

McAuliffe 1500.59



Comptroller General
of the United States

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Washington, D.C. 20548

Decision

Matter of: National Foundation Company

File: B-253369

Date: September 1, 1993

E. Alan Arnold, Esq., Smith, Currie & Hancock, for the protester.

Lester Edelman, Esq., Department of the Army, for the agency.

Susan K. McAuliffe, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Bid submitted in the name of Nicholson Construction Company, a Georgia corporation, cannot be accepted where there is no such corporation and there is no contemporaneous, publicly available evidence in the record that supports the claim that Nicholson Construction Company was the trade name or assumed name of a Georgia corporation, National Foundation Company, which was not mentioned in the bid (except by reference to that firm's expired Cage Code and a county business license number, now also expired, for the firm), although individual who signed the bid as vice president was also the vice president of National Foundation Company and both named companies were located at the same address.

DECISION

National Foundation Company protests the rejection of its bid as nonresponsive under invitation for bids (IFB) No. DACW62-93-B-0007, issued by the Army Corps of Engineers for remedial action at Center Hill Dam, Tennessee.

We deny the protest.

The apparent low bid was submitted by Nicholson Construction Company; however, the bid bond accompanying the bid named the principal as "National Foundation Company dba Nicholson Construction Company." The bid as submitted by the Nicholson Construction Company identified Nicholson Construction Company as a Georgia corporation. The bid referenced a taxpayer identification number and an expired

Cage Code of National Foundation Company.¹ The bid package indicated that both companies had the same vice president since he signed both the bid and bid bond. The bid and bid bond also gave the same address for both companies. The bid submitted by Nicholson Construction Company did not mention National Foundation Company's name and did not contain that company's corporate seal. The bond issued to National Foundation Company dba Nicholson Construction Company included National Foundation Company's corporate seal.

The Corps rejected the Nicholson Construction Company bid as nonresponsive because the bid submission did not establish that the two named companies were the same legal entity. The Corps concluded that the expired Cage Code number, unidentified taxpayer number, same vice president and same address at best indicated that the two firms were related. In light of information obtained from the Georgia Secretary of State, however, the agency could not conclude that the entities were in fact the same. The Secretary of State had reported that National Foundation Company and Nicholson Construction Company, Inc. were registered as separate corporations in Georgia. Nicholson Construction Company was not reported to be a listed trade or assumed name of National Foundation Company. Nicholson Construction Company, as the protester now acknowledges, is not a corporation registered in Georgia. (The agency noted the bidder's relationship to another corporation, Nicholson Construction Company, Inc., which firm's letterhead stationery had been submitted to the Corps by the bidder in correspondence indicating that both Nicholson firms might be the same legal entity.) Although contacted and given an opportunity to submit information after bid opening to resolve the admitted discrepancy, Nicholson Construction Company failed to provide the promised clarification to the agency. The Corps subsequently rejected the bid as nonresponsive. This protest followed.

The protester challenges the agency's determination that the bid was nonresponsive. National Foundation Company asserts that although there is a discrepancy between the nominal bidder and the principal named in the bid bond, the name used in the bid documents (Nicholson Construction Company) and the name used in the bid bond (The National Foundation Company dba Nicholson Construction Company) identify the same legal entity since Nicholson Construction Company is a trade name for National Foundation Company. The protester states that National Foundation Company is the actual bidder.

¹A Cage Code is a code given to contractors so that payment can be executed and to track ownership of technical data.

The determination of what legal entity is actually bound to the bid is a matter of responsiveness. Haz-Tad, Inc., et al., 68 Comp. Gen. 92 (1988), 88-2 CPD ¶ 486. The test for responsiveness is whether the bid as submitted represents an unequivocal offer to provide the requested supplies or services at a firm, fixed price. Uncertainty as to the identity of the bidder is a circumstance that renders a bid nonresponsive, since the bidder potentially could avoid the obligation to perform the contract. See Cline Enters., Inc., B-252407, June 24, 1993, 93-1 CPD ¶ 492. A bid from a nonexistent entity cannot be accepted since upon acceptance of the bid, no one would be bound to perform the IFB work. Martin Co., B-178540, May 8, 1974, 74-1 CPD ¶ 234. An award to an entity other than that named in the bid constitutes an improper substitution of bidders. Id.; Syllor, Inc. and Ease Chem., B-234723; B-234724, June 6, 1989, 89-1 CPD ¶ 530. Further, where the bidder has allegedly bid under a trade or assumed name, the bid can only be accepted if there is evidence, existing and publicly available at the time of bid opening, that establishes with reasonable certainty the actual bidder's use of the trade name. See Coonrod & Assocs., 67 Comp. Gen. 117 (1987), 87-2 CPD ¶ 549; Sunrise Int'l Group, Inc., B-251956, Feb. 8, 1993, 93-1 CPD ¶ 114; Ebsco Interiors, B-205526, Aug. 16, 1982, 82-2 CPD ¶ 130.

Here, the bid does not reveal with sufficient certainty the identity of the nominal bidder. The bid identifies Nicholson Construction Company as the nominal bidder and includes a certification that the bidder is a Georgia corporation. Relying primarily on the information on the bid bond, National Foundation claims in its protest submissions that it is the actual bidder and that Nicholson Construction Company is merely a trade name used by the firm for conducting business in the state of Georgia. The bid, however, does not identify the protester as the actual bidder. The Cage Code included in the bid is expired and, like the listed taxpayer identification number, is unrelated to the bidder actually named in the bid and certified to be an existing corporation in Georgia. Contrary to the bid certification, the Secretary of State's office for Georgia reports, and the protester now does not contest, that Nicholson Construction Company is not a Georgia corporation. The protester's corporate seal is not included in the Nicholson Construction Company bid and National Foundation Company is not mentioned anywhere in the bid; the above-mentioned unidentified numbers referenced in the bid (which subsequent correspondence showed were once assigned to National Foundation Company), and the similarity in address and corporate officers are simply insufficient to establish National Foundation Company as the actual bidder.

Further, the record contains no contemporaneous, publicly available evidence that reasonably establishes that Nicholson Construction Company was a trade or assumed name for National Foundation Company and that the two firms were the same legal entity. The protester's submissions include a copy of a May 1989 agreement between National Foundation Company and Nicholson Construction Company, Inc., under which National Foundation purchased the right to the other firm's corporate name for use in Georgia. However, this agreement was not publicly available for the agency to consider in its review of the propriety of the bid.

Accordingly, regardless of the discrepancy between the bid and bond documents which the agency cites as its primary grounds for rejection of the bid, the contracting officer acted properly in rejecting the bid. We agree with the agency that it had no reasonable basis to conclude, on the basis of any evidence publicly available as of bid opening, that the bid was actually submitted by National Foundation Company using Nicholson Construction Company as a trade or assumed name. Since the uncertainty of the identity of the actual bidder renders the bid nonresponsive, acceptance of the bid would have constituted an improper substitution of bidders. Sunrise Int'l Group, Inc.; Eagle III Knoxville, Inc., B-252735; B-252735.2, July 27, 1993, 93-2 CPD ¶ ___; Syllor, Inc. and Ease Chem., supra.

The protest is denied.


for James F. Hinchman
General Counsel