DECISION

THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

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FILE: B-186047 DATE: June 25, 1976

MATTER OF: Victory Salvage Company
Walker - Moody Construction Company, Ltd.
Barstow Truck Parts and Equipment Company, Inc.

DIGEST:

Bid submitted in name of apparent joint venture accompanied by bid bond containing name of principal differing from one of the parties to the joint venture must be rejected as nonresponsive because of the discrepancy. Defect may not be cured by post-bid opening clarification.

Victory Salvage Company (Victory) and Walker - Moody Construction Company, Ltd. (Walker), the alleged second high bidders on various items under Surplus Sale IFB No. 60-6031, have protested the prospective award of any contract to Barstow Truck Parts and Equipment Company, Inc. (Barstow), the apparent high bidder on those items, on the basis of a purported deficiency in Barstow's bid bond which arguably renders that bid nonresponsive.

The subject IFB, issued by the Defense Supply Agency's (DSA) Defense Property Disposal Region, Pearl City, Hawaii, solicited bids for a variety of surplus vehicles and equipment and required, inter alia, the submission of a bid deposit in an amount not less than 20 percent of the total bid. The solicitation further authorized the submission of an approved annual deposit bond in lieu of a bid deposit, provided that it was in an acceptable form.

Upon the opening of bids, it was discovered that while the face of Barstow's bid set forth "Barstow Truck Parts and Equipment and Klayer Associates" as the nominal bidders, the bid was accompanied by an annual deposit bond naming Barstow as principal but was amended to cover bids also submitted by John Tallman of Honolulu, Hawaii. There was no information either in the bid itself or the accompanying bond indicating the relationship of Mr. Tallman to either Klayer Associates or Barstow. Both Victory and Walker argue that since the bid of the apparent joint venture is supported by a bond naming only one of the joint venturers as principal, and that Klayer Associates is not supported by the bond, the bond does not constitute an acceptable form of bid deposit and the bid must therefore be rejected as nonresponsive. DSA apparently concurs with Victory and Walker, recommending that Barstow's bid be rejected.

The record further reveals that subsequent to bid opening, the sales contracting officer inquired by telegram as to the relationship of the apparent joint venture, to which Barstow's president responded that Klayer had no interest in the contract other than as a bidding and removal agent for Barstow. Additional clarification was subsequently provided when Barstow's president notified DSA that John Tallman, whose name appeared on the annual bond, was the sole owner of Klayer Associates.

Barstow alleges, and the record corroborates, that in the instance of at least one prior sale, DSA's Hawaii sales office accepted a bid (submitted under the identical annual deposit bond) setting forth the nominal bidders as "Barstow Truck Parts/ Klayer Associates" after obtaining post-bid opening clarification that Klayer's role was limited to that of a removal agent. The record also indicates that similar bids from Victory had been accepted in which Klayer was named as an apparent co-principal even though Victory's bond failed to reference Klayer. In view of the foregoing, Barstow contends that the position assumed by DSA in the instant case is arbitrary, capricious, and an abuse of discretion.

We have consistently held that a bid bond which names a principal different than a nominal bidder is deficient and the defect may not be waived as a minor informality. See A.D. Roe Company, Inc., 54 Comp. Gen. 271 (1974), 74-2 CPD 194; B-177890, April 4, 1973; B-178796, August 8, 1973. This rule is prompted by the rule of suretyship that no one incurs a liability to pay the debts or perform the duty of another unless he expressly agrees to be bound. See A.D. Roe, supra.

Where the nominal bidder appears to be a joint venture, as in the instant case, the surety's liability under the bond is contingent upon the bid being in the names of the entities listed on the bid bond. See B-177890, April 4, 1973. Moreover, the bid documents themselves must establish the relationship between the bid bond principals and the nominal bidders so as to subject the surety to liability in the event the bidder failed to execute or perform the contract. B-176138, October 19, 1972. Accordingly, a bid rendered nonresponsive due to a conflict between the names on the bid and the bond may not be clarified after bid opening, as in the instant case, with extraneous evidence in order to make it responsive since a bidder would then, in effect, have an election as to whether or not he wished to have his bid considered. See A.D. Roe, supra, and cases cited therein.

Although there have been instances in which we have determined that there was sufficient information submitted with the bid documents themselves to determine that apparently disparate bidders and bid bond principals were actually one and the same (cf. B-169369, April 7, 1970), there is no evidence submitted with the instant bid setting forth either the relationship of John Tallman to Klayer Associates, or that Klayer Associates was to be merely a removal agent rather than a contracting co-principal. Where such relationships are established by evidence outside the bid, the bid must be rejected as nonresponsive. 51 Comp. Gen. 836, 838 (1972). Therefore, we must concur with the proposed rejection of Barstow's bid.

With regard to the evidence in the record of acceptances by the sales office of bids under prior sales containing similar defects, it would appear, by virtue of the authorities cited above, that those acceptances and the ensuing awards were legally defective. Since those contracts have evidently been fully performed, corrective action at this time would appear impracticable. We are, however, bringing this matter to the attention of the Director of DSA with a request that steps be taken to prevent a recurrence of such improper awards.

Paul G. Dembling

For The Comptroller General
of the United States