



United States General Accounting Office
Washington, DC 20548

Decision

Matter of: Harris Excavating

File: B-284820

Date: June 12, 2000

Darcy V. Hennessy, Esq., Moore Hennessy & Freeman, for the protester.
Richard A. Say, Esq., U.S. Army Corps of Engineers, for the agency.
Guy R. Pietrovito, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protester's bid is responsive, despite a discrepancy in the name of the bidder as identified on the bid and the name of the principal identified in the required bid bond, where reasonably available extrinsic evidence in existence at the time of bid opening establishes that the bidder and principal are the same entity, such that there is no doubt that the surety will be liable under the bond to the government on the bidder's behalf.

DECISION

Harris Excavating protests the rejection of its bid and the award of a contract to Smoky Hill LLC under invitation for bids (IFB) No. DACW41-00-B-0001, issued as a total small business set-aside, by the U.S. Army Corps of Engineers, Kansas City District, for construction services. The Corps rejected Harris's bid because the names of the bidding entity and of the principal on the required bid bond were different.

We sustain the protest.

The IFB required bidders to submit a bid guarantee in the amount of 20 percent of their bid price. IFB at 1, 00100-1. The solicitation included the required clause at Federal Acquisition Regulation (FAR) § 52.228-1(a), which informed bidders that the failure to furnish a bid guarantee in the proper form and amount may result in the rejection of the bid. IFB at 00700-80, 00700-81.

The protester submitted the apparent low bid, identifying itself as “Harris Excavating.” Agency Report, Tab 1, Harris Bid, at 2. The bid was signed by “Larry Harris,” who identified himself as president. Id. In the bid representations and certifications, the bidder’s Taxpayer Identification Number (TIN) was stated, and it was indicated that the bidder was a sole proprietorship that was not owned or controlled by a common parent and that:

It operates as a corporation incorporated under the laws of the State of Kansas, an individual, a partnership, a nonprofit organization, or a joint venture.

Id. at 00600-2, 00600-3, 00600-5.

The bid bond submitted with the bid by the protester contained a blank space that was to contain the name of the principal, but was signed by “R.L. Harris,” who was identified as the principal and whose title was listed as owner. In addition, the bid bond did not contain the solicitation number but specifically described the IFB work.

The Corps rejected the protester’s bid because the discrepancy in the names of the identified bidding entity and principal identified in the bond assertedly created doubt as to whether the surety would be bound to the government on behalf of the protester. Contracting Officer’s Statement at 2-3; Legal Memorandum at 5. Also, the agency states that there was “doubt regarding the nature of the bidder’s organization”; that is, the bid was signed by an individual identified as president, which the Corps argues indicates a corporate entity, while the bond principal was identified as owner, which indicates a sole proprietorship. Contracting Officer’s Statement at 2-3. Although, prior to rejecting Harris’s bid, the agency requested information from the protester concerning its responsibility, the agency did not inquire as to the discrepancy between the names of the bidding entity and bond principal. Id. 1-2.

Award was made to Smoky Hill LLC, a higher-priced bidder, and this protest followed. Performance has been stayed pending our decision in this matter.

Harris contends that the entities identified in the bid and bid bond are one and the same, an individual doing business variously as Harris Excavating or R.L. Harris or Larry Harris. Protest at 3. The protester complains that the agency made no inquiry as to the identity of the bidding and bond principal and argues, citing a number of our decisions, e.g., Jack B. Imperiale Fence Co., Inc., B-203261, Oct. 26, 1981, 81-2 CPD ¶ 339 and Lamari Elec. Co., B-216397, Dec. 24, 1984, 84-2 CPD ¶ 689, that information demonstrating that the named bidder and bid bond principal are the same entity can be submitted after bid opening where the information is reasonably available at the time of bid opening.

In this regard, Harris has submitted a number of documents that predate the bid opening date to demonstrate that the bidder and bond principal are the same entity. For example, Harris has submitted a 1994 Internal Revenue Form 1099-MISC, prepared by the Corps's Omaha District, which is addressed to "R.L. Harris DBA Harris Excavating" and which identifies as the recipient's identification number the same TIN as in Harris's bid. Protest, exh. E. Harris also submitted a 1995 Employer's Annual Federal Unemployment Tax Return, IRS Form 940-EZ, which uses a preprinted IRS mailing label that identifies the taxpayer as Robert L. Harris and Harris Excavating, and is signed by R.L. Harris, as owner. Id., exh. H. Also, Harris Excavating submitted a 1989 Certificate of Insurance, which identifies the insured as "Harris Excavation DBA Larry Harris." Id., exh. F. Harris also submitted a Dun & Bradstreet Report for R.L. Harris and Harris Excavating identifying Robert L. Harris as owner, which apparently reflects information in Dun & Bradstreet's files extant as of bid opening. Id., exh. K.

The Corps argues that the protester's bid should be rejected because the name of the bidder and the bid bond principal are not the same, such that it is not clear that the bond will bind the surety. The Corps notes that the documents provided by the protester were not submitted with the protester's bid, were not available to the contracting officer, and allegedly did not resolve the discrepancy between Harris's bid and bid bond. In this regard, the Corps states, citing Atlas Contractors, Inc./Norman T. Hardee, a Joint Venture, B-208332, Jan. 19, 1983, 83-1 CPD ¶ 69 at 4, that the contracting officer is not required "to interpret an inartfully prepared bid, by sequential logical deductions and inferences, to make it responsive."

A bid guarantee is a form of security that ensures that a bidder will not withdraw its bid within the period specified for acceptance and, if required, will execute a written contract and furnish required performance and payment bonds. FAR § 28.001. The bid guarantee secures the surety's liability to the government, thereby providing funds to cover the excess costs of awarding to the next eligible bidder in the event that the bidder awarded the contract fails to fulfill these obligations. A.W. and Assocs., Inc., B-239740, Sept. 25, 1990, 90-2 CPD ¶ 254 at 2. When required by a solicitation, a bid guarantee is a material part of the bid and must be furnished with it. A.D. Roe Co., Inc., B-181692, Oct. 8, 1974, 74-2 CPD ¶ 194 at 3; 38 Comp. Gen. 532, 537 (1959). Noncompliance with a solicitation requirement for a bid guarantee generally renders the bid nonresponsive and requires the rejection of the bid. FAR § 28.101-4(a); A.W. and Assocs., Inc., *supra*, at 2.

The sufficiency of a bid guarantee depends on whether the surety is clearly bound by its terms; when the liability of the surety is not clear, the bond is defective. Techno Eng'g & Constr., Ltd., B-243932, July 23, 1991, 91-2 CPD ¶ 87 at 2. Under the law of suretyship, no one incurs a liability to pay the debts or perform the duties of

another unless that person has expressly agreed to do so.¹ Andersen Constr. Co.; Rapp Constructors, Inc., B-213955, B-213955.2, Mar. 9, 1984, 84-1 CPD ¶ 279 at 4. Thus, generally, a bid bond which names a principal different from the bidder is deficient, and the bid must be rejected unless it can be established that the different names identify the same entity. Goss Fire Protection, Inc., B-253036, Aug. 13, 1993, 93-2 CPD ¶ 97 at 4; A.D. Roe Co., Inc., *supra*, at 4-5.

On the other hand, where the entity that submitted the bid and that is identified as the bid bond principal are exactly the same, any discrepancy between the bidder's and bid bond principal's names is merely a matter of form that does not require rejection of the bid. See K-W Constr., Inc., B-194480, June 29, 1979, 79-1 CPD ¶ 475 at 2. Extrinsic evidence that is reasonably or publicly available and in existence at the time of bid opening may be provided to establish the identity of the bidder and bid bond principal as the same entity.² Gem Eng'g Co., B-251644, Mar. 29, 1993, 93-1 CPD ¶ 303 at 2 (award to second-low bidder properly terminated where corporate records and Dun & Bradstreet report resolved discrepancy in the name of the low bidder and bid bond principal); Lamari Elec. Co., *supra*, at 2 (entity submitting the bid and identified as the bid bond principal was the same, an individual using different trade names); Jack B. Imperiale Fence Co., Inc., *supra*, at 2-3 (discrepancy in corporate names used in bid and bid bond resolved through submission of corporation records, tax forms, bid bonds, insurance papers, loan documents, and contract documents); K-W Constr., Inc., *supra*, at 2 (bidder's and bid bond principal's identity established through submission of corporate documents).

The Corps does not disagree that extrinsic evidence may be provided to resolve discrepancies between the nominal bidder's and bond principal's names, but argues that the failure to fill in the space for the principal's name at the top of the bid bond and the bond's failure to reference the IFB number creates doubt as to the validity of the bond. These arguments are meritless. First, the Corps acknowledges that the bond included a specific and adequate description of the IFB work such that the failure to include the IFB number would not alone render the bid nonresponsive. Legal Memorandum at 6-7. Also, although Harris's bid bond did not fill in the space for the principal's name at the top of the bond, the bond identifies the principal as R.L. Harris, whose title is stated to be owner. Such an irregularity in, or incompleteness of, the bond does not necessarily affect the obligation of the surety to the government. See, e.g., General Ship and Engine Works, Inc., B-184831, Oct.

¹ Suretyship is a contractual relationship where one person (the surety) agrees to be answerable for the debt or default of another (the principal). Restatement of Security § 82 (1941); 72 C.J.S. Principal and Surety § 2 (1974).

² In K-W Constr., Inc., *supra*, at 2, we analogized this rule to the similar rule allowing the authority of bid signers to be established by extrinsic evidence after bid opening.

31, 1975, 75-2 CPD ¶ 269 at 5 (obligation of surety not affected by failure of named principal to sign bond). Here, the bond identifies the principal and solicitation work and is duly executed by the surety, so that the failure to name a principal in the designated space at the top of the bond is immaterial.

The proper question to be considered is whether the nominal bidder and bid bond principal are the same entity, such that it is certain that the surety will be obligated under the bond to the government in the event that that bidder withdraws its bid within the period specified for acceptance or fails to execute a written contract or furnish required performance and payment bonds.

As described above, the bidding entity is Harris Excavating, which certified itself as a sole proprietorship³ and which is owned by Larry Harris,⁴ and the bond principal is an individual, R.L. Harris. The protester has submitted numerous documents and records that show that R.L. Harris, Larry Harris, and Harris Excavating all refer to the same business entity. Specifically, the protester submitted two tax records that reference the same TIN as used by the protester in its bid and that jointly refer to the taxpayer as “R.L. Harris” (the name of the bond principal) and “Harris Excavating” (the bidder). A certificate of insurance shows the insured to be “Harris Excavating DBA Larry Harris.”

From this evidence, which was reasonably available to the contracting officer if she had asked the bidder about the discrepancy, see Lamari Elec. Co., *supra*, at 2 and Jack B. Imperiale Fence Co., Inc., *supra*, at 2-3, there is no question that Harris Excavating, R.L. Harris, and Larry Harris refer to the same entity and that the surety would be legally bound on the bid bond. In considering this reasonably available extrinsic evidence, the contracting officer would not be required “to interpret an inartfully prepared bid, by sequential logical deductions and inferences, to make it responsive,” but could unambiguously establish that the nominal bidder and bid bond principal were the same individual, such that there was no doubt that the surety would be liable under the bid bond. Jack B. Imperiale Fence Co., Inc., *supra*, at 2-3; cf. The Scotsman Group, Inc., B-245634, Jan. 13, 1992, 92-1 CPD ¶ 57 at 3-4 (extrinsic evidence did not establish that the nominal bidder and bid bond principal were the same entity).

³ A sole proprietorship is a non-incorporated business owned by a single individual, and there is no legal distinction between the individual and his or her businesses. See William L. Cary and Melvin Aron Eisenberg, Corporations 1 (6th ed. 1988).

⁴ The Corps suggests that, because the protester identified himself as “president” of Harris Excavating, this indicates that Harris Excavating is a corporation. Legal Memorandum at 3. This argument, however, ignores the specific language of the protester’s bid, which states that Harris Excavating is a sole proprietorship.

We recommend that the Corps terminate the contract awarded to Smoky Hill LLC and make award to Harris Excavating, as the entity that submitted the lowest responsive bid, if the protester is found to be responsible. We also recommend that the Corps reimburse the protester the reasonable costs of filing and pursuing the protest, including attorneys' fees. 4 C.F.R. § 21.8(d)(1). The protester should submit its certified claim for such costs, detailing the time expended and the costs incurred, directly to the contracting agency within 60 days after receipt of this decision.

The protest is sustained.

Comptroller General
of the United States