

Gary



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Astro Painting Company

File: B-247922.2

Date: June 19, 1992

George G. Benetatos, Esq., for the protester.
Lawrence W. Luecking, for D&K Painting Company, Inc., an interested party.
Paul M. Fisher, Esq., Department of the Navy, for the agency.
Stephen J. Gary, Esq., and David Ashen, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Where bidder failed, after being given a second opportunity, to furnish documentation required to support the acceptability of bidder's proposed individual surety, the agency reasonably found surety unacceptable and bid was properly rejected.

DECISION

Astro Painting Company protests the Department of the Navy's award of a contract to D&K Painting Company, Inc. (D&K), under invitation for bids (IFB) No. N62474-91-B-0616, for painting services at the Naval Air Station, Moffett Field, California. Astro objects to the rejection of its bid on the ground that its proposed individual bid bond surety was unacceptable.

We deny the protest.

The solicitation required that a bid bond equal to 20 percent of the bid price be submitted with the bid. In the event the bid bond was executed by an individual surety, the IFB's "Instructions to Bidders" also required the offeror to obtain from the surety and submit with its bid a completed standard form (SF) 28, Affidavit of Individual Surety, and a pledge of assets. Further, with respect to any pledges of real property, the solicitation generally repeated the requirements of FAR § 28.203-3(a), specifying that the bidder provide:

"(i) Evidence of title in the form of a certificate of title prepared by a title insurance

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company approved by the United States Department of Justice. This title evidence must show fee simple title vested in the surety along with any concurrent owners; whether any real estate taxes are due and payable; and any recorded encumbrances against the property, including the lien filed in favor of the government as required by FAR § 28.203-3(d);

"(ii) Evidence of the amount due under any encumbrance shown in the evidence of title;

"(iii) A copy of the current real estate tax assessment of the property or a current appraisal dated no earlier than 6 months prior to the date of the bond, prepared by a professional appraiser who certifies that the appraisal has been conducted in accordance with the generally acceptable appraisal standards as reflected in the Uniform Standards of Professional Appraisal Practice, as promulgated by the Appraisal Foundation. . . ."

Although Astro's bid of \$440,000 was second low when bids were opened on September 24, 1991, the Navy found the apparent low bidder nonresponsible, determined that Astro was next in line for award, and then reviewed Astro's bid bond. To satisfy the IFB's bid bond requirement, Astro had submitted a bid bond on SF 24, Bid Bond, executed by a representative of Astro as principal and John Stefanidis as individual surety. The bidder also submitted the required SF 28, executed by Mr. Stefanidis as individual surety and indicating the pledge of real property in Astoria (Queens), New York.¹

In reviewing Astro's bid, the Navy determined there were deficiencies in the documentation that Astro had submitted to support the acceptability of the pledged property. First, the documentation failed to establish that Mr. Stefanidis was the fee simple owner of the pledged property. Since only Mr. Stefanidis had signed the SF 28, the Navy concluded that he was the sole individual surety and that Astro was therefore required to demonstrate that Mr. Stefanidis possessed fee simple title to the property. The 1978 bargain and sale deed submitted by Astro, however, indicated that the property was owned jointly by two other

¹Mr. Stefanidis also pledged real property in San Bruno, California, which the agency determined was his residence and therefore unacceptable under FAR § 28.203-2(c)(3)(ii), which provides that "[u]nacceptable assets include . . . real property which is a principal residence of the surety." Astro has not protested this determination.

individuals--Mr. Stefanidis' spouse, Katherine Stefanidis (nee Lykiardopoulos), and Klio Lykiardopoulos.

In addition, the Navy noted that another document that Astro had submitted as evidence of title, a title insurance policy in the names of Katherine Stefanidis and Klio Lykiardopoulos, was stale, having been issued in 1978; that a submitted appraisal also was not current, having been performed more than six months prior to the date of the bid; that the appraisal was not certified as having been prepared in accordance with generally accepted appraisal standards; and that there was no evidence of a lien on the property having been recorded in favor of the government. Accordingly, by letter dated January 15, 1992, the agency asked Astro to provide the following information to satisfy the requirements of the IFB and of the FAR:

"a. You will need to submit a lien on the real estate for the benefit of the government, and that lien must be recorded.

"b. You will need to submit a certificate of title. . . . If a certificate of title cannot be obtained, a title report written specifically for this office must be submitted. This title evidence must show fee simple title vested in the surety along with any concurrent owners. . . .

"c. You will need to submit a copy of the current real estate tax assessment . . . or a current appraisal dated no earlier than six months prior to the date of the bond . . . [T]he appraisal . . . was prepared in February 1990 . . . more than six months prior to the date of the bond.

"d. You will need to submit evidence of the amount due under any encumbrance shown in the evidence of title."

On January 30, Astro submitted a 1978 contract of sale, again indicating that the property was jointly owned by Katherine Stefanidis and Klio Lykiardopoulos; a statement of the remaining balance due on a mortgage on the property; and a more recent appraisal which, however, again lacked the required certification. After reviewing this material, the Navy advised Astro by letter of February 3 of several remaining deficiencies. Among other things, the agency pointed out that "no lien was provided on the Astoria . . . property," and that "the title information does not indicate any interest in the property by the individual surety, John Stefanidis." In response to the agency's second notice of deficiencies, Astro submitted a document granting a lien on the Astoria property in favor of the government, executed by

its co-owners, Katherine Stefanidis and Klio Lykiardopoulos. However, despite the agency's admonition that such a lien "must be recorded," Astro submitted no evidence that the lien had been recorded.

After reviewing the information submitted by Astro, the Navy concluded that the documentation failed to establish the acceptability of the proposed individual surety, since: Astro still had not provided a certificate of title; there was no indication that Mr. Stefanidis, whom the agency continued to view as the sole individual surety, held a fee simple interest in the property; and Astro had not provided evidence of a properly recorded lien. Accordingly, on March 6 the agency advised Astro that its proposed surety had been found unacceptable and that Astro had been found nonresponsible on that basis. After the agency awarded the contract to D&K, the next low, responsible bidder, Astro filed this protest.

Astro denies that its bid guarantee was unacceptable. According to the protester, Mr. Stefanidis was not required to possess a fee simple interest in the pledged property, because he was not the individual surety proposed by Astro; instead, according to Astro, the individual sureties were Katherine Stefanidis and Klio Lykiardopoulos, who were the fee simple owners of the pledged property. Astro argues that a statement from the co-owners authorizing Mr. Stefanidis to place liens against the property "to bid on government jobs," which it submitted with its bid, was a power of attorney that permitted Mr. Stefanidis to sign the SF 28 on their behalf, and indicated their intent to be bound as sureties. Astro also asserts that the unrecorded lien it submitted also indicated an intent to be bound on the part of the co-owners. Finally, Astro argues that the property owners' failure to record their executed lien in favor of the government was a minor informality which the agency should have allowed them to correct.

The contracting officer is vested with a wide degree of discretion and business judgment in determining the acceptability of an individual surety, and we will not question such a determination so long as it is reasonable. Santurce Constr. Corp., 70 Comp. Gen. 133 (1990), 90-2 CPD ¶ 469. It is the surety's obligation to provide the contracting officer with sufficient information to clearly establish the surety's acceptability. Southern California Eng'g Co., Inc., 69 Comp. Gen. 387 (1990), 90-1 CPD ¶ 365. Nevertheless, agencies may not automatically reject a bidder for unacceptable individual sureties because the SF 28 and supporting documentation contain minor defects that might easily be remedied. Gene Quigley, Jr., 70 Comp. Gen. 273 (1991), 91-1 CPD ¶ 182. Since these matters concern bidder responsibility, absent any evidence that the sureties lack

integrity or credibility, the agency should give the bidder the opportunity to have his sureties provide satisfactory explanations or pledge sufficient and acceptable assets. The procuring agency, however, is not required to delay an award unreasonably to allow a bidder to show that its surety is responsible. Id.

In this case, we find that although the agency afforded Astro ample opportunity to document the acceptability of the pledged property (and therefore of the proposed individual surety), the information furnished by Astro did not clearly establish that the asset was acceptable. As we have stated previously, the regulations applicable to individual sureties "contain specific criteria by which to judge the acceptability of individual sureties," and "specifically delineate those assets which are acceptable and identify some, but not all, of those that are unacceptable." Bundick Enters., Inc., 70 Comp. Gen. 94 (1990), 90-2 CPD ¶ 402. These regulations contain documentation requirements that must be satisfied in order for a particular pledged asset and for the surety pledging that asset to be found acceptable. Id. For example, FAR § 28.203-3(a)(1) requires the submission of a certificate of title prepared by an approved title insurance company and showing "fee simple title vested in the surety along with any concurrent owners." In addition, FAR § 28.203-1(a) explicitly states that "[a]n individual surety may be accepted only if a security interest in [acceptable] assets . . . is provided to the government by the individual surety. The security interest shall be furnished with the bond." Further, FAR § 28.203-3(b) provides that "[f]ailure to provide evidence that [a] lien [in favor of the government] has been properly recorded will render the offeror nonresponsible." Here, the record shows that Astro failed to satisfy these requirements.

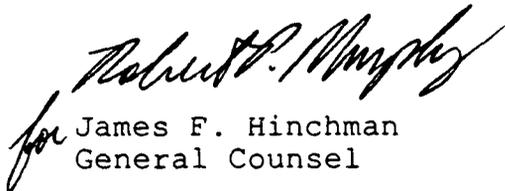
First, Astro failed to provide a certificate of title prepared by an approved title company. Instead, it submitted documents relating to the purchase of the property by Ms. Stefanidis and Klio Lykiardopoulos in 1978--a contract of sale, a bargain and sale deed, and a title insurance policy in favor of Ms. Stefanidis and Klio Lykiardopoulos. Astro was advised on two occasions that the documents it submitted did not satisfy the requirement for a proper certificate of title. Unlike the information Astro submitted, a proper certificate of title, as indicated in the solicitation, would have revealed whether, subsequent to the purchase of the property in 1978, any liens against the property had been recorded which would have priority over the required lien in favor of the government. A bidder's failure to submit evidence of title prepared by an approved title insurance company furnishes a reasonable basis to the

agency for finding the proposed surety unacceptable. See Don Kelland Materials, Inc., B-245801, Feb. 3, 1992, 92-1 CPD ¶ 135.

As for the requirement for a recorded lien, while Astro eventually submitted a document granting a lien in favor of the government executed by the apparent co-owners of the Astoria property, it failed to provide evidence that the lien was recorded (and has not yet provided such evidence in connection with its protest). Although Astro argues that this was only a minor informality which it should have been allowed to correct, the record shows it was given ample opportunity to provide the required documentation. In any case, we do not consider this to be a minor informality. The requirement that the lien in favor of the government be recorded serves the purpose of assuring that the government's security interest has priority over subsequently filed liens. Astro's failure to establish compliance with the requirement therefore was a material deficiency which rendered its proposed surety (or sureties), and thus its bid, unacceptable.

In view of our findings above, the issue of whether Mr. Stefanidis was the individual surety for Astro's bid bond, or was merely acting as an agent for the co-owners of the pledged property, is academic; even were we to find that the co-owners of the pledged property were the actual sureties, Astro's failure to provide the required documentation to support the acceptability of the pledged asset would render those individuals unacceptable as well.

The protest is denied.


for James F. Hinchman
General Counsel