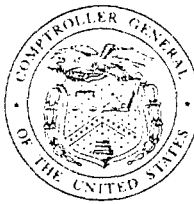


Proc II

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548**

10,217

FILE: B-194629.2

DATE: May 17, 1979

MATTER OF: Alpha Sigma Investment Corp.

DLG01608

DIGEST:

1. Protest may be decided without agency report where it is apparent from submission that protest is without legal merit.
2. Where construction contract bid forms state "good and sufficient surety" must be provided "in proper form and amount", bid was properly rejected where bidder's corporate surety was not listed in Treasury Circular 570. Requirement of adequate surety is material to bid, and failure to provide surety may not be waived or excused.

Alpha Sigma Investment Corporation (ASI) has protested the rejection of its bid upon a construction project. It is clear from ASI's submission that its protest is without legal merit, and therefore, it is not necessary to obtain an agency report before reaching our decision. Klean-Vu Maintenance, Inc., B-194054, February 22, 1979, 79-1 CPD 126; Western Branch Diesel, Inc., B-190407, December 21, 1977, 77-2 CPD 494.

According to its submission, ASI submitted a bid on IFB DOT-CGB-7870 for the construction of Coast Guard barracks and a galley mess in Galveston, Texas. In connection with its bid, ASI received the Standard Forms used for construction contracts: SF 20, Invitation for Bids; SF 21, Bid Form; and SF 22, Instructions to Bidders. ASI's bid was rejected because the offered corporate surety was not listed in Treasury Department Circular 570, entitled "Companies Holding Certificates of Authority as Acceptable Sureties on Federal Bonds and as Acceptable Reinsuring Companies."

DLG01615

[Protest Concerning Bid REJECTION]

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ASI argues that because the requirement of listing in Circular 570 is not specifically stated in the Standard Forms, its failure to provide a listed surety should not affect the consideration of ASI's bid. Alternatively, ASI contends that it should now be permitted to amend its bid by substituting an acceptable surety.

Since 1959, we have consistently held that where a bid guarantee is required as a part of a bid, the failure to provide a guarantee will render the bid nonresponsive. 38 Comp. Gen. 532 (1959); 46 Comp. Gen. 11 (1966); Red Carpet Building Maintenance, B-189991, November 28, 1977, 77-2 CPD 416. That failure cannot be waived or excused unless one of the conditions in Federal Procurement Regulations (FPR) § 1-10.103-4 (1964 ed. amend. 184) is present. 46 Comp. Gen. 11 (1966). Those exceptions are very narrow, and none applies here.

However, in this case, the question is not the total failure to provide a guarantee, but rather the provision of an inadequate guarantee. We addressed this problem recently in Chemical Technology, Inc., B-192893, December 27, 1978, 78-2 CPD 438. Chemical involved a bid guarantee in the form of an irrevocable letter of credit signed by Chemical's president, who also signed the bid. The protester claimed that it had met the requirement specified in SF 21 and 22 of making a "firm commitment" to the Government. We analyzed the reasons for requiring a responsible third party's bid guarantee and held that the bid was properly determined to be nonresponsive because the surety was not a third party. See also Davisville Construction Company, B-190080, December 12, 1977, 77-2 CPD 456 (significant shortfall in the amount required for bond caused bid to be non-responsive.)

ASI contends that the bid forms which it received purported to contain all material terms and conditions applicable to the bid. In support of its position, the protester points to the following language in the IFB:

"[The bid will be based on the terms, conditions, specifications and drawings FULLY DETAILED on Standard Form 21 of this Invitation for Bids.' (emphasis added)]"

Neither Form 21 nor its accompanying instruction sheet, Form 22, mentions Circular 570. Accordingly, the protester argues the defect caused by providing an unlisted surety should not be fatal.

Standard Form 21, to which the protester refers, states that the bid must be accompanied by a "good and sufficient surety." This language puts the potential bidder on notice that not every surety will be considered adequate, and the burden at this point is on the bidder to determine whether its bonding company is acceptable to the Government. Further, SF 22, Instructions to Bidders, which supplements SF 21, states at paragraph number four,

"* * * failure to furnish the bid guarantee in proper form and amount * * * may be cause for rejection of the bid."

The requirement to provide an acceptable surety is stated on the forms which ASI received. It is incumbent upon the would-be bidder to determine which of the sureties available are acceptable to the Government. To do so, the bidder would have to look outside the four corners of the forms. Chemical Technology, Inc., supra. ASI, by consulting the Federal Procurement Regulations in this regard, would have learned of the existence of a convenient list of acceptable sureties, Treasury Circular 570. Since the regulations are accessible to all bidders, it is not unreasonable to expect that bidders in need of information to supplement the provided forms would check that source. ASI's failure to do so resulted in its furnishing a bond from a surety that apparently is unacceptable to the Government, and its bid therefore is nonresponsive. Since the bid was nonresponsive, ASI may not now amend it to make it responsive. Permitting such an amendment would be contrary to established competitive procurement procedures. Newport Ship Yard, Inc., B-191703, May 25, 1978, 78-1 CPD 400; FPR § 1-2.406-3(a) (1964 ed. amend. 165).

We note that companies may be authorized throughout the year to do business with the United States as sureties on bonds, and notices to that effect are published in the Federal Register, although Treasury Circular No. 570 is only published annually as of July 1. ASI does not state that its surety has been authorized to do business subsequent to the publication of the most recent Treasury Circular No. 570; it instead offers to substitute another surety. Under the circumstances, we need not consider the effect of a bidder's submission of a bond from a surety authorized pursuant to 31 C.F.R. 223.3 (1978) to do business with the United States when that surety is not listed in the annual edition of the Circular.

The protest is denied.



Deputy Comptroller General
of the United States