



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Triax Pacific, Inc.
File: B-236920
Date: January 23, 1990

DIGEST

1. General Accounting Office (GAO) denies a protest alleging that individual sureties named on the bid bond of the low bidder are not acceptable where the protester presents no evidence to support its assertion. The acceptability of individual sureties is a matter of bidder responsibility where the contracting officer is vested with a wide range of discretion and business judgment, and GAO will not object to an affirmative determination in this type of case unless bad faith by procuring officials is shown.
2. Agency has the discretion to request and receive waivers of the statutory cost limitation on one line item of low bid on family housing unit project even after bids are opened if the waiver is granted prior to award in accordance with Department of Defense procedures.

DECISION

Triax Pacific, Inc., protests the award of a contract to Service Alliance Systems, Inc. (SAS), by the Department of the Air Force, under invitation for bids (IFB) No. F04626-89-B-0028, which was issued on June 30, 1989, for repairs and improvements to military housing units at Travis Air Force Base in California.

We deny the protest.

SAS was the apparent low bidder among the five bids which the contracting officer received by the bid opening date of August 1 with a bid of \$12,688,662. Triax was the second-low bidder at \$14,085,200. In agency protests dated August 8 and 11, Triax protested the proposed award to SAS. The Air Force denied these protests on August 30. On September 13, Triax then protested to our Office. No award has been made.

Triax protests that the individual sureties named on SAS' bid bond are unacceptable such that SAS' bid is

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nonresponsive. Triax also alleges that SAS' bid is nonresponsive because its line item No. 6 price of \$52,000 for repairs and improvements to one four bedroom housing unit exceeds the \$44,500 per unit statutory cost limitation for family housing units.

With regard to Triax's assertion that SAS is nonresponsive on account of inadequate individual sureties, we have consistently found the question of the acceptability of an individual surety is one of responsibility, not responsiveness. United Food Servs., Inc., B-214098.2, Sept. 18, 1984, 84-2 CPD ¶ 312. The contracting officer is vested with a wide range of discretion and business judgment in considering responsibility matters, and we will not object to an affirmative determination in this type of case unless the protester shows the procuring officials acted in bad faith. C.E. Wylie Constr. Co., 68 Comp. Gen. 408 (1989), 89-1 CPD ¶ 406.

In the present case, in response to Triax's agency-level protest, the contracting officer reviewed the documentation submitted by the low bidder, and found no indication that the individual sureties were in any way unacceptable. In this regard, we think the contracting officer could properly take into account the fact that the sureties' representations were made under oath and that a bank official certified that, based on his personal investigation, the sureties' representations were true. See C.E. Wylie Constr. Co., 68 Comp. Gen. 408 supra.

While we agree that information made available to the agency in the course of an agency-level protest could warrant examination of a surety's acceptability, Triax presented no evidence prior to our receipt of the agency report in this matter that would indicate that the individual sureties proposed by the low bidder were unacceptable, other than its speculation that this might be the case.

Under the circumstances, Triax's protest on this point is denied. Nevertheless, we note that on December 15, 1989, almost 2 months after the Air Force submitted its report on the protest, Triax provided this Office and the Air Force with a decision of the Army Corps of Engineers on an agency-level protest on another procurement where certain evidence was referenced that casts doubt on the acceptability of the individual sureties proposed by SAS and the bank official who certified their net worth. Since no award has been made, it may be appropriate for the Air Force to again review the acceptability of the low bidder's proposed individual sureties before proceeding with the award.

With regard to Triax's contention that SAS should be disqualified from receiving this award, because its line item No. 6 of \$52,000 exceeded the statutory cost limitation of \$44,500, the Air Force responds that it obtained on August 22, 1989, a waiver to this limitation from the appropriate Department of Defense official that permitted it to accept SAS' low bid. FAR § 36.205(a)(1) (FAC 84-45).

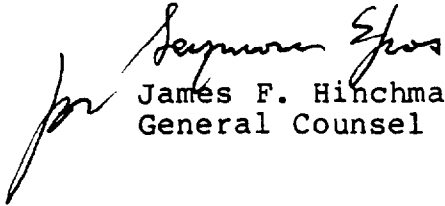
In this case, the statutory cost limitation on the improvements to the family housing units is required by 10 U.S.C. § 2825(b)(1) (1988). However, as noted by the Air Force, there is provision for waiver of this limitation to increase the amount by up to 25 percent of the limitation, where the appropriate authority determines that the increase is required for the sole purpose of meeting unforeseen variations in cost that could not have been reasonably anticipated at the time the project was originally approved. 10 U.S.C. § 2853(c). Bidders were apprised of the possibility that a waiver could be obtained in an IFB provision, which states in pertinent part: "bids may be rejected which . . . exceed the cost limitations unless such limitations have been waived by the Under Secretary of Defense (Research and Engineering) prior to award." Department of Defense FAR Supplement § 252.236-7081 (1988 ed.)

It is true that whenever a bidder offers a unit price in excess of the statutory cost limitation on a housing project it takes the risk that its bid will be rejected as nonresponsive if no waiver to this limitation is requested or obtained. Bill Strong Enters., Inc., B-222492.2, Aug. 11, 1986, 86-2 CPD ¶ 173; Skip Kirchdorfer, Inc. and David Elder Constr. Co., Inc., B-204244, Nov. 24, 1981, 81-2 CPD ¶ 425. However, contrary to Triax's contention, it is clear that the Air Force had the authority to request and obtain a waiver to the statutory cost limitation on improvements to family housing units after bids were opened so long as the waiver was granted prior to award. See 52 Comp. Gen. 969 (1973) (involving the very similar limitation on the costs of construction of bachelors officers quarters where we found that it was within the agency's discretion to waive a cost limitation, even where no notice of this possibility was announced in the IFB).

In the present case, the record indicates that the waiver was granted by the appropriate agency official. Moreover, the Air Force explains that the waiver was proper because an award to SAS would result in savings of \$1,396,578 and because an award to Triax under existing funding would require the application of various deductive items that would delete significant improvements to the vast majority

of the housing units covered by this IFB. On the other hand, SAS' price for the line item No. 6 housing unit is only \$7,500 (less than 25 percent) higher than the statutory cost limitation on this unit. Under the circumstances, the Air Force had the discretion to request and authorize the waiver of the statutory cost limitation on line item No. 6 and accept SAS' bid. 52 Comp. Gen. 969 supra.

The protest is denied.


James F. Hinchman
General Counsel