



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: U.S. Floors, Inc.
File: B-241552; B-241555
Date: February 6, 1991

Phil B. Hammond, Esq., Hammond & Tellier, P.C., for the protester.
Denver C. Snuffer, Jr., Esq., Maddox, Nelson, Snuffer & Dahle, for D.H. Butcher and Company, an interested party.
Craig R. Schmauder, Esq., Department of the Army, for the agency.
David Hasfurth, Esq., Andrew T. Pogany, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

An affidavit of Individual Surety (Standard Form 28) is a document separate from the bid bond itself and serves solely as an aid in determining the responsibility of an individual surety. Deficiencies in an affidavit, including those necessitating a substitution of assets by the surety, may be corrected after bid opening and prior to award.

DECISION

U.S. Floors, Inc. (USF) protests the awards made to D.H. Butcher and Company under invitation for bids (IFB) Nos. DACA83-90-B-0193 (IFB-0193) and DACA83-90-B-0194 (IFB-0194), both issued by the Army Corps of Engineers, Honolulu District, for the replacement of bathtubs and showers in housing units on the Aliamanu Military Reservation, Oahu, Hawaii. The protester contends that Butcher's bids should have been rejected because of inadequate bid guarantees.

We dismiss the protest under IFB-0194 and deny the protest under IFB-0193.

Both IFBs required the submission of a price for a base schedule and a price for an additive item. As relevant here, the IFBs required each bidder to submit with its bid a separate bid bond (Standard Form (SF 24)) with good and sufficient surety or sureties acceptable to the government. The security was to be in the form of 20 percent of the bid price or \$3 million, whichever was less. The IFBs required bidders, when providing a bid bond of an individual surety, to

050523 / 143101

obtain from the individual surety an SF 28, Affidavit of Individual Surety, and a pledge of assets. The pledge of assets from each surety was to be in the form of:

(1) evidence of an escrow account containing cash, certificates of deposit, commercial or government securities or other assets; and/or (2) a recorded lien on real estate. The latter required the submission of evidence of fee simple title in the surety and any concurrent owners along with evidence of the amount of any encumbrances and any real estate taxes due and payable and a copy of the current real estate tax assessment of the property or a current appraisal in the form specified.

Bids on both IFBs were opened on September 17, 1990. Butcher was the low bidder on both IFBs. USF was second low bidder on IFB-0193 and third low bidder on IFB-0194. The bids of Butcher included SF 24s in the amount of 20 percent of the bids and listed Brent D. Butcher and Marian J. Butcher as individual co-sureties. The bonds were signed by Duane H. Butcher, "Owner," as principal and by each individual surety. Included was an SF 28 for each surety, which listed various real and personal property of the sureties with a declared fair value of \$657,500 and declared taxable value of \$545,200 and which also listed liabilities.

By letters of September 19 to the contracting agency, USF protested any award to Butcher under either IFB on the bases that the bidder's bid bonds were defective and its bid prices were unrealistically low. By letter of September 21, Brent D. Butcher, one of the individual sureties, requested permission to substitute a certificate of deposit (CD) in lieu of the real estate and personal property previously pledged on IFB-0193 and enclosed a copy of a CD in the name of the United States of America for \$142,000. A new SF 28 was also submitted listing the CD instead of any real and personal property. The contracting officer determined the CD acceptable in lieu of the assets listed on that surety's original SF 28. Brent D. Butcher also submitted a \$150,000 CD under IFB-0194. By letters of September 26 and 29, USF's agency-level protests were denied. Awards were made to Butcher on September 30 under IFB-0193 for the base schedule at \$379,950 and under IFB-0194 for the base schedule and the additive item at \$749,206. These protests followed.

First, since USF as the third low bidder would not have been in line for the award on IFB-0194 even if Butcher's bid were rejected, USF is not an interested party and cannot protest any award to the low bidder under that IFB. ECS Composites, Inc., B-235849.2, Jan. 3, 1990, 90-1 CPD ¶ 7. This protest is, therefore, dismissed.

Concerning IFB-0193, the protester contends that the Affidavits of Individual Surety submitted by Butcher did not

comply with the requirements set forth in the IFB which required each bidder to obtain and submit as part of its bonding from its individual sureties a pledge of assets which is to be evidenced by either an escrow account and/or a recorded lien on real estate. With the lien the bidder had to provide evidence that the surety is vested with fee simple title, evidence regarding encumbrances and tax liabilities on the property, and a copy of a current real estate tax assessment or appraisal. None of this documentation was furnished, as required, with Butcher's bid and, USF argues, the bid should have been rejected. The protester also contends that as of the September 17 bid opening date the bid guarantee was defective because the assets listed in the Affidavits of Individual Sureties were insufficient to support Butcher's bid bond. Finally, the protester argues that the contracting officer's decision to permit the individual surety, Brent D. Butcher, to make a substitution of assets after bid opening and thereby cure the deficiencies in Butcher's bid bond was improper. We disagree.^{1/}

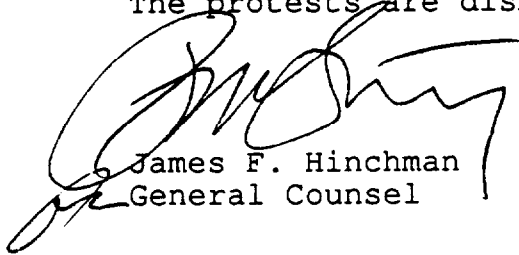
First, an Affidavit of Individual Surety is a document separate from the bid bond itself and serves solely as an aid in determining the responsibility of an individual surety. Site Preparation Contractors Inc., B-232105, Sept. 20, 1988, 88-2 CPD ¶ 269. Thus, for instance, where a surety--as here--has failed to provide a pledge of assets with its SF 28, this concerns a matter of responsibility which may be furnished at any time prior to award. The late submission has no effect on the responsiveness of the bid. See R.C. Benson & Sons, Inc., B-240251.2, July 31, 1990, 90-2 CPD ¶ 92. Second, FAR § 28.203-4 specifically permits the contracting officer to agree to a surety's substitution of assets for those originally pledged after determining that the substitute assets to be pledged are adequate to protect the outstanding bond or

^{1/} The protester also alleges that Brent D. Butcher is ineligible to act as a surety for the bidder because he is a co-owner of the bidder and is precluded from acting as surety since anyone who is a partner in any business of the principal (the bidder Butcher) on the bond cannot act as a surety on that bond. We have no reason to doubt Brent D. Butcher's separate affidavit (the letter was sworn and notarized on the back) of October 12 stating that he has never had an ownership interest in the company. There is no convincing evidence in the record to show otherwise.

guarantee obligation.^{2/} Hence, we find that the sureties' initial failure to submit a pledge of assets, as well as the other documentation noted by USF, and the fact that a substitution of assets by the surety Brent D. Butcher was permitted, had no effect on the acceptability of the Butcher bid.

Finally, we conclude that the substituted asset pledged by Brent D. Butcher was sufficient for the purpose of the bid bond obligation. Butcher bid a total of \$707,550 on IFB-0193. Brent D. Butcher's CD under IFB-0193 in the name of the United States of America for \$142,000 was for slightly more than 20 percent of the bid price. One individual surety is adequate support for a bond. FAR § 28.203(b).

The protests are dismissed and denied.



James F. Hinchman
General Counsel

^{2/} Indeed, FAR § 28.203(d) even permits the contracting officer to allow a bidder--whose surety has been found unacceptable--a reasonable time to substitute an acceptable surety for the unacceptable one.