

Vickers



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Burtch Construction

File: B-240695; B-240696

Date: November 23, 1990

Robert S. Marconi, Esq., Stanislaw, Ashbaugh, Chism, Jacobson & Riper, for the protester. Sherry Kinland Kaswell, Esq., and Justin P. Patterson, Esq., Department of the Interior, for the agency. James Vickers, Esq., and John G. Brosnan, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Bid is responsive despite individual surety's failure to file pledge of assets with bid bond since a pledge of assets is information which bears on responsibility and, as such, may be furnished any time prior to award.

DECISION

Burtch Construction protests the rejection of its low bids as nonresponsive under solicitation Nos. R90-8 and R90-9, issued by the Bureau of Indian Affairs (BIA), Department of the Interior, for road construction on the Flathead Indian Reservation, Montana. Burtch's bids were rejected because they did not include, along with the bid bonds, Affidavits of Individual Surety with the required "pledge of assets."

We sustain the protest.

Burtch's bids contained bid bonds executed by two individual sureties and each also was accompanied by a completed Standard Form (SF) 28, Affidavit of Individual Surety. However, Burtch's sureties used a June 1966 edition of SF 28 and not the current edition of the form dated January 1990, which also contains a requirement for submitting a pledge of assets. The pledge of assets is to be in the form of evidence of an escrow account containing commercial and/or government securities and/or a recorded covenant not to convey or encumber real estate. The contracting officer rejected the two bids as nonresponsive since the solicitation required that the pledge of assets be submitted with the bid bond.

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The purpose of a bid guarantee is to secure the liability of a surety to the government in the event that the bidder fails to fulfill its obligation to execute a written contract. The sufficiency, and thus the responsiveness, of a bid guarantee depends on whether a surety is clearly bound by its terms. O.V. Campbell & Sons Indus., Inc., B-229555, Mar. 14, 1988, 88-1 CPD ¶ 259. The failure to submit a surety's pledge of assets with the bid, however, in no way affects the individual surety's liability. In fact, a pledge of assets serves only one purpose: it assists the contracting officer in determining the financial acceptability of the individual surety, which involves a matter of responsibility, not responsiveness. See Aceves Constr. and Maintenance, Inc., B-233027, Jan. 4, 1989, 89-1 CPD ¶ 7. Thus, even though Federal Acquisition Regulation § 28.203 presently requires that an individual surety include a pledge of specific assets in support of its bond, the pledge contains information bearing on responsibility which may be provided any time prior to award. R.C. Berson & Sons, Inc., B-240251.2, July 31, 1990, 90-2 CPD ¶ 92.

Both of these contracts have been awarded but performance has been suspended pending our decision. Therefore, we recommend that BIA obtain from Burtch's sureties the required pledges of assets and review them to ascertain if the pledges are acceptable and the net worth of the sureties is adequate. If Burtch is found to be responsible and its bid responsive, the awarded contracts should be terminated and award made to Burtch. Additionally, Burtch is entitled to recover its costs of filing and pursuing the protests, including attorneys' fees. Bid Protest Regulations, 4 C.F.R. § 21.6(d) (1990).



Acting Comptroller General
of the United States