

G.ihooly



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Ram II General Contractor, Inc.

File: B-234613

Date: June 7, 1989

DIGEST

Rejection of protester's bid was proper where agency reasonably found that protester failed to provide sufficient information to permit finding one of the two required individual sureties on its bid bond acceptable.

DECISION

Ram II General Contractor, Inc., protests the rejection of its bid under invitation for bids (IFB) No. F41650-88-B-0544, issued by the Department of the Air Force for construction of a calibration range building at Kelly Air Force Base, Texas. The Air Force rejected RAM II's bid because one of the individual sureties on its bid bond failed to submit sufficient proof of ownership and the value of the assets claimed in support of surety net worth.

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. Paragraph 12 of the IFB's Special Instructions further provided that:

"If individual surety bonds are furnished either for bid bond or for payment and performance bonds, the individual sureties must submit with their bonds proof of ownership and value of the assets which they claim in their net worth. The government's preferred method of proof is to have a statement of net worth prepared by a certified public accountant in accordance with generally accepting accounting principles. The statement of net worth on the SF 28, Affidavit of Individual Surety, is not of itself sufficient and will not be accepted absent additional proof of value and ownership. Failure to provide the proof and

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information requested above may result in rejection of a bid"

At the December 21, 1988, bid opening, Ram II was the low bidder in the amount of \$157,700. Ram II submitted a bid bond naming two individual sureties and provided a completed Affidavit of Individual Surety (SF 28) for each surety. For one surety, John W. Imbert, Ram II submitted a financial statement but no additional proof of value and ownership.

The Air Force telephoned Ram II's president on January 4, 1989, and requested a statement of net worth for John Imbert prepared by a certified public accountant (CPA), along with certain other unrelated information. Later that day, Ram II's broker notified the Air Force by phone that Mr. Imbert had not been audited. By letter dated January 4, 1989, the Air Force requested Ram II to submit additional documentation by January 18 to verify assets claimed by Mr. Imbert, including warranty deeds, appraisals, assessments, registrations, bank statements, and vehicle registration.

The Air Force reports that on January 9 Ram II's representative handcarried to the Air Force buyer the requested material, including an accountant's report for Mr. Imbert as an enclosure. The buyer saw the enclosure was titled "Accountants' report" and told Ram II it looked like what she needed. After further evaluation, the Air Force determined the report was not prepared in accordance with generally accepted accounting principles. At the end of the report, the accountant stated that:

"John and Billy Imbert have elected to omit substantially all of the disclosures required by generally accepted accounting principles. If the omitted disclosures were included in the financial statement they might influence the user's conclusion about the financial condition of John and Billy Imbert. Accordingly this financial statement is not designed for those who are not informed about such matters."

According to the Air Force, Ram II submitted no other proof of ownership and value of the assets claimed by Mr. Imbert. Based on this lack of proof, the contracting officer determined that Mr. Imbert was unacceptable as a surety, and notified Ram II by letter dated February 15 that its bid was rejected. Ram II protested the rejection of its bid to our Office on February 24.

Ram II protests that it furnished the preferred method of proof, a CPA report, for its surety. Ram II argues that the

Air Force's reference to Ram II's failure to provide the requested information concerning title and value is a "post hoc pretextual justification" after the Air Force buyer stated everything was acceptable.

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. The agency, however, is not limited to consideration of information contained in the SF 28. Cascade Leasing, Inc., B-231848.2, Jan. 10, 1989, 89-1 CPD ¶ 20. Moreover, the contracting officer is vested with a wide degree of discretion and business judgment in determining surety acceptability and therefore we will not object to a finding that a surety is unacceptable unless the protester shows that there was no reasonable basis for the determination or that the agency acted in bad faith. J&J Engineering, Inc., B-233463.2, Feb. 13, 1989, 89-1 CPD ¶ 147. In our view, the record here reflects a reasonable basis for the nonresponsibility determination and does not show bad faith on the part of the Navy.

The IFB clearly required individual sureties to submit with their bonds proof of ownership and value of the assets which they claim in their net worth. The IFB further provided that the preferred method of proof was a statement of net worth prepared CPA in accordance with generally accepted accounting principles (GAAP). Mr. Imbert's bid bond, however, was accompanied only by a financial statement, apparently prepared by Mr. Imbert, of his assets and liabilities. Thus, we think the Air Force reasonably sought more specific information regarding Mr. Imbert.

In response to the Air Force's detailed request for additional information, Ram II submitted an accountant's report which omitted substantially all of the disclosures required by GAAP, and even contained a deviation from GAAP. According to the Air Force, no other proof of ownership was submitted.

In these circumstances, where the IFB clearly stated a preference for a statement of net worth prepared in accordance with GAAP, we find the Air Force had a reasonable basis to question the acceptability of Mr. Imbert as a surety. The CPA who prepared Mr. Imbert's financial statement cautioned that it was merely a compilation of information furnished by Mr. Imbert, without independent

audit or verification. The disclosures omitted by Mr. Imbert in the accountant's report could have negatively reflected on his net worth, and contributed to his financial unacceptability. For example, Mr. Imbert listed potential liability for \$117,811.44 in outstanding bond obligations on his SF 28, but his financial statement did not indicate this potential liability.

Ram II argues in its comments that the Air Force made its determination in bad faith because it ignored information submitted as an attachment to Ram II's January 9 communication. Ram II states the ignored documentation included a title insurance policy for Imbert's residence, an application for a homeowner's warranty for the residence and a residential appraisal report. The Air Force, in supplemental comments, responds that the only document received January 9 to support the bid bond was the accountant's report for Mr. Imbert. Since Ram II has submitted no evidence in support of its assertion that it submitted information which the Air Force ignored, we find it has not met its burden of affirmatively proving its case in this regard. See Vanguard Industries, Inc., B-233490.2, Dec. 21, 1988, 88-2 CPD ¶ 615. We note that in its original protest letter to our Office, Ram II included as an exhibit its January 9 submission to the Air Force, but did not include the disputed documentation.

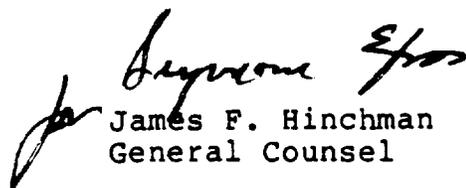
Ram II also argues in its comments that the Air Force exhibited bad faith in requesting Ram II to withdraw its protest shortly after it had been filed. Ram II states that the contracting officer attempted to induce it to withdraw its protest by advising that the project would be re-offered at a price anticipated in excess of \$200,000, and that a contract would be more lucrative at this price range than at the price Ram II bid.

Contracting officials are presumed to act in good faith and, in order to establish otherwise, there must be convincing proof that the agency had a malicious and specific intent to harm the protester. Golten Marine Co., Inc.--Reconsideration, B-228398.2, Apr. 18, 1988, 88-1 CPD ¶ 372. The record here does not support the protester's allegation. According to the Air Force, the contracting officer, in discussions with Ram II in an effort to resolve the protest, stated that a mistake in bid was suspected based on a comparison with other bids received. The contracting officer further stated that the project would be canceled and redesigned in the event the protest was denied, since all other bids received were over the statutory cost limitation or so close to the limitation that no award could

be made. Ram II has not demonstrated how this effort to resolve the protest constitutes bad faith.

Ram II also comments that the Air Force previously approved Mr. Imbert as a surety. However, the fact that the same individual may have been accepted under a different procurement does not mean the contracting officer in the subject procurement is bound to accept a surety who has not established proof of ownership and value of assets claimed in its net worth. See Excavations, Inc., B-232066, Nov. 1, 1988, 88-2 CPD ¶ 421.

The protest is denied.


James F. Hinchman
General Counsel