Schatz

Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Santurce Construction Corp.

File: B-240728

Date: December 10, 1990

Frank Rotger for the protester.
Lester M. Hunkele, III, Esq., Department of Veterans Affairs, for the agency.
Sylvia Schatz, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Where agency investigation revealed misstatements and discrepancies in individual sureties' net worth information furnished in Affidavits of Individual Surety in support of bid guarantee, agency reasonably determined that there was inadequate evidence of value and ownership of claimed assets as well as doubt as to the integrity of the sureties and the credibility of their representations; contracting officer therefore properly rejected bidder as nonresponsible.

DECISION

Santurce Construction Corp. protests its rejection as nonresponsible under invitation for bids (IFB) No. 620-074, issued by the Department of Veterans Affairs (VA), for the renovation of Building 15, VA Medical Center, Montrose, New York. Santurce argues it improperly was found nonresponsible based on a determination that the individual sureties on its bid guarantee failed to submit sufficient proof of ownership and value of assets claimed in support of net worth, and thus were unacceptable.

We deny the protest.

The IFB, included under the Small Business Administration's (SBA) 8(a) program, solicited bids from 8(a) firms.1/ The IFB required bidders to submit a bid bond or guaranty in the amount of $2,500,000 if the amount of the contract exceeded $5,000,001, which was the case here. In addition, the IFB incorporated Federal Acquisition Regulation (FAR) § 52.228-11, which provides that offerors shall obtain from individual sureties a pledge of assets, including evidence of an escrow account for personal property and a recorded lien on real property, supported by a certificate of title.

Only Santurce submitted a bid, in the amount of $9,047,390. Santurce's bid guarantee, in the proper amount, named two individual sureties, Mr. Pease and Mr. Barrus, and was accompanied by Affidavits of Individual Surety, Standard Form (SF) 28, setting forth each surety's net worth, and also included a certificate of sufficiency for each surety. Mr. Pease's SF 28 indicated a net worth of $21,857,000, including real property in Utah with a stated fair market value of $19,550,000, subject to a $2,675,000 mortgage. Mr. Barrus listed his net worth as $24,330,000, including a claimed $16,030,000 in equity in real property in Utah, with a fair market value of $18,875,000 and subject to a $2,845,000 mortgage. Each surety's certificate of sufficiency was signed by a Mr. Marier, with the title of Vice President of Pyxis Financial Corporation.

A preaward investigation by VA revealed that Mr. Pease owned much less real property in Utah, with a vastly lower fair market value, than claimed in his affidavit. Meanwhile, the agency was unable to confirm ownership by Mr. Barrus of any real property in Utah, contrary to the statements in his SF 28. Neither surety provided the required pledge of assets, such as evidence of an escrow account for personal property, or a recorded lien in favor of the government, supported by title, for the real property listed in their SF 28s. The VA also noted that neither surety used the newest revised version of the SF 28, which provides additional protection to the government against fraud by requiring a sworn statement that is subject to the provisions of 18 U.S.C. §§ 1001 and 494 (1988) (providing monetary and criminal penalties for fraud in government contracts).

1/ Section 8(a) of the Small Business Act provides for contracts to be awarded to the SBA and for the SBA to subcontract for their performance with socially and economically disadvantaged small business concerns. See 15 U.S.C. § 537(a).

As part of its investigation, the VA also contacted the Office of the State of Utah Financial Institutions and learned that "Pyxis Financial Corporation" was not licensed to conduct bank or trust company business in Utah, and that its certificate of incorporation had been suspended on February 1, 1990, for failure to file required annual reports. The agency was further advised that charges of possible criminal conduct had been referred to the local county attorney's office for prosecution on February 26, based on the misrepresentation of Pyxis as a bank or other depository institution, and that the Utah Attorney General's Office had been requested to commence a civil proceeding enjoining Pyxis and Messrs. Marier and Barrus from making further unlawful representations. The investigation also revealed that Mr. Barrus was the registered agent as well as an officer and director of Pyxis; as such, the agency concluded, Mr. Barrus's certificate of sufficiency was tantamount to him certifying his own net worth, and thus was unacceptable.

On July 24, the VA telefaxed a letter to Santurce advising that its bid was rejected as nonresponsive,2/ because its bid guarantee was unacceptable (and because its bid was 21 percent over the government estimate, which issue we need not resolve), and stating it would resolicit on an unrestricted basis if Santurce did not provide an acceptable guarantee within 5 working days of July 24. In response, by letter of July 25, Santurce requested additional information as to the reasons for rejection of its guarantee. By telefax of August 1, the VA responded that it rejected Santurce's guarantee because, among other reasons, it was not supported by acceptable security. Santurce, in a telefaxed response, requested that the original guarantee submitted on June 21, with all supporting documentation, be returned to Santurce prior to its submittal of a new guarantee. On August 7, the 5-working-day deadline having expired, the VA advised Santurce it no longer would accept any additional bid guarantees from Santurce and that it would readvertise the project on an unrestricted basis.

Santurce argues that the VA's nonresponsibility determination was arbitrary and capricious because the agency failed to

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2/ While the financial acceptability of an individual surety is a matter of responsibility and not responsiveness, the contracting officer's incorrect use of the word "nonresponsive" rather than "nonresponsible" in rejecting Santurce's bid is of no legal consequence. See Aceves Constr. and Maintenance, Inc., B-233027, Jan. 4, 1989, 89-1 CPD ¶ 57. It is plain from the record that the contracting officer, in effect, made a nonresponsibility determination when rejecting Franklin's bid.

give Santurce specific reasons why the assets pledged were unacceptable and an adequate opportunity to correct any deficiencies. Santurce asserts that the agency was required under FAR part 28 to afford it 10 days after rejection to provide an acceptable guarantee by, for example, substituting acceptable sureties for the unacceptable sureties.

The contracting officer is vested with a wide degree of discretion and business judgment in determining the acceptability of an individual surety, and we will not question such a determination so long as it is reasonable. Carson & Smith Constructors, Inc., B-232537, Dec. 5, 1988, 88-2 CPD ¶ 560. Further, because the purpose of the bonding requirement is to provide the government with a financial guarantee, information which calls into question a surety's integrity and credibility of their representations in connection with the procurement diminishes the likelihood that this guarantee will be enforceable, and may be considered by the agency in determining the sureties' acceptability. Farinha Enters., Inc., 68 Comp. Gen. 666 (1989), 90-1 CPD ¶ 262.

We find that the VA had a reasonable basis for rejecting both sureties, since the deficiencies and discrepancies discovered in the net worth information furnished cast legitimate doubt on the adequacy of the sureties' assets, as well as on their integrity and the credibility of their representations. The VA attempted to, but could not, verify Mr. Barrus's alleged ownership of any real property in Utah. Further, the VA was advised by the Utah Bureau of Land Management and several local appraisers that the estimated value of Mr. Pease's land was only between $25 to $300 per acre, nowhere near the $1,300 per acre claimed. This information alone, we believe, was sufficient to support the agency's conclusions as to the sureties' adequacy, but there were significant other supporting considerations as well: the absence of the required recorded liens supported by titles, making it difficult or impossible to verify ownership of the property; the inadequacy of the certificates of sufficiency, which are to be executed by the officer of a bank or other depository institution, since Pyxis is not such an institution and, moreover, is subject to civil and criminal prosecution for misrepresenting itself as such an institution; and the fact that Mr. Barrus, as an agent and officer of Pyxis, essentially certified the sufficiency of his own assets. Santurce does not challenge the VA's position regarding any of these omissions, misstatements, or discrepancies. We conclude that the agency reasonably determined that both sureties were unacceptable.

The protester's assertion that, under the FAR, it should have been afforded 10 days after rejection of its guarantee to provide an acceptable guarantee is without merit. The FAR contains no such requirement. Indeed, to the extent that

Santurce wished to submit acceptable sureties for Messrs. Pease and Barrus, we point out that such a substitution was impermissible; substituting sureties on a bid guarantee would alter the sureties' joint and several liability under the guarantee, the principal factor in determining the bid's responsiveness to the bid guarantee requirement. See Clear Thru Maintenance, Inc., 61 Comp. Gen. 456 (1982), 82-1 CPD ¶ 581.3/ Further, we believe the 5 days given to Santurce to augment surety information already requested in the solicitation was reasonable; a contracting officer need not request any additional information where information of record casts legitimate doubts on the integrity and credibility of the individual sureties. Seaworks, Inc., B-226631.2, Dec. 27, 1989, 89-2 CPD ¶ 581.

Finally, Santurce argues that the agency was required to waive the bid guarantee requirement here, since it was the only bidder. However, while the FAR does provide that a contracting officer may waive a bid guarantee requirement where, as here, only one bid has been received and it does not comply with the bid guarantee requirement, it does not require that he do so. See FAR § 28.101-4(c). The VA determined that waiver of the bid guarantee here would not be in the government's interest, since the discrepancies and misstatements in the SF 28s raised serious doubts as to the likelihood that the sureties' financial guarantees would be enforceable. This was a reasonable determination. See Farinha Enters., Inc., 68 Comp. Gen. 666, supra.

The protest is denied.

Robert P. Murphy

for James F. Hinchman
General Counsel

3/ FAR § 28.203(d) does provide that a contractor submitting an unacceptable individual surety in satisfaction of a performance or payment bond requirement may be permitted a reasonable time, as determined by the contracting officer, to present an acceptable substitute surety. However, substitution is permitted in that situation because performance and payment bonds are executed only by the contractor, i.e., after award, and thus, unlike a bid bond or guarantee, have no effect on the responsiveness of a bid. This provision therefore does not apply here.