

DECISION

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

FILE: B-216397

DATE: December 24, 1984

MATTER OF: Lamari Electric Co.

DIGEST:

1. Bid in trade name of individual, accompanied by bid bond on which principal is another trade name of that individual, is responsive where bid bond correctly identifies solicitation and project and the same individual is identified as owner on both bid and bond.
2. Under Federal Acquisition Regulation, procuring agencies are required to refer negative responsibility determinations of small business construction concerns to Small Business Administration for possible certificate of competency, even when determination is based upon past unsatisfactory performance. Agency interpretation that such determination need not be referred to SBA is unreasonable.

Lamari Electric Co. protests the rejection of a bid for certain building renovations at the National Institutes of Health (NIH), Department of Health and Human Services (HHS), Bethesda, Maryland. We sustain the protest.

The apparent low bid on invitation for bids (IFB) No. 263-84-B(95)-0142, a total small business set-aside, was submitted by a firm identified as "Lamari Const." and signed by Paul B. Lamari, owner. However, the bid bond submitted with the bid identified "Lamari Electric Co." as the principal; it also showed Paul B. Lamari as the "owner" of that company. The bond stated the proper IFB number and correctly identified the project as renovation of suite B-100/B-200 in NIH Building 41. On both the bid and the bond, the box indicating that an "individual" was bidding had been checked.

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After initially finding that Lamari was not a responsible contractor because of past unsatisfactory performance and instituting certificate of competency (COC) procedures, NIH discovered the discrepancy between the bid and the bid bond when Lamari, in a letter providing financial and contractual data, stated that its company name was "Lamari Electric trading as Lamari Construction." NIH subsequently rejected the Lamari bid as nonresponsive because the bid was by a firm with a different name (Lamari Const.) than the principal identified in the bid bond (Lamari Electric Co.). In rejecting the bid, NIH reasoned that while each of these firms appeared to be a sole proprietorship, it could not be certain either which one it would be making an award to or that the bond issued to Lamari Electric Co. would guarantee performance by Lamari Const. On October 10, 1984, based on urgency, NIH authorized award to the next low bidder (Kaufman Constructors, Inc.) despite the pending protest.

We have consistently held that a bid bond which names a principal different from the nominal bidder is deficient and that the defect may not be waived as a minor informality. A. D. Roe Co., Inc., 54 Comp. Gen. 271 (1974), 74-2 CPD ¶ 194, and cases cited therein. On the other hand, we have recognized that a bid can be accepted, even if the principal on the bid bond differs from the name of the bidder, if it can be established from information available at the time of bid opening that the bidder is the same legal entity as the principal named on the bid bond. Jack B. Imperiale Fence Co., Inc., B-203261, Oct. 26, 1981, 81-2 CPD ¶ 339; K-W Construction, Inc., B-194480, June 29, 1979, 79-1 CPD ¶ 475.

In the present case, the entity who submitted the bid and who was the principal on the bid bond is the same, i.e., Paul B. Lamari, an individual. In this regard, it is clear that an entity's use of different trade names on a bid or a bid bond has no effect on either the entity's or the bid bond surety's legal obligations. Pedestrian Bus Stop Shelters, Ltd., 63 Comp. Gen. 265 (1984); 84-1 CPD ¶ 331; cf. Las Piedras Construction Corp., B-208555.2, Dec. 27, 1982, 82-2 CPD ¶ 579 (change of name of surety). Also, we have found no provision under Maryland law where an individual, by conducting business under separate trade names, could be construed as being separate legal entities for purposes of contracting. The Lamari bid bond clearly identified the proper IFB and renovation project, as well as listing the principal as Paul B. Lamari, owner of Lamari

Const. and Lamari Electric Co. The surety, in our opinion, would therefore be bound to the government on the bid bond. See Satellite Services, B-207361.2, Apr. 5, 1983, 83-1 CPD ¶ 357.

The only case cited by HHS as precedent for rejecting Lamari's bid as nonresponsive is Martin Co., B-178540, May 8, 1974, 74-1 CPD ¶ 234, where this Office held that a sole proprietorship could not properly be substituted after bid opening for a bid in the name of a corporation. However, as was stated in Ebsco Interiors, B-205526, Aug. 16, 1982, 82-2 CPD ¶ 130:

"The protester and the [agency] argue that in general a contract cannot be awarded to any entity other than the one which submitted the bid [citing Martin Co., B-178540, 74-1 CPD ¶ 234, supra]. This rule does not automatically prohibit an award in cases like this where a bidder uses a trade name instead of its formal corporate name in its bid. Rather, the rule is generally to be applied to situations like that in Martin Company, supra, where it was not clear from the face of the bid which of two or more legal entities is the bidder. Where trade names are used but it is possible to sufficiently identify the actual bidder so that it would not be able to avoid the obligation of the bid, acceptance of the bid is proper. See Mark II, Inc., B-203694, Feb. 8, 1982, 82-1 CPD ¶ 104. . . ."

In this case, only one legal entity is named on both the bid and bid bond, Paul B. Lamari, the individual. Under such circumstances, Lamari's bid was clearly responsive and NIH's rejection of its bid because of the use of differing trade names on the bid and bid bond was improper.

As noted above, NIH initially determined that Lamari was not a responsible contractor, based upon alleged past unsatisfactory performance, and referred this matter to the Small Business Administration (SBA) for a possible COC before it discovered the discrepancy between the bid and bid bond. The agency now contends that even if Lamari's bid is found responsive, it need not refer this matter to SBA. HHS relies upon a series of Federal Acquisition Regulation (FAR) provisions, each referencing another, to conclude that in the case of construction contracts, a nonresponsibility determination based on past performance is exempt from the

requirement for referral based on 15 U.S.C. § 637(b)(7) (1982), which gives SBA exclusive authority to determine the competency of small business concerns.

The regulations in question are the following:

"9.103 Policy

"(a) Purchases shall be made from, and contracts shall be awarded to, responsible prospective contractors only.

"(b) No purchase or award shall be made unless the contracting officer makes an affirmative determination of responsibility. In the absence of information clearly indicating that the prospective contractor is responsible, the contracting officer shall make a determination of nonresponsibility. If the prospective contractor is a small business concern, the contracting officer shall comply with Subpart 19.6, Certificates of Competency and Determinations of Eligibility. . . . (Emphasis supplied.)

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"19.602-1 Referral.

"(a) Upon determining and documenting that a responsive small business lacks certain elements of responsibility (including, but not limited to, competency, capability, capacity, credit, integrity, perseverance, and tenacity), the contracting officer shall--

"(1) Withhold contract award (see 19.602-3); and

"(2) Refer the matter to the cognizant SBA Regional Office in accordance with agency procedures except that referral is not necessary if small purchase procedures are being used or if the small business concern--

"(i) Is determined to be unqualified and ineligible because it does not meet the standard in 9.104-1(g); provided, that the determination is approved by the chief of the contracting office; or

"(ii) Is suspended or debarred under Executive Order 11246 or Subpart 9.4. (Emphasis supplied.)

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9.104 Standards

9.104-1 General Standards

"To be determined responsible, a prospective contractor must--

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"(g) Be otherwise qualified and eligible to receive an award under applicable laws and regulations. For standards pertaining specifically to construction contracts, see Subparts 36.2, 36.3, and 36.4. (Emphasis supplied.)

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"36.201 Evaluation of contractor performance

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"(c) Distribution and use of performance reports . . .

"(2) Before making a determination of responsibility in accordance with Subpart 9.1, the contracting officer may consider performance reports in accordance with agency instructions."

HHS argues that the reference in FAR 9.104-1(g) to FAR Subparts 36.2, 36.3 and 36.4 exempts agencies from submitting nonresponsibility determinations of small business concerns on construction contracts to the SBA where the determination is based upon past unsatisfactory performance. These subparts, however, do not contain standards relating to bidder responsibility, qualifications, or eligibility.

Section 36.201 merely addresses the preparation and use of performance reports, which may be used to evaluate bidder responsibility in general. Moreover, as confirmed by a review of the historical files in the FAR Secretariat, it is clear that the last sentence of section 9.104-1, "General Standards," cross-referencing the regulations concerning construction contracts, was intended to apply to all subsections of that section. This section 9.104-1, supra, lists all standards which prospective contractors must meet in order to be found a responsible contractor, e.g., adequate financial resource, satisfactory performance record, etc.

Therefore, we believe the HHS interpretation of the FAR as exempting it from the statutory requirement of referral to SBA in this case is unreasonable. Negative responsibility determinations of small businesses competing for construction contracts clearly are subject to the COC procedures.

In view of the foregoing, Lamari's protest is sustained. We do not, however, believe it would be practicable to disturb the award, which was made more than 2 months ago, since the record indicates that renovation of Building 41 is urgently required to accommodate both an increase in the number of investigations and the biological requirements of the National Cancer Institute laboratories that will occupy it.

for Milton J. Astor
Comptroller General
of the United States