Kuppert

Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Pete Vicari General Contractor, Inc.

File: B-236927

Date: January 23, 1990

DIGEST

Agency reasonably found individual surety on bid bond unacceptable, and thus properly rejected bidder as non-responsible, where, in response to agency request for supporting information showing ownership and value of assets claimed, the surety submitted escrow agreement as a pledge of assets, but the agreement was made subject to Louisiana, rather than federal law; agency was not required to compromise the financial guarantee represented by the bid bond by making government subject, in case of default, to laws under which its rights may be less than under federal law, which otherwise applies to federal contracts.

DECISION

Peter Vicari General Contractor, Inc., protests the rejection of its low bid under invitation for bids (IFB) No. GS-07P-89-HUC-0660, issued by the General Services Administration (GSA) for fire safety improvements, at the United States Custom House, New Orleans, Louisiana. The contracting officer rejected the protester's bid because the information provided by the individual sureties concerning their assets was insufficient to prove their acceptability.

We deny the protest.

The IFB required each bidder to provide a bid guarantee in an amount equal to 20 percent of its bid price. The IFB also contained General Services Acquisition Regulation (GSAR) § 552.228-74, "Pledges of Assets," which required bidders submitting guarantees supported by individual sureties to obtain pledges of assets from those individuals in the form of either (1) evidence of an escrow account containing commercial and/or government securities, or (2) a recorded covenant not to convey or encumber real estate.

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Vicari, the apparent low bidder, submitted as its guarantee a bid bond naming two individual sureties. Following bid opening, the agency, in reviewing the affidavits of individual surety (Standard Form (SF) 28) included with Vicari's bond, determined that ownership and value of the sureties' stated assets were not clearly established. By letter dated July 21, 1989, the agency informed Vicari that reliable and verifiable supporting documentation had to be submitted within 10 days, and that the escrow account specified in the GSA regulation incorporated in the IFB would be one acceptable type of documentation. Thereafter, by letters and telephone conversations, the agency advised Vicari of deficiencies in the information furnished, and Vicari attempted to correct the deficiencies.

One of the areas the agency deemed deficient concerned evidence of an escrow account for one of the sureties. On August 10, the protester delivered an escrow agreement to the contracting officer and, although the parties disagree on certain specifics, the record shows that at least as of August 31, the agency had advised Vicari that the escrow agreement as submitted was insufficient because it provided in paragraph 27 that "this Escrow Agreement shall be governed by the laws of Louisiana in all respects, including matters of construction, validity and performance." The Hibernia Bank, the escrow agent, refused GSA's request that this provision be deleted, agreeing only to modify the clause to affect only potential disputes to which the bank was a party. GSA considered this modification inadequate and thus determined that the surety had not sufficiently shown that it had assets that would be available in the event of default, and rejected Vicari as nonresponsible.

Federal Acquisition Regulation (FAR) § 28.202-2(a) requires the contracting officer to determine the acceptability of individuals proposed as sureties, and states that the information provided in the SF 28 is helpful in determining the net worth of a proposed individual surety. The contracting officer is not limited to consideration of the information in the SF 28, however, and may go beyond it where necessary in making his decision. Transcontinental Enters., Inc., 66 Comp. Gen. 549 (1987), 87-2 CPD ¶ 3. One way the agency may go beyond the SF 28 is to require pledges of assets from individual sureties, as authorized by GSAR § 528.202-71; this step assures that surety assets shown on the SF 28 will be available to reimburse the government's costs in the event of a default. Ultimately, the determination of an offeror's responsibility as it is affected by the financial capabilities of offered individual sureties involves the exercise of subjective business judgment, and we will not disturb such a determination unless it is shown

to be unreasonable. Eastern Maintenance Servs., Inc., B-220395, Feb. 3, 1986, 86-1 CPD ¶ 117.

Applying the above standard, we find that GSA's actions here were reasonable. Specifically, it was proper for GSA to request supporting information establishing the ownership and value of the sureties' claimed assets, and it was proper for the agency to reject the escrow agreement Vicari furnished to satisfy this requirement based on the qualifying language in paragraph 27.

In this regard, paragraph 27, even as modified, made the contract subject to the laws of Louisiana rather than federal law, which governs contracts entered into by the government. See Nationwide Roofing and Sheet Metal, Inc., 64 Comp. Gen. 474 (1985), 85-1 CPD ¶ 454. Application of state law gives rise to the possibility that the government's rights in case of default would be less than under federal law. We have held that a bid guarantee containing similar qualifying language as to applicable law that renders the government's rights uncertain warrants rejecting a bid as nonresponsive. See generally Carolina Security Patrol, Inc., B-236276, Oct. 5, 1989, 89-2 CPD ¶ 320.

Although here the issue is one of responsibility, the agency's concerns with the qualifying language are just as valid. GSA is unfamiliar with the intricacies of Louisiana law and was concerned with the possibility that its rights in a dispute with the bank could be adjudicated differently than would be the case under federal law; if GSA accepted the escrow agreement as an adequate pledge of assets, it would be agreeing to subject the government's rights concerning the escrow assets to this uncertainty. GSA was not required to do so and thereby possibly compromise the financial guarantee in support of which the pledge of assets was requested in the first place.

Vicari argues that GSA afforded it an insufficient opportunity to come up with an escrow agreement. We disagree. While, as indicated above, the parties dispute the point at which GSA first advised Vicari that it wanted paragraph 27 deleted, GSA in mid-August furnished Vicari with a sample acceptable escrow agreement, and on August 31 participated in a telephone conference with the protester and the Hibernia Bank. During this conference, GSA clearly stated that paragraph 27, even as modified, would likely be considered to render the escrow unacceptable. We conclude that GSA gave Vicari ample opportunity to develop an acceptable escrow agreement.

Accordingly, we find that the agency reasonably viewed one of Vicari's individual sureties as unacceptable, and thus properly rejected Vicari as nonresponsible.

The protest is denied.

James F. Hinchman
General Counsel