



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Restorations of Tejas, Inc.

File: B-233014

Date: December 23, 1988

DIGEST

1. Procuring agency reasonably found bidder was nonresponsible where bidder failed to provide sufficient information to establish financial acceptability of proposed individual sureties.
2. Although an agency may allow a prospective awardee a reasonable time period after bid opening to cure a problem related to the responsibility of a proposed surety, it is not obligated to delay award indefinitely while bidder attempts to cure the problem.

DECISION

Restorations of Tejas, Inc. (ROTI), protests the rejection of its low bid under invitation for bids (IFB) No. GS-07P-88-HUC-0227, issued by the General Services Administration for construction services. GSA rejected ROTI's bid because ROTI failed to provide sufficient information to establish the financial acceptability of its individual sureties.

We deny the protest.

The IFB, issued June 24, 1988, sought exterior repairs and fire safety improvements at the U.S. Courthouse in Corpus Christi, Texas. Bidders were required to furnish a bid guarantee as well as performance and payment bonds. The IFB also included General Services Administration Regulation (GSAR) § 552.228-74--Pledge of Assets (APR 1984) and provided:

"(a) Offerors shall obtain from each person acting as an individual surety on a bid guarantee, a performance or a payment bond (1) Pledges of Assets, and (2) Standard Form 28, Affidavit of Individual Surety."

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"(b) Pledges of assets from each person acting as an individual surety, in the amount of the penal sum of the bond, shall be in the form of:

(1) Evidence of an escrow account containing commercial and/or Government securities; and/or

(2) A recorded Covenant not to Convey or Encumber Real Estate. (At the Contracting Officer's discretion the offeror may be required to provide evidence of clear title by the conduct of a title search on each piece of pledged property.)"

Of the five bids received, ROTI's bid was low. ROTI proposed two individual sureties, William G. Pilgrim and Richard J. Somers, in support of its bid bond and submitted SF-28s, Affidavit of Individual Sureties, with supporting schedules.

In accordance with the IFB, the contracting officer requested that ROTI submit a pledge of assets for each individual surety. The Excel Surety Group, on behalf of ROTI, submitted to GSA documents entitled "Escrow Receipts" and bearing the seal of Dominion Savings and Trust Co., Dallas, Texas. These documents state that Mr. Pilgrim had deposited securities with a face value in excess of \$175,000 in account number CT1005 with Dominion and that Mr. Somers had deposited securities with a face value in excess of \$175,000 in account number CT10007.^{1/}

Notwithstanding the "escrow receipts" submitted by the Excel Surety Group, GSA states that it could not find ROTI's proposed sureties to be acceptable. GSA states that, on August 11 and September 6, the Excel Surety Group had submitted escrow receipts from Dominion for Mr. Pilgrim and Mr. Somers showing varying amounts of unnamed commercial securities in accounts CT10005 and CT10007. Because GSA could not ascertain the market value of the securities

^{1/} GSA has advised our Office that on November 3, 1988, Dominion was closed by the Texas Banking Commission as insolvent and for various violations of the Texas Banking Code. In addition, audit reports, dated November 21, 1987, indicate that the stock holdings of Mr. Pilgrim and Mr. Somers consist primarily of securities of Dominion.

pledged in support of ROTI's bond, GSA requested on September 16 that ROTI provide a list of securities contained in the Dominion escrow accounts and warned that if this information was not received by September 26, ROTI's bid would be rejected.

On September 23, the contracting officer called the protester to remind ROTI of the deadline for submission of the additional information. ROTI informed the contracting officer that a meeting was scheduled for September 27 between Excel Surety and GSA's legal counsel to discuss the requirement that a list of securities be provided. ROTI requested and received from the contracting officer an additional day, until September 27, to provide the required information. When ROTI did not provide the requested information by September 27, it was found nonresponsive, and its bid was rejected.

Whether an individual surety is financially acceptable is a matter of responsibility which may be established at any time before contract award. T&A Painting, Inc., 66 Comp. Gen. 214 (1987), 87-1 CPD ¶ 86. However, no purchase or award may be made unless the contracting officer makes an affirmative determination of responsibility. Federal Acquisition Regulation (FAR) § 9.103(b) (FAC 84-18). The determination of responsibility rests within the broad discretion of the contracting officer who, in making that decision, must rely on his or her business judgment. We therefore will not question a negative determination of responsibility unless the determination lacks a reasonable basis. Oertzen & Co., GmbH, B-228537, Feb. 17, 1988, 88-1 CPD ¶ 158.

The protester argues that GSA did not follow the procedures of the FAR in requesting that ROTI submit pledges of assets for its individual sureties. ROTI contends that under FAR § 28.202-2(c) GSA should have requested further certificates indicating additional assets or a new surety.

We find no merit to this argument. The obligation of the contracting officer to investigate individual sureties is set out in the Federal Acquisition Regulation (FAR) which requires the contracting officer to determine the acceptability of individuals proposed as sureties and notes that the information provided in the SF-28 is helpful in determining the net worth of proposed individual sureties. FAR § 28.202-2. Moreover, FAR does not prevent the contracting officer from going beyond the SF-28 information in making his or her determination of the financial acceptability of individual sureties, where necessary. Transcontinental Enterprises, Inc., 66 Comp. Gen. 549 (1987), 87-2 CPD ¶ 3.

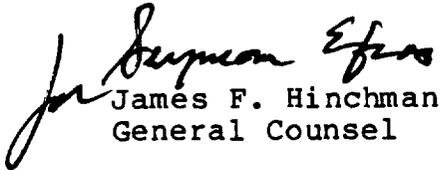
In any event, the IFB provides that the contracting officer may require bidders to provide a pledge of assets for proposed individual sureties. While ROTI apparently believes that this solicitation provision is inconsistent with the FAR, its argument on this ground is untimely. A protest based upon an alleged impropriety in a solicitation which is apparent prior to bid opening must be filed prior to bid opening. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1988); Eastern Maintenance and Services, Inc., B-229734, Mar. 15, 1988, 88-1 CPD ¶ 266. Any objection ROTI had to the pledge of assets requirement should have been raised prior to bid opening.

Furthermore, the record indicates that GSA had a reasonable basis to question the acceptability of ROTI's proposed sureties. While the sureties indicated substantial net worth in their SF-28s, each had significant outstanding bond obligations, and the sureties net worth primarily consisted of unidentified notes receivable, trust certificates and stock. In response to GSA's request for a pledge of assets, the Excel Surety Group, on behalf of ROTI, furnished information indicating that the sureties had deposited unidentified stock in an escrow account, and these same accounts had been furnished as security for obligations on two unrelated contracts. GSA was reasonably concerned about the market value, rather than face value, of the stock contained in these accounts.

ROTI also argues that GSA had given it an additional 10 days, beyond September 27, to furnish the requested information and that its bid was rejected prior to the expiration of this time. The record, however, does not support ROTI's allegations. GSA states in its report that on September 27, a meeting took place between the Excel Surety Group and the contracting officer and legal counsel on contract No. GS-07P-88-HTC-0100, which had been awarded to Beltran Security, Inc. Mr. Pilgrim was proposed as one of the sureties on this contract. GSA gave Excel Surety, on behalf of Beltran, 10 additional days to provide information relating to this contract. The contracting officer for this IFB was not present at that meeting, and Excel Surety was informed that if ROTI needed additional time to furnish the information sought by the contracting officer under this IFB that the request must be made to the contracting officer. Such a request was not made. Since ROTI in its comments on the agency report made no attempt to rebut the specific statements made by the agency, we accept the agency's statements in this regard. See American Hospital Consultants Co., B-226166, Apr. 8, 1987, 87-1 CPD ¶ 386. Since ROTI did not provide the required information within the

time allowed by the agency, GSA properly found ROTI nonresponsible and rejected its bid. We have held that while any agency may, in its discretion, allow a prospective awardee a reasonable time period after bid opening to cure a problem related to the responsibility of its sureties, it is not required to delay award indefinitely while a bidder attempts to cure the problem. Eastern Maintenance and Services, Inc., B-229734, supra.

The protest is denied.


James F. Hinchman
General Counsel