802, July 1, 1987, 66 Comp. Gen. ____, 87-2 CPD ¶ 3.

The problem with Excavators' bid, however, concerned the accuracy of the information contained in the SF 28, which is a matter of responsibility. See Transcontinental Enterprises, Inc., B-225802, supra. Although a determination of nonresponsibility based upon the financial acceptability of an individual surety may be based upon information submitted any time prior to award, that determination may not be waived as no award may be made without an affirmative

determination of responsibility. T&A Painting, B-224222, Jan. 23, 1987, 66 Comp. Gen. _____, 87-1 CPD ¶ 86. Thus, the fact that the bond and the affidavits may have been sufficient on their face does not, as the protester argues, require that they be accepted. The agency acted properly in considering the financial capability of the surety.

In reviewing a bidder's responsibility including situations like the one here concerning the responsibility of an individual surety, the contracting officer is vested with a wide range of discretion and business judgment, and this Office will defer to the contracting officer's decision unless the protester shows that there was bad faith by the procuring agency or that there was no reasonable basis for the determination. See Eastern Metal Products & Fabricators, Inc., B-220549.2 et al., Jan. 8, 1986, 86-1 CPD ¶ 18.

A surety must disclose all outstanding bond obligations, regardless of the actual risk of liability on those obligations, to enable the contracting officer to make an informed determination of the surety's financial soundness. See Satellite Services, Inc., B-220071, Nov. 8, 1985, 85-2 CPD ¶ 532. Since Item 10 of the affidavit provides space for the surety to list "all other bonds on which he is surety," we believe that the duty of the individual surety to disclose all such obligations, without exception is clear. Moreover, a contracting agency may consider the failure of a surety to disclose fully all outstanding bond obligations as a factor in its responsibility determination. Id.

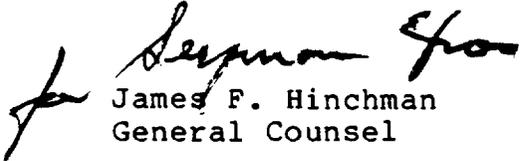
We believe that, regardless of the actual liability that may remain on any outstanding bond, the pattern of nondisclosure of the bond obligations of Excavators' individual surety under this solicitation and under the other cited contract provided the contracting officer with a reasonable basis upon which to find the protester nonresponsible. See Satellite Services, Inc., B-220071, supra. Moreover, other unrefuted indications of the potential financial unacceptability of Excavators' individual surety provided further justification for the contracting officer's determination. Since the agency determined that one of the two required individual sureties was not responsible, the bid was properly rejected. Transcontinental Enterprises, Inc., B-225802, supra.

Finally, the protester states that it has been improperly treated because its individual sureties on other procurements have been determined to be inadequate while in other

cases the same individual has been accepted as surety for another firm.

First, Excavator has only protested the agency's rejection of its bid under this procurement and, as we indicated above, the protester has provided us with no basis upon which to question the agency's action. Moreover, the fact that this same individual may have been accepted under a different procurement--the protester does not indicate the value of the bonding requirement on the other procurement--does not necessarily mean that the contracting officer in the subject procurement is bound to accept a surety whose affidavit was admittedly defective. See Discount Machinery & Equipment, Inc., B-230567, May 2, 1988, 88-1 CPD ¶ 422.

The protest is denied.


James F. Hinchman
General Counsel