



## Decision

**Matter of:** BW JV1, LLC

**File:** B-401841

**Date:** December 4, 2009

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Joshua B. Levy, Esq., and Julie P. Wilson, Esq., Crivello Carlson, SC, for the protester.

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### DIGEST

Agency properly rejected bid of a joint venture that submitted a bid bond that states that it was executed by a corporation, which was one of the joint venture members, and the joint venture agreement provided that both joint venture members were required to execute the bid bond.

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### DECISION

BW JV1, LLC of Milwaukee, Wisconsin, protests the rejection of its bid by the Department of Veterans Affairs (VA) under invitation for bids (IFB) No. VA-69D-09-IB-0319 for renovations at the Clement J. Zablocki VA Medical Center in Milwaukee. The VA rejected BW JV1's bid as nonresponsive because the agency could not determine that the principal named on the bid bond was the same entity as that identified in BW JV1's bid.

We deny the protest.

The IFB required bidders to submit a bid guarantee, or bid bond, of not less than 20 percent of the bid price but not to exceed \$3,000,000. IFB at 9. BW JV1 submitted the apparent low bid. Agency Report (AR) at 2.

The protester's bid identified the bidder as "BW JV1" of 2735 S. Krahn Road, New Berlin, Wisconsin, and was signed by Bruce Witt, President, and Keith Harenda,

Project Director. The accompanying bid bond identified the principal as “BW JV1”<sup>1</sup> of 1237 W. Bruce Street, Milwaukee, Wisconsin, and contained signatures that appeared to be those of Messrs. Witt and Harenda.<sup>2</sup> The principal on the bid bond was identified as a “joint venture” under the “Type of Organization” section of the bid bond. Attached to the bid bond was a notarized “Acknowledgement of Principal” that identified the principal that executed the “foregoing instrument” (that is, the bid bond) to be “KPH Construction Corp.”; this acknowledgment was signed by Keith P. Harenda as President of KPH Construction Corp. AR, Tab 4, BW JV1 Bid.

In response to a request from the contracting officer, the protester provided VA with a copy of a joint venture agreement that showed that BW JV1 is a joint venture between BW Contracting Services, located at 2735 S. Krahn Road, New Berlin, Wisconsin, and KPH Construction Corp., located at 1237 W. Bruce Street, Milwaukee, Wisconsin. Protest, exhib. C, Joint Venture Agreement at 1. The joint venture agreement provided that neither venture member could execute a security agreement or bond on behalf of, or in the name of, the joint venture except by written authorization of both KPH and BW Contracting.<sup>3</sup> See id. at 6.

The contracting officer concluded that the varying names, addresses, and signatories on the bid and bid bond created an ambiguity as to whether the principal identified in the bid and bid bond are the same legal entity. See AR at 6. VA rejected the protester’s bid, citing Federal Acquisition Regulation (FAR) §§ 14.404-2(a) and 28.101-4(a), which require the rejection of bids that fail to conform to the essential requirements of the IFB or where bidders fail to furnish a bid guarantee in accordance with the requirements of the IFB. AR, Tab 6, VA Rejection Letter, Aug. 19, 2009. This protest followed.

The protester contends that the bid and bid bond were submitted by the same entity. In this regard, the protester explains that the bidder, BW JV1, is a joint venture and that both members of the venture signed the bid and bid bond as President and Project Director of BW JV1. Protest at 2, 5. The different addresses, the protester further explains, are mutually agreed upon offices provided under the joint venture agreement. Id. at 4. Any discrepancy between the names, the protester argues, is an

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<sup>1</sup> The agency points out that the names are slightly different: the name on the bid is BW JV1, ending with the number “1,” while the name on the bond is BW JVI, ending with the Roman numeral “I.” See Contracting Officer’s Statement at 1.

<sup>2</sup> Although the bid bond contained two signatures, names and titles of the two individuals signing the face of the bid bond were not provided.

<sup>3</sup> The record does not contain a written authorization for one joint venture member to act for another with respect to executing the bid bond, nor does the protester assert that such an authorization exists or that one venture partner could, in fact, act for the other in executing the bid bond.

insignificant typographical error which the agency should waive as an informality or minor irregularity under applicable provisions of the FAR. Id. at 4, 7–8, citing FAR §§ 14.301(a), 28.101-4(c)(7), 52.214-19(b).<sup>4</sup> The protester also argues that the additional acknowledgment of principal does not affect the validity of the bid bond, because this acknowledgment was not required by the IFB. Finally, the protester has provided a letter from its surety, which states that it stands behind the validity of bond.

The sufficiency of a bid bond relates to whether the government will receive full and complete protection in the event that the bidder fails to execute the required contract documents and deliver the required performance and payment bonds. Martina Enter./Tom Swenson Gen. Contractors, B-250766, Oct. 21, 1992, 92-2 CPD ¶ 266 at 2 (holding that the bid of a joint venture, which submitted a bid bond in the name of only one of the corporations forming the joint venture, is nonresponsive). Among other things, the terms of the bid bond must clearly establish the liability of the surety at the time of bid opening; when the liability is not clear, the bond is defective. Design for Health, Inc., B-239730, Sept. 14, 1990, 90-2 CPD ¶ 213 at 2. A surety does not incur a liability to pay the debts of another unless it expressly agrees to be bound. Mount Diablo Corp., Inc., B-228193, Nov. 10, 1987, 87-2 CPD ¶ 475. For this reason, we rigidly apply the rule that the principal listed on the bid bond must be the same as the nominal bidder. Opine Constr., B-218627, June 5, 1985, 85-1 C.P.D. ¶ 645. If the bid bond names a principal different from the nominal bidder, it is deficient and may not be corrected after bid opening as a minor informality. Atlas Contractors, Inc./Norman T. Hardee, a Joint Venture, B-208332, Jan. 19, 1983, 83-1 CPD ¶ 69 at 3.

Where the entity that submitted the bid and that is identified as the bid bond principal are exactly the same, any discrepancy between the bidder's and bid bond principal's names is merely a matter of form that does not require rejection of the bid. Harris Excavating, B-284820, June 12, 2000, 2000 CPD ¶ 103 at 3, citing K-W Constr., Inc., B-194480, June 29, 1979, 79-1 CPD ¶ 475. Extrinsic evidence that is reasonably or publicly available and in existence at the time of bid opening may be provided to establish the identity of the bidder and bid bond principal as the same entity. Gem Eng'g Co., B-251644, Mar. 29, 1993, 93-1 CPD ¶ 303 at 2 (award to second-low bidder properly terminated where corporate records and Dun & Bradstreet report resolved discrepancy in the name of the low bidder and bid bond principal); Lamari Elec. Co., B-216397, Dec. 24, 1984, 84-2 CPD ¶ 689 at 2 (entity submitting the bid and identified as the bid bond principal was the same, an

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<sup>4</sup> Section 28.101-4(c)(7) provides that noncompliance with a solicitation requirement for a bid guarantee shall be waived when an otherwise acceptable bid bond was submitted with a signed offer, but the bid bond was not signed by the offeror. Section 52.214-19(b) provides that an agency may waive informalities or minor irregularities in bids received.

individual using different trade names); Jack B. Imperiale Fence Co., Inc., B-203261, Oct. 26, 1981, 81-2 CPD ¶ 339 at 2 (discrepancy in corporate names used in bid and bid bond resolved through submission of corporation records, tax forms, bid bonds, insurance papers, loan documents, and contract documents); K-W Constr., Inc., *supra*. (bidder's and bid bond principal's identity established through submission of corporate documents).

Although extrinsic evidence available to the contracting officer indicates that the different spellings of the bidder's name (that is, BW JV1 and BW JVI) concern a discrepancy that appears to be a mere matter of form, the identification of a corporation as the entity that executed the bid bond calls into question the liability of the surety with respect to the joint venture, thus rendering the bid nonresponsive. Specifically, the bid bond's notarized acknowledgment of the principal states that the person executing the bid bond is Keith P. Heranda, as president of KPH Construction Corp., and that this is "the corporation described in and which executed the foregoing instrument," *i.e.*, the bid bond. AR, Tab 4, BW JV1 Bid. The principal identified on the face of the bid bond, however, is BW JV1, a joint venture, and not KPH Construction Corp. Moreover, although KPH Construction is one of the two joint venture members, the protester's joint venture agreement provides that the bid bond had to be executed by both venture members. *See Joint Venture Agreement* at 6. We find that the bid bond is unclear as to which entity executed the bid bond and that this casts doubt on whether the surety would be liable to the government in the event that the joint venture failed to execute contractual documents after acceptance of the bid.<sup>5</sup>

In sum, we find that the agency properly rejected the protester's bid as nonresponsive. *See Dick Enter., Inc.*, B-259686, B-259686.2, June 21, 1995, 95-1 CPD ¶ 286 at 2-3 (surety's liability inconclusive where bid submission names several legal entities and bid signed by vice president of one corporation, but bond signed by joint venture member). Where a protester submits a bid bond that creates an ambiguity in the identity of the principal and the nominal bidder, the contracting officer is not obligated to reconcile the ambiguity by deductions and inferences in order to make the bid responsive. MKB Constructors, Inc., B-255098, Jan. 10, 1994, 94-1 CPD ¶ 10 at 3. The bidder's intention is established at the time of bid opening and the bidder bears the primary responsibility for properly preparing its bid documents in such a

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<sup>5</sup> As noted above, it appears that both joint venture members signed the front of the bid bond, although the names and titles of the two signers was not provided. Although without more, this discrepancy would not appear to require the agency to reject the protester's bid, *see, e.g., General Ship & Engine Works, Inc.*, B-184831, Oct. 31, 1975, 75-2 CPD ¶ 269 at 5 (obligation of surety not affected by failure of named principal to sign bond), here the bid bond's acknowledgment of principal states that the bid bond was executed by only one corporate joint venture member and not by the joint venture.

fashion that the contracting officer may accept the bid with full confidence that an enforceable contract conforming to all the requirements of the IFB will result.<sup>6</sup> See Outdoor Venture Corp., B-235056, June 16, 1989, 89-1 CPD ¶ 571 at 2.

The protest is denied.

Lynn H. Gibson  
Acting General Counsel

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<sup>6</sup> For this reason, the surety's post-bid opening letter to the contracting officer cannot establish the liability of the surety and responsiveness of the protester's bid. A nonresponsive bid cannot be made responsive after bid opening through an explanation of what the bidder or surety intended. Design for Health, Inc., *supra*, at 3. We also reject the protester's argument that the acknowledgment of principal does not affect the validity of the bid bond because the acknowledgment was not required by the IFB. Where bidders include unsolicited or extraneous materials in their bid submission, those materials are considered part of the bid and can render the bid nonresponsive. See, e.g., Taylor-Forge Eng'g Sys., Inc., B-236408, Nov. 3, 1989, 89-2 CPD ¶ 421 at 1-3 (agency properly rejected bid as nonresponsive where bidder's cover letter conflicted with terms of bid and created an ambiguity).