



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: J & J Engineering, Inc.

File: B-233463.2

Date: February 13, 1989

DIGEST

1. Where the protester was rejected as nonresponsible for failing to provide the contracting officer with sufficient information to determine whether the sureties on the protester's individual surety bid bond were acceptable and the record shows the nonresponsibility determination was reasonably based, rejection of the protester's bid was proper.
2. Federal Acquisition Regulation provision which requires acceptance of a bid guarantee which is in an amount less than required but equal to or greater than the difference between that bid and the next acceptable bid does not apply where bid guarantee is otherwise defective due to lack of acceptable individual sureties.
3. An agency is not required to refer determination of nonresponsibility of a bidder to the Small Business Administration for review under the Certificate of Competency procedures when the rejection of the bidder is based on the unacceptability of individual sureties.
4. Protester whose bid was properly rejected as nonresponsible based on its bid bond is not an interested party under General Accounting Office's Bid Protest Regulations to protest on other grounds the award of a contract to another firm when award could be made to a bidder other than the protester if the protest were sustained.
5. Request for reconsideration is denied where protester fails to show any error of fact or law that would require reversal or modification of the initial dismissal.

DECISION

J & J Engineering, Inc., protests the award of a contract to Oneida Construction Inc./David Boland under invitation for bids (IFB) No. N62467-86-B-0090, issued by the Navy for

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construction of a storage facility at the Naval Supply Center, Jacksonville, Florida. J & J contends that its bid was improperly rejected based on the Navy's unwarranted finding that its bid bond using individual sureties was unacceptable; that the Navy was required to accept the bid guarantee because the individual sureties' assets were greater in amount than the difference between its bid price and the next acceptable bid; that the Navy did not notify the Small Business Administration (SBA) when it rejected J & J's bid; and that the Navy did not make a determination, or request SBA's assistance in determining, whether Oneida qualified as a small disadvantaged business (SDB) in light of its status as a joint venture.

J & J also requests reconsideration of our December 6, 1988, dismissal of the firm's prior protest concerning the Navy's planned award of the contract to Simone Construction Company, the apparent low bidder. We dismissed that protest because the Navy's rejection of Simone's bid, after J & J's protest was filed, rendered the protest academic. J & J now argues that the Navy's subsequent November 16 award to Oneida was in violation of the Competition in Contracting Act of 1984 (CICA), 31 U.S.C. § 3553(c)(1) (Supp. IV 1986), since J & J's protest, filed November 3, was still pending in our Office.

We deny the protest and the request for reconsideration.

The solicitation, issued July 1, 1988, was set aside for SDBs and contemplated award of a firm, fixed-price construction contract. The IFB required bids to be accompanied by a bid bond (Standard Form (SF) 24) in the amount of 20 percent of the bid price or \$3 million, whichever was less. Since J & J was bonded by individual rather than corporate sureties, J & J was required to submit a completed Affidavit of Individual Surety (SF 28) for each of the two required individual sureties.

The Navy received seven bids by the September 22 bid opening date. J & J was the second low bidder at \$3,697,640. Due to the unacceptability of the individual sureties submitted by both Simone, the apparent low bidder, and J & J, in support of their bid bonds, the Navy rejected both bids and made award on November 16 to Oneida, the third low bidder at \$3,741,000, a joint venture that furnished a corporate bid bond.

J & J's bid was rejected because the two individual sureties on its bid bond were found nonresponsible. In reviewing the SF 28s that J & J had submitted with its bond, the Navy found a number of assets listed on the affidavits to be questionable as to validity and/or worth. Initially, the Navy requested additional information from J & J by telephone on September 27 concerning the listed securities, gas and oil leases (certification of the activity and production of the leases), and the net worth of the individuals (certifications that the assets listed were liquid and readily attainable by the government in the event of default). J & J responded by telefaxing "review audits," described by the certified public accountants (CPAs) who performed them as limited reviews of financial information submitted by the sureties themselves; the CPAs expressly state that the reviews are not the equivalent of a certified audit.

The Navy then telefaxed a letter to J & J on September 30, 1988, a copy of which was later mailed on October 3, requesting that J & J provide CPA-certified balance sheets and income statements with signed opinions for each individual surety, or alternatively, specific clarifying information for each of the questioned assets listed on the affidavits of individual surety and on the other information submitted by J & J. The Navy noted that certain assets were unacceptable^{1/} and provided J & J with a list of information to be provided on other assets for the first surety, including certified appraisals or tax assessments and deeds for undeveloped real estate; certified appraisals of furniture and art work; and copies of titles of automobiles. For the second surety, the Navy also noted that certain assets were unacceptable, and, with regard to other assets, requested bank statements; copies of shares, proof of ownership and financial statements of closely-held corporations; copies of deeds and tax appraisals of real estate; a certified appraisal and title to a gemstone collection; copies of share certificates; copies of deed or tax assessments of a personal residence; a certified appraisal of personal effects; and a certified appraisal of drilling equipment.

In response to the Navy's request, J & J did not submit either CPA-certified balance sheets or signed opinions, or any of the items requested in the alternative (copies of

^{1/} For example, the Navy stated that it had not been able to verify the existence of certain over-the-counter stock pledged by the first surety and thus regarded these assets as unacceptable.

securities, shares, or corporate financial reports; bank statements; automobile titles; or certified appraisals of personal property or equipment). Instead of the certified appraisals and deeds requested for the real estate, for example, J & J submitted estimating letters from realtors. Because the information received did not demonstrate that J & J's sureties had sufficient net worth to protect the government, the Navy rejected J & J's bid for failure to establish the responsibility of the two individual sureties.

J & J first argues that the Navy should have asked J & J for further information concerning the sureties so as to allow J & J to cure the deficiencies found by the Navy.

The contracting officer's obligation to investigate individual sureties is set out at Federal Acquisition Regulation (FAR) § 28.202-2, which requires that the contracting officer determine the acceptability of individuals proposed as sureties. The regulation states that the information provided in the SF 28 is helpful in determining the net worth of proposed individual sureties, but the agency is not limited to the consideration of information contained in the SF 28. There is nothing to prevent the contracting officer from going beyond that information where necessary in making his decision. Transcontinental Enterprises Inc., 66 Comp. Gen. 549 (1987), 87-2 CPD ¶ 3; Enclave One Inc., et al., B-232383 et al., Nov. 17, 1988, 88-2 CPD ¶ 488. Moreover, the contracting officer is vested with a wide degree of discretion and business judgment in making this determination and our Office will defer to the agency's decision unless the protester shows that there was no reasonable basis for the determination of that there was bad faith by the agency. Gem Construction Co., Inc., B-232271, Nov. 29, 1988, 88-2 CPD ¶ 530. In our view, the record here clearly reflects a reasonable basis for the nonresponsibility determination and does not show bad faith on the part of the Navy.

When the Navy found that the affidavits submitted by J & J did not contain sufficient information to verify the financial condition of the individuals, the agency reasonably sought specific information beyond that on the face of the SF 28 to establish the responsibility of the sureties. The information provided by J & J did not include any of the documents sought by the Navy. Thus it was J & J's failure to provide the requested information concerning the net worth of the sureties that resulted in the determination of nonresponsibility. It was not reasonable to expect the Navy to again ask J & J for the identical information requested

in the September 30 letter when that information was not forthcoming in J & J's response to the Navy's very precise, detailed communication to the firm. Enclave One Inc., et al., B-232383 et al., supra.

J & J next argues that the Navy violated FAR 28.101-4(b), which requires that noncompliance with a solicitation requirement for bid guarantee be waived when the amount of the bid guarantee submitted is less than required, but is equal to or greater than the difference between the bid price and the next acceptable bid. The only exception to this rule is when the contracting officer determines in writing that acceptance of the bid would be detrimental to the government's interest. J & J contends that the difference between J & J's bid and Oneida's bid was only \$43,360, and that J & J's bid guarantee was equal to or greater than that amount. Further, J & J states that even if the Navy had good reason to reject J & J's bid, it failed to indicate in writing that acceptance of J & J's bid would be detrimental to the government's interest.

J & J has misread the requirements of the FAR. In order to be eligible for the waiver in FAR § 28.101-4, the bidder's bid guarantee must first be acceptable in other respects; the situation addressed in that section involves an acceptable bid guarantee whose sole defect is that it falls short of the required guarantee by a certain amount. Here, in contrast, the Navy found J & J's bid guarantee unacceptable because J & J failed to provide sufficient information demonstrating that each surety's net worth equals or exceeds the penal sum of the bond (in this case, \$740,000), as required by FAR § 28.202-2. Accordingly, the fact that the Navy did not question certain of the sureties' assets-- which, J & J claims, would be worth more than \$43,360, the difference between J & J's bid and Oneida's--does not mean that the Navy was required to accept the bid guarantee under FAR § 28.101-4; on the contrary, the waiver provision is inapplicable because J & J's bid guarantee was not otherwise acceptable.

J & J further alleges that the Navy erred in not notifying the SBA when it rejected the firm's bid, depriving J & J of the opportunity to apply for a Certificate of Competency (COC). The protester's argument is without merit. The determination that a bidder is nonresponsible based on the unacceptability of its individual sureties need not be referred to the SBA for review under the COC procedures since such determinations are based solely on the qualifications of the individual surety and there is no indication that Congress intended to bring surety qualifications under

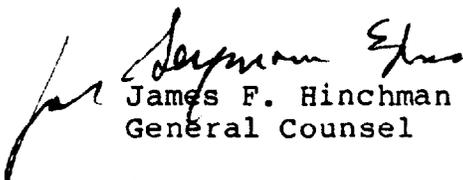
the scrutiny of the SBA through the Small Business Act, 15 U.S.C. § 637(b)(7) (1982). Clear Thru Maintenance, Inc., 61 Comp. Gen. 456 (1982), 82-1 CPD ¶ 581.

J & J finally argues that the Navy failed to determine, or request SBA's assistance in determining, whether Oneida qualified as an SDB in light of its status as a joint venture. We find that J & J is not an interested party to this issue.

Under our Bid Protest Regulations an interested party is an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of or failure to award a contract. 4 C.F.R. § 21.0(a) (1988). Here, because J & J's bid was properly rejected based on its bid bond, and there is another firm in line for award, J & J would not be eligible for award even if we were to find the award to Oneida invalid on the basis of Oneida's joint venture status. Gaff Manufacturing, Inc., B-230934.3, June 16, 1988, 88-1 CPD ¶ 577.

With respect to J & J's request for reconsideration of our decision to dismiss its initial protest, the protester has not shown that our prior dismissal was legally or factually wrong. See 4 C.F.R. § 21.12. As noted above, since J & J's initial protest challenged the planned award to the apparent low bidder, Simone, the protest became academic and thus was properly dismissed once the Navy rejected Simone's bid. Further, to the extent that J & J challenges the Navy's decision to award a contract to Oneida while J & J's protest against the Navy's planned award to Simone was pending, we agree that the contract award was inconsistent with CICA, 31 U.S.C. § 3553(c)(1). J & J was not prejudiced, however, since the Navy suspended performance of the contract once J & J filed its current protest challenging the award to Oneida. Accordingly, in the event that we had sustained J & J's protest concerning the nonresponsibility of its sureties, the remedies available to our Office would not have been circumvented by the Navy's action. See 4 C.F.R. § 21.6.

The protest and the request for reconsideration are denied.


James F. Hinchman
General Counsel