

Miller



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: N.G. Simonowich

File: B-240156

Date: October 16, 1990

N.G. Simonowich for the protester.
John Avril for G.A. Avril Company, an interested party.
Bruce W. Baird, Esq., Defense Logistics Agency, for the agency.
Behn Miller and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Where processing bank declined to accept high bidder's credit card for the amount of his bid deposit, protest that contracting officer improperly rejected bid as nonresponsive is sustained since (1) deficiency in credit balance pertains solely to bidder's responsibility and can therefore be cured any time prior to award; (2) despite credit deficiency, government's interests were never at risk since as part of its bid, the bidder had submitted a pre-approved bid bond which insured the government against all default by the bidder, even where the bidder's instrument of payment was in a non-guaranteed form such as a credit card; and (3) prior to award, the bidder promptly cured credit deficiency with cash.

2. Since property sales contemplate award being made on an item-by-item basis, where bidder sets forth in his bid deposit statement that his total contract price is "\$1,602" and that the amount of his bid deposit is "20% of Bid," subsequent facsimile modifications which contain the solicitation number, the word "modification", the date, the signature of the bidder, and a clear itemized list of new bids and corresponding bid prices reasonably can be construed to mean that the initial contract price of \$1,602 has been modified; under these circumstances, the \$1,602 figure does not limit the amount of bidder's deposit and contractor is entitled to award on all items for which he was high bidder.

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DECISION

N.G. Simonowich protests the award of items 26, 99, 103, 144, 146, 151, 152, 154, 157, 158, 180, 181, 182, and 183 under invitation for bids (IFB) No. 31-0133, issued by the Defense Logistics Agency (DLA), Defense Reutilization and Marketing Region (DRMR), for the sale of various kinds of scrap metal. Specifically, Simonowich protests that its bid was improperly rejected as nonresponsive.

We sustain the protest.

BACKGROUND

The IFB set bid opening for June 12, 1990, and required each bidder to provide a bid deposit in an amount equal to 20 percent of the total bid price; under the terms of the IFB, the bid deposit could be made by cash, cashier's check, certified check, traveler's check, bank draft, money order, or by charge to a VISA or MasterCard credit card account. Bidders with letters of credit or bid bonds could make their bid deposits by uncertified company checks. At section B01, the IFB also provided:

"If a credit card is used as a bid deposit and acceptance is declined by the processing bank the bid will be declared nonresponsive."

The IFB also provided that bidders could modify their initial bids by telegraph or facsimile; in the event of such a modification, the IFB stated that:

"[A]ny modification which increases the amount of a bid already submitted . . . must provide for an increased bid deposit."^{1/}

The record shows that Simonowich submitted an initial bid followed by two bid modifications on successive dates. On June 8, using the agency's standard bid form 114, Simonowich submitted a bid for items 147 and 151. On the cover page of the bid form, each bidder was required to complete a bid deposit statement; Simonowich's statement read as follows:

"The total amount of my bid is \$1,602.00 and attached is the bid deposit, when required by the Invitation, in the form of Bid Bond 90-188 and VISA, in the amount of 20% of Bid."

^{1/} This requirement appears in DRMR's instructions on surplus sales, which the IFB incorporated by reference.

The dollar figure Simonowich inserted--\$1,602--represented the total price of Simonowich's bids for items 147 and 151; Bid Bond 90-188 referenced Simonowich's \$50,000 annual deposit bond for the period November 3, 1989, through September 30, 1990.^{2/}

With his bid, Simonowich also included a credit card information sheet which the agency required from any bidder who intended to pay either the bid deposit or final contract price by means of a credit card. The credit card information sheet advised bidders that if they were successful, the agency would automatically debit the bidder's credit card for "20% of the contract price"; Simonowich's completed sheet contained all the credit card information required by the agency to access Simonowich's VISA account.

The IFB also advised bidders that the agency would accept facsimile bids or bid modifications. On June 11, by facsimile, Simonowich submitted a hand-written modification in which he restated his bid price for items 147 and 151 and offered bids on 25 other IFB items. On June 12, again by facsimile, Simonowich submitted a second hand-written modification in which he increased his prior bids on 6 items and offered bids on 50 more items. As a result of the modifications, the number of items for which Simonowich offered bids increased to 77; however, despite this bid increase, Simonowich did not re-execute or modify his initial June 8 bid deposit statement to reflect the increase in his total bid price.

At the June 12 bid opening, Simonowich was determined to be the high bidder on 14 of the 77 items on which he had bid. Apparently because items 180, 181, and 182 required a pre-award survey, the agency delayed processing Simonowich's bid until the survey was completed.

On the morning of June 20, Simonowich's secretary contacted the contracting officer and inquired about the bidding results. The contracting officer informed the secretary that while Simonowich was high bidder on several items, final award could not be determined or processed until the results of the pre-award survey were received.

Later that day, at 1:15 p.m., Simonowich's secretary again called the contracting officer to check the status of the

^{2/} The bond guarantees any individual bid not exceeding \$250,000 submitted by Simonowich for a sale of surplus property for the fiscal year ending September 30, 1990, up to the penal amount of the bond (\$50,000).

award. The contracting officer informed the secretary that based on the survey's results, Simonowich would be awarded all the items for which he was high bidder. The contracting officer further advised the secretary that she would contact Simonowich with the final contract price as soon as the award paperwork was ready for signature.

At 2 p.m., the contracting officer telephoned Simonowich's office and informed Simonowich's secretary that the total contract price for Simonowich's bid was \$119,927.17, and accordingly, the 20 percent bid deposit, which would be charged to Simonowich's VISA account, amounted to \$23,985.43. The contracting officer also advised Simonowich's secretary that no award could be made until the bid deposit was charged to the VISA account.

Simonowich's secretary then asked the contracting officer to charge the bid deposit to Simonowich's MasterCard account instead of the VISA account since as of that date, the charge limit on his VISA account was full. The contracting officer refused. Simonowich's secretary then requested time to get the VISA account in order; the contracting officer also denied this request. A few minutes later the agency's cashier advised the contracting officer that the processing bank had just declined Simonowich's credit card for the amount of the bid deposit. When Simonowich's secretary called the contracting officer a few minutes later, the contracting officer advised her that because the bank had declined Simonowich's VISA credit card for the amount of the \$23,985.43 bid deposit, Simonowich's bid was nonresponsive.

Shortly thereafter, Simonowich telephoned the contracting officer and told her that the VISA charge had been declined due to a banking error; Simonowich advised the contracting officer that the processing bank's president would be immediately contacting the officer about the VISA account. Simonowich also asked the contracting officer to allow his proposed award on the 14 items to stand since he was in the process of correcting the VISA credit deficiency.

At 2:55 p.m., the processing bank's president telephoned the contracting officer and told her that \$24,000 had been wired to Simonowich's VISA account. At 3 p.m., the contracting officer contacted the bank that had sent the \$24,000 to the processing bank and learned that the money transfer had taken place earlier that afternoon. Despite the cash transfer, the contracting officer determined that the Simonowich bid remained nonresponsive.

Later that afternoon, Simonowich protested the rejection of its bid for nonresponsiveness to the contracting officer. The contracting officer refused to reverse her determination

of nonresponsiveness. On June 22, Simonowich filed his protest with our Office.

We find that DLA improperly rejected Simonowich's bid as nonresponsive.

ANALYSIS

Responsiveness of Simonowich's Bid

Bid deposits and bid bonds are forms of bid guarantees designed to protect the government's interests in the event of a bidder's default. Marine Power and Equip. Co., Inc., 62 Comp. Gen. 75 (1982), 82-2 CPD ¶ 514. If a bidder fails to honor his bid in any respect, the bid bond secures a surety's liability for all excess reprourement costs. Surface Preparation & Coating Enters., Inc., B-235170, July 20, 1989, 89-2 CPD ¶ 69. A bid deposit similarly obligates a bidder not to withdraw before award and to pay the full purchase price; while a bid deposit may be applied towards the purchase price of goods being sold by the government, in the event the bidder defaults on his contractual obligations, the government may retain the deposit as liquidated damages. Marine Power and Equip. Co., Inc., 62 Comp. Gen. 75, supra. Bid deposits offer some advantages over bid bonds--the government has immediate access to the funds without any defenses sureties might raise. On the other hand, bid deposits tie up all bidders' funds for a period of time.

In determining whether a bid is responsive to a bid deposit requirement we look to see whether the bid deposit documents submitted at bid opening are in the form required by the solicitation. See Forbes Mfg., Inc., B-237806, Mar. 12, 1990, 90-1 CPD ¶ 267 (where bidder's personal check rendered his bid nonresponsive since the solicitation provided that the only acceptable form of bid deposit was a guaranteed instrument of payment). Submission of a bid deposit in the exact manner and form called for by the solicitation demonstrates that the bidder has obligated itself to forfeit the bid deposit in the event that it withdraws before award or fails to pay the full purchase price. See Marine Power and Equip. Co., 62 Comp. Gen. 75, supra (replacement of one valid negotiable instrument with another did not render a bid nonresponsive where the bidder had executed all documents necessary to create a binding procurement contract at the time of bid opening).

In this case the contracting officer rejected Simonowich's bid as nonresponsive because of the insufficient credit line in the VISA account he pledged. He relies in support on the solicitation statement that if a credit card is used as a bid deposit, an insufficient credit line will render a bid

nonresponsive. As discussed below, this language is not controlling; we find that Simonowich's bid was responsive.

On the cover page of his bid, Simonowich clearly stated that his VISA account was to be debited to cover the 20 percent bid deposit charge. The accompanying credit card information sheet submitted by Simonowich was complete and contained no irregularities or facial defects; thus, Simonowich's VISA pledge represented a firm commitment by Simonowich to be liable for the bid deposit. Since his bidding documents clearly bound him to furnish the bid deposit by means of a credit card charge, an instrument explicitly approved for use as a bid deposit by the solicitation, Simonowich's bid was responsive. See Marine Power and Equip. Co., 62 Comp. Gen. 75, supra; Intermountain Paper Stock, Inc., B-211269, Apr. 22, 1983, 83-1 CPD ¶ 450. As explained below, the sufficiency of the protester's credit line--the basis on which DLA rejected the bid as nonresponsive--in fact concerns the protester's responsibility.

Whereas bid responsiveness concerns whether the bid itself unequivocally offers to perform in conformity with all material terms and conditions of a solicitation, "responsibility" refers to a bidder's ability to perform all the contract requirements, and is determined not at bid opening, but at any time prior to award based on information received by the agency up to that time. Ibex, Ltd., B-230218, Mar. 11, 1988, 88-1 CPD ¶ 257. Although the agency argues that the IFB expressly warned all bidders that a credit card deficiency would render a bid nonresponsive, a requirement which relates to responsibility cannot be converted into a matter of responsiveness merely by the terms of the solicitation. See Sage Assocs. Gen. Contractors, Inc., B-235497, Aug. 15, 1989, 89-2 CPD ¶ 141; Norfolk Dredging Co., B-229572.2, Jan. 22, 1988, 88-1 CPD ¶ 62.

A bid deposit is analogous to a bid bond; in the case of bid bonds, the question of the financial acceptability of a surety, as a matter of responsibility, may be established any time before actual contract award. See National Hazard Control Corp., B-237194, Feb. 9, 1990, 90-1 CPD ¶ 168; Transcontinental Enters., Inc., B-225802, July 1, 1987, 87-2 CPD ¶ 3. The adequacy of Simonowich's VISA credit line is no different, since it essentially pertains to the adequacy of the assets supporting the bid deposit.

On matters of responsibility, the contracting officer should ordinarily solicit and consider information on the issue any time before award. National Hazard Control Corp., B-237194, supra. Moreover, in situations where a bidder has immediately corrected a principal factor on which a nonresponsibility determination hinges prior to award, we

have held that the contracting officer should accept the new evidence of responsibility. See Transcontinental Enters., Inc., B-225802, supra; Tomko, Inc., B-210023.2, B-212217, Feb. 15, 1984, 84-1 CPD ¶ 202. In this case, the contracting officer knew and verified that the credit deficiency had been cured by a transfer of funds by the protester; moreover, there is no evidence in the record suggesting that the deficiency was the result of any fraud or other improper action on the protester's part. Accordingly, the VISA deficiency, since it was remedied before award, did not provide a basis for rejecting Simonowich as nonresponsible. Transcontinental Enters., Inc., B-225802, supra.

Application of the Bid Bond

The VISA credit charge deficiency did not adversely affect the government's ability to protect its interests since, in addition to his VISA credit card, Simonowich also presented his annual agency deposit bid bond for the amount of the bid deposit.

In determining whether a bid guarantee is responsive, a bidder's intentions must be determined at bid opening from all the bid documents, which include any bid bond or other documents in the agency's possession. The Ramirez Co. and Zenon Constr. Corp., B-233204, Jan. 27, 1989, 89-1 CPD ¶ 91. In this case, the bid bond constituted an integral part of Simonowich's bid, since on the face of his bid document Simonowich set forth that his bid deposit took the "form(s) of Bid Bond 90-188 and VISA."

Under the terms of Bid Bond 90-188, regardless of the contractor's instrument of payment: "[F]or failure to pay the purchase price of any bid . . . the principal shall pay the Government as liquidated damages an amount equal to 20% of the purchase price." Thus, if Simonowich were to default on his bid, the government had access to 20 percent of the amount of Simonowich's total bid price under the bond.

When the agency initially notified Simonowich that his annual bid deposit bond had been approved, by letter dated November 6, 1989, the agency informed Simonowich that: "[t]his bond will allow you to submit uncertified personal or company checks as a bid deposit"

The IFB also stated: "Bidders whose bid or payment is accompanied by a letter of credit or who have on file an approved bid bond . . . may make their bid deposit and/or payments by uncertified personal company checks."

Accordingly, DLA argues that the bid bond applies only where a company or personal check, not a credit card, is presented

as an instrument of payment. We disagree. Nothing on the face of the bond or in the agency's regulations prohibits a contractor's bond or letter of credit from guaranteeing any instrument of payment presented by the contractor. Even under the agency's view restricting the application of a bid bond to instances where a non-guaranteed instrument of payment is involved, we see no reason why the bid bond should not apply in this case. By their non-guaranteed nature, a check and credit card are equivalent. Like a personal or company check, use of a credit card is contingent upon sufficient credit or funds in the contractor's account; a VISA credit card is just as susceptible to a stop-payment order as a check. Since both are non-guaranteed forms of payment, we see no distinction between a personal or company check and an individual's credit card for purposes of relying upon a bid bond in the event of a contractor's default.

Award to Simonowich

The record shows that although Simonowich submitted two modifications to his bid, he never re-executed his initial bid deposit statement. Accordingly, although Simonowich's bid deposit statement clearly states that the deposit is in the amount of "20% of Bid", the statement also lists a contract price of \$1,602 based on Simonowich's initial bid. We do not find this defect prevents award to Simonowich of all those items on which he submitted the high bid.

According to the agency, because of the rapid fluctuations in market prices for scrap metal, it is common practice in the scrap metal industry to submit an initial sealed bid which is subsequently modified by facsimile. Despite the provision in the IFB requiring a bidder to provide for an increased bid deposit, as a general policy DLA does not require a bidder to re-execute his bid deposit statement when he modifies his bid, as long as the initial statement indicates that the deposit is in the amount of 20 percent of the total contract price and sets forth an acceptable instrument of payment. According to the agency, when a bidder presents a modification enumerating the item numbers and corresponding bid prices, the agency assumes that the contract price portion of the initial bid deposit statement is modified accordingly.

Simonowich clearly indicated in the bid deposit statement that his bid deposit amount was 20 percent of his bid. In the facsimile modifications, Simonowich listed the new items for which he was bidding with his offered bid prices; each facsimile was clearly labeled "Bid Modification," listed the solicitation number and the date, and was signed by Simonowich. Based on these documents, and given DLA's description of its treatment of bid modifications in this area, it is reasonable to assume that Simonowich intended to

modify the contract price listed in his initial bid deposit statement to account for its increased bid.

In addition, the IFB clearly provided that bidders could modify their initial bids by telegraph or facsimile modifications. In the case of telegraphic modifications--which are analogous to facsimile modifications--FAR § 28.101-4(c) (6) provides that noncompliance with a bid guarantee shall be waived when: "[A] telegraphic offer modification is received without corresponding modification of the bid guarantee, if the modification expressly refers to the previous offer and the offeror corrects any deficiency in bid guarantee." Thus, Simonowich's failure to amend the amount of his bid guarantee when he modified his bid is waivable since the modification expressly referred to his previous bid and he later effectively corrected the amount of the bid guarantee, as contemplated by the FAR provision.

Accordingly, we find that Simonowich's failure to revise the contract price in his initial bid deposit statement is not a fatal flaw in his bid.

RECOMMENDATIONS

Based on our finding that DLA improperly rejected Simonowich's bid as nonresponsive due to an insufficiency in the credit line Simonowich pledged as his bid deposit, which was cured by the protester before award, we recommend that Simonowich be awarded the 14 scrap metal items for which he was high bidder.

The General Services Administration (GSA)--whose surplus sales totaled \$99.4 million in fiscal year 1989--requires its contracting activities to process all credit card transactions immediately upon bid opening. If the GSA contracting activity does not have the electronic authorization equipment at the site of the bid opening or sale, the agency prohibits credit cards from being used as an instrument of payment.^{3/} We recommend that DLA consider adopting a similar policy, or in the alternative that the agency consider requiring bidders who use credit cards to back them up with a bid bond, as Simonowich did here. Since credit cards are not guaranteed instruments and are subject to such events as insufficient funds and stop payment orders, they may not adequately protect

^{3/} 6.8 percent of GSA's sales are credit card sales.

the government's interests. See Marine Power and Equip. Co.,
62 Comp. Gen. 75, supra; Intermountain Paper Stock Inc.,
B-211269, supra.

The protest is sustained.

A handwritten signature in cursive script that reads "Milton J. Aroskar".

Acting Comptroller General
of the United States