



Comptroller General
of the United States
Washington, D.C. 20548

2092211

Decision

Matter of: National Environmental Services Company, Inc.
File: B-254377
Date: November 22, 1993

James M. Mack, Esq., for the protester.
Gilber H. Chong, Esq., and Paul M. Fisher, Esq., Department of the Navy, for the agency.
Peter A. Iannicelli, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest is dismissed as untimely where initial agency-level protest against agency's nonresponsibility determination was filed more than 10 working days after protester received contracting agency's notification that protester was found nonresponsible because its individual surety's assets did not satisfy the requirements of the solicitation and the Federal Acquisition Regulation.

DECISION

National Environmental Services Company, Inc. (NESCO) protests the rejection of its bid under invitation for bids (IFB) No. N62474-92-B-0565. The IFB was issued by the Department of the Navy for removing asbestos materials and installing non-asbestos materials in buildings at various military installations in the San Francisco area. The protester contends that its bid was improperly rejected as nonresponsible on the ground that the proposed individual bid bond surety was unacceptable.

We dismiss the protest because the initial protest to the agency was not timely filed.

The IFB was issued on February 11, 1993. Seven bids were received by the March 11 bid opening. NESCO's bid of \$1,782,474.36 was the lowest; Central Environmental, Inc.'s bid of \$2,971,501 was second-lowest. NESCO used an individual surety who pledged real property to fulfill the IFB's requirement for a 20-percent bid bond.

By letter of March 16, the Navy expressed concerns about the adequacy of NESCO's bid bond. The Navy informed NESCO that the supporting documentation for its surety was inadequate

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because, among other things, it did not include:
(1) evidence that the lien in favor of the United States had been recorded; (2) an appraisal of the property;
(3) evidence of title, prior liens and encumbrances, and the surety's marital status. By letter of March 26, NESCO's surety responded with additional documentation.

On March 30, 1993, the Navy again wrote NESCO concerning title to the pledged property. The Navy explained that the warranty deed supplied by the surety showed that the property was not solely owned by the individual surety as the surety had stated. Instead, the deed showed the property to be owned by the individual surety and a company called Greenway Environmental Services (Greenway), as tenants in common. Moreover, the additional documentation supplied by the surety showed that the individual surety was married before he took title to the property and, therefore, his spouse had an interest in the property as well.¹ By letter of April 5, NESCO's surety submitted certified copies of recorded quitclaim deeds from both Greenway and the individual surety's wife purportedly giving the individual surety a 100-percent interest in the pledged property.

By letter of April 13, 1993, the Navy raised additional concerns about the effect the above changes in title would have on two deeds of trust recorded as liens on the property. Specifically, the Navy questioned whether the transfer of title from the co-owners to the individual surety might invoke the accelerated payment clauses contained in the deeds of trust and outlined steps NESCO should take to clarify the situation and protect the government's interest. The agency also requested an updated title report. NESCO responded by letter dated April 27.

After reevaluating NESCO's supporting documentation and obtaining the advice of counsel, contracting activity personnel contacted NESCO by telephone in June 1993, and explained that the individual surety still did not have clear title to the property. The agency concluded that even though Greenway and the individual surety's spouse apparently had attempted to transfer title via quitclaim deeds to the individual surety alone, the individual surety's spouse still had an ownership interest in the realty. The agency explained that initially the individual surety, his wife, and Greenway were concurrent owners of the realty. The quitclaim deed from the individual surety's

¹In accordance with the Federal Acquisition Regulation (FAR) § 28.203-2(c)(3)(iii) real property owned concurrently, including joint tenancy, tenancy by the entirety, and tenancy in common, may not be used to satisfy the underlying bond obligation.

spouse was recorded first and conveyed her interest to her husband. However, the quitclaim deed from Greenway was filed after the quitclaim deed from the spouse; therefore, the Navy concluded that Greenway actually conveyed its interest to the individual surety and his wife, once again giving her an interest in the property.

At this point, more than 90 days had passed since bid opening, and the contracting officer decided to award the contract to the second-low bidder rather than solicit and analyze any additional title information from NESCO. Accordingly, the Navy awarded the contract to Central Environmental, Inc. on June 23, 1993. By letter of the same date, the Navy notified NESCO that it had been determined nonresponsible because its individual surety's assets did not satisfy the requirements of the solicitation and the FAR. On July 15, NESCO filed an agency-level protest which was dismissed by the agency because it was filed more than 10 working days after receipt of the agency's June 23 letter.

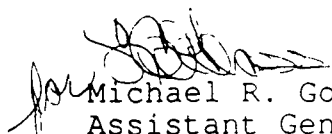
Our Bid Protest Regulations contain strict rules requiring timely submission of protests. Under our Regulations, protests based upon other than alleged improprieties in a solicitation must be filed no later than 10 working days after the protester knew, or should have known, of the basis for protest, whichever is earlier. 4 C.F.R. § 21.2(a)(2) 1993. Our Regulations further provide that a matter initially protested to the contracting agency will be considered only if the initial protest to the agency was filed within the time limits for filing a protest with our Office. 4 C.F.R. § 21.2(a)(3); Tandy Constr., Inc., B-238619, Feb. 22, 1990, 90-1 CPD ¶ 206. Thus, to be timely under our Regulations, NESCO's agency-level protest would have to have been filed within 10 working days after it learned of the basis of its protest.

Here, the Navy reports that its June 23, 1993, letter advising NESCO that it considered the firm to be nonresponsible was sent by certified mail and received by NESCO's agent on June 28. NESCO states that the individual who signed for the Navy's letter was an employee of another firm that is a tenant in the same building as NESCO. NESCO contends that it did not actually receive the Navy's letter revealing its basis of protest until the following day (June 29) and that since that individual was not its agent, it did not have actual knowledge of its basis for protest until it received the letter from the individual who signed for it. Even if, as NESCO argues, it actually received the Navy's letter on June 29, NESCO's agency-level protest was untimely because it was filed with the Navy on July 15, the 11th working day after NESCO knew its basis of protest. Id. Because NESCO's protest to the Navy was not timely filed,

the subsequent protest to our Office is also untimely and will not be considered. See Tandy Constr., Inc., supra; 4 C.F.R. §§ 21.2(a)(2) and 21.2(a)(3).

In any event, 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. While an agency generally should make reasonable efforts to obtain additional documentation regarding an individual surety's acceptability, Don Kelland Materials, Inc., B-245801, Feb. 3, 1992, 92-1 CPD ¶ 135, it is not required to wait an unreasonable amount of time to allow a bidder to demonstrate such acceptability. Gene Quigley, Jr., 70 Comp. Gen. 273 (1991), 91-1 CPD ¶ 182. Here, even after receiving four opportunities from the agency, NESCO failed to show that the proposed individual surety had the required interest in acceptable assets. Under these circumstances, we cannot find that the agency was unreasonable in rejecting NESCO's bid.

The protest is dismissed.


Michael R. Golden
Assistant General Counsel