



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Bundick Enterprises, Inc.

File: B-239867.2

Date: November 19, 1990

Terry G. Bundick for the protester.
Sharon Matsumara, Esq., Acting Associate Counsel, Department of the Navy, for the agency.
Anne B. Perry, Esq., and John F. Mitchell, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest challenging the application of the new individual surety regulations to the procurement is dismissed as untimely where protester did not protest this application within 10 working days of learning agency intention to apply the new regulations.
2. Protester properly was found nonresponsible where sureties pledged assets which are unacceptable under the current regulatory requirements.

DECISION

Bundick Enterprises, Inc. protests the rejection of its bid under invitation for bids (IFB) No. N62474-89-B-6671, issued by the Department of the Navy for the installation of motor operated valves and a fuel pipeline stripping pump at Defense Fuel Supply Point, Ozol, California. The Navy rejected Bundick's bid because its individual bid bond sureties were found to be nonresponsible.

We dismiss in part and deny the protest in part.

The IFB was issued on December 21, 1989, and had an amended bid opening date of February 28, 1990. The IFB required bidders to submit a bid bond in an amount equal to 20 percent of the bid price. The solicitation contained a standard form (SF) 24 bid bond which instructed bidders who were proposing individuals as sureties to provide two or more responsible sureties to execute the bid bond. The bidder also was required to provide a completed standard form (SF) 28, Affidavit of Individual Surety, setting forth financial

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information for each individual. Amendments concerning the acceptability of individual sureties became effective on February 26, subsequent to issuance of the IFB. 54 Fed. Reg. 48,985 (1989). These new regulations at Federal Acquisition Regulation (FAR) § 28.203 (FAC 84-53) contain specific criteria by which to judge the acceptability of individual sureties, including changes in the definition of acceptable assets as well as the new requirement that an offeror may submit from one to three individual sureties for each bond, provided that the pledged assets, alone or when combined, equal or exceed the penal amount of the bond.

Five bids were received by the amended bid opening date of February 28. The protester submitted the apparent low bid of \$158,220, which was signed by "Terry G. Bundick, President," and provided a bid bond in the amount of 20 percent of its bid price executed by two individual sureties, Walter T. Robertson and Terry G. Bundick.

Mr. Bundick's SF 28 reflected a net worth of \$216,255. The listed assets included: unencumbered, solely owned real estate valued at \$4,800; construction equipment valued at \$137,375; cash in banks in the amount of \$9,230; accounts receivable in the amount of \$39,255; cash value insurance in the amount of \$2,800; automobiles valued at \$13,500; personal property valued at \$22,250; guns and jewelry valued at \$8,400; musical equipment valued at \$5,850; and office equipment valued at \$5,320.

Mr. Robertson's SF 28 reflected a net worth of \$675,000. The assets listed by Mr. Robertson included real estate equity in the surety's principal home and business address valued at \$150,000; heavy construction equipment valued at \$550,000; minus liabilities in the amount of \$25,000.

By a letter dated March 14, the contracting officer requested that Bundick submit additional information in support of the purported net worths of the individual sureties, since it had failed to provide any evidence of such with its bid. The contracting officer informed Bundick in this letter that the new Federal Acquisition Regulation concerning the acceptability of individual sureties would apply and to therefore supply the type of information necessary. The contracting officer enclosed a copy of these regulations for Bundick's convenience. In a March 19 letter Bundick submitted only personal financial statements of the individual sureties. The contracting officer again requested additional information of the type required by the new regulations in a letter dated April 6. By a letter dated April 10, Bundick requested that the contracting officer permit Bundick to replace its individual sureties with a corporate surety since the new regulations render most of its individual sureties' assets

unacceptable. The contracting officer did not respond to Bundick's request to substitute a corporate surety and ultimately determined that the individual sureties proposed by Bundick were unacceptable and rejected Bundick as nonresponsible pursuant to FAR § 28.203(c).

By a letter dated April 11, but not received until April 17, Bundick filed a protest in our Office challenging the contracting officer's application of the new regulations in this procurement, and alleging, in the alternative, that it was improper for the agency to refuse Bundick's request to substitute a corporate surety for its individual sureties under the "Substitution of Assets" clause, FAR § 28.203-4. Bundick challenges the nonresponsibility determination on the grounds that it should not have been based upon the new regulations because they were not a part of the solicitation package.

Bundick's challenge against the applicability of the new regulations to this procurement was not timely filed. Bundick was informed by a letter dated March 14, and received sometime before its March 19 reply, that the new regulations would apply, but did not protest until April 17.^{1/} Although Bundick alleges that it was not aware of the new regulations until April 6, it offers no explanation of why the March 14 letter which enclosed a copy of the new regulations was not adequate notice that the new individual surety regulations would be applied. In order to be timely, a protest must be filed not later than 10 working days after the basis for protest is or should have been known. 4 C.F.R. § 21.2(a)(2) (1990). Since Bundick did not file a protest in our Office within 10 days after it received the March 14 letter its protest is untimely.


While under the new regulations it is still the contracting officer's obligation to determine the acceptability of individual sureties, the regulations also specifically delineate those assets which are acceptable and identifies some, but not all, of those that are unacceptable. FAR §§ 28.203-2(b) and (c). Here, Mr. Robertson listed his principal residence and construction equipment as the assets for security of his bond obligations. Both of these, however, are specifically proscribed in the new regulations as unacceptable assets and, therefore, the contracting officer did not err in determining Mr. Robertson to be an unacceptable surety. As Mr. Bundick acknowledges in his comments on the agency report, nearly all his listed assets also are

^{1/} Although Bundick's original protest letter is dated April 10, we did not receive it in our Office until April 17, which is the relevant date for determining timeliness. 4 C.F.R. § 21.0(g).

unacceptable under the new regulations. See FAR
§§ 28.203-2(c)(3)(ii) and (6).

Bundick's final argument is that it should be permitted to substitute a corporate surety for the two individual sureties rejected by the contracting officer under the "Substitution of Assets" clause. FAR § 28.203-4. That clause does not permit offerors to replace sureties, rather, it permits a surety to substitute new assets for those already pledged. Except in special circumstances not applicable here, the replacement of unacceptable sureties after bid opening is not allowable since the liability of the sureties is an element of responsiveness which must be established at the time of bid opening. See e.g., FAR § 28.101-4; Allied Prod. Management Co., Inc., B-236227.2, Dec. 11, 1989, 89-2 CPD ¶ 534.

The protest is dismissed in part and denied in part.


James F. Hinchman
General Counsel