Has further

The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Jerry Eaton, Inc.

File: B-233458

Date: January 24,1989

DIGEST

1. In determining the acceptability of an individual bid bond surety, an agency may consider, under appropriate circumstances, the surety's failure to disclose other bond obligations on the affidavit of individual surety, standard form 28, as such disclosure is necessary to enable the contracting officer to make an informed judgment concerning a surety's financial soundness.

2. The question of the acceptability of an individual bid bond surety is one of bidder responsibility, not responsiveness; the fact that the contracting officer labeled the reason for the rejection of the protester's bid as nonresponsiveness rather than nonresponsibility has no bearing on the merits of the rejection of the bid.

3. Where the record indicates a continuing pattern by an individual bid bond surety of not disclosing outstanding bond obligations on its standard form 28, a contracting officer has a reasonable basis to reject the bidder's surety as unacceptable.

DECISION

Jerry Eaton, Inc., protests the award of a contract to PEM Insulation Co., Inc., under invitation for bids (IFB) No. DACA05-88-B-0162, issued by the United States Army Engineer District, Sacramento, California, for the removal of asbestos insulation from various buildings and its replacement with non-asbestos insulation. Eaton contends that its low bid was improperly rejected on an unwarranted finding that its bid bond using individual sureties was unacceptable.

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We deny the protest.

Bids were opened on September 20, 1988. Eaton submitted the low bid for the base item and three additives. PEM submitted the next low bid. After the contracting officer decided on September 30 to reject Eaton's bid because he found one of the individual sureties on its bid bond nonresponsible, award was made to PEM on the same date.

The IFB required each bidder to submit with its bid a bid guarantee equal to 20 percent of the bid or $3 million, whichever was less. Eaton submitted a bid bond naming two individual sureties in response to the IFB bid guarantee requirement. In reviewing the affidavits of individual surety, standard form (SF) 28, the agency concluded that on one of the affidavits, that of L. Arthur DePue, insufficient information had been furnished to permit a determination of the value and ownership of the assets pledged. Consequently, the agency requested additional information from Eaton by telegram dated September 20. The agency was provided with some of the requested information concerning one of the several real estate parcels listed on DePue's affidavit. While reviewing this information the agency found that this surety had failed to list outstanding bid bonds in item 10 of its affidavit. The agency discovered that Mr. DuPue had been listed on bid bonds as an individual surety under three solicitations, two of which were issued by other Engineer District offices. Further, the contracting officer was informed that one of these offices had rejected a bid which was accompanied by a bond listing this surety because of the surety's failure to disclose all of its other outstanding bonds on its affidavit. The surety's failure to list all its other outstanding bonds on the prior procurement combined with a similar failure under the subject IFB were viewed as representing a pattern that reflected negatively on the responsibility of that surety. Thus, by letter of September 30, Eaton's bid was rejected as "nonresponsive" due to the failure of that surety to list all of its other outstanding bonds on its affidavit.

Eaton protests the propriety of the rejection of its bid. Eaton argues that its bid was erroneously rejected as "nonresponsive" and maintains that it was improper for the agency to later change the reason for rejection to nonresponsibility. Eaton further argues that the agency did not provide it with sufficient time to correct the defects in the surety's affidavit or to provide security for the difference between Eaton's and PEM's bid prices. In this regard, the protester complains that it was not allowed

sufficient time within which to cure the defects in the affidavit because the agency improperly rushed the award due to the impending end of the fiscal year.

A bid guarantee's purpose is to secure the liability of a surety to the government in the event that the bidder fails to fulfill its obligation to execute a written contract and to provide payment and performance bonds. The sufficiency of a bid guarantee depends on whether a surety is clearly bound by its terms. When the liability of the surety is not clear, the guarantee may be regarded as defective, and the bid rejected as nonresponsive. When, as here, a required bid bond is proper on its face, the bid itself is responsive. Such a bid bond is proper "on its face" when it has been duly executed by two individual sureties whose affidavits indicate that they both have net worths at least equal to the penal amount of the bond, and the bid bond contains no obvious facial defects, such as submission of a blank bid bond, or markup or alteration of the bond without evidence of surety approval. Transcontinental Enterprises, Inc., 66 Comp. Gen. 549 (1987) 87-2 CPD ¶ 3.

The problem with Eaton's bid, however, concerned the accuracy of the information contained in SF 28, which is a matter of responsibility. Transcontinental Enterprises, Inc., 66 Comp. Gen., supra. Although a determination of nonre-sponsibility based upon the financial acceptability of an individual surety may be based upon information submitted any time prior to award, that determination may not be waived as no award may be made without an affirmative determination of responsibility. T&A Painting, Inc., 66 Comp. Gen. 214, (1987) 87-1 CPD ¶ 86.

While it is true as the protester points out that the agency incorrectly labeled the basis for rejecting Eaton's bid as nonresponsiveness rather than as the nonresponsibility of one of Eaton's sureties, this fact has no bearing on the merits of the protest since a valid reason for rejecting Eaton's bid did exist at the time of its rejection. Singleton Contracting Corp., B-216536, Mar. 27, 1985, 85-1 CPD ¶ 355. We fail to understand how the error prejudiced the protester because the actual reason for the rejection of Eaton's bid--the surety's failure to list all outstanding bond obligations--was clearly stated in the rejection letter.

In reviewing a bidder's responsibility, including situations like the one here concerning the responsibility of an individual surety, the contracting officer is vested with a wide range of discretion and business judgment, and this Office will defer to the contracting officer's decision

unless the protester shows that there was bad faith by the procuring agency or that there was no reasonable basis for the determination. See Eastern Metal Products & Fabricators, Inc., B-220549.2 et al., Jan. 8, 1986, 86-1 CPD ¶ 18.

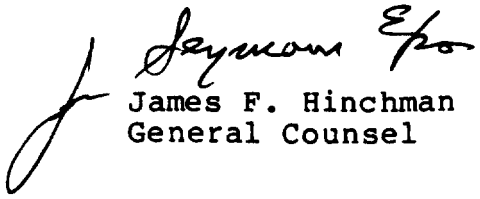
A surety must disclose all outstanding bond obligations, regardless of the actual risk of liability on those obligations, to enable the contracting officer to make an informed determination of the surety's financial soundness. See Satellite Services, Inc., B-220071, Nov. 8, 1985, 85-2 CPD ¶ 532. Since item 10 of the affidavit provides space for the surety to list "all other bonds on which he is surety," we believe that the duty of the individual surety to disclose all such obligations, without exception, is clear. Moreover, a contracting agency may consider the failure of a surety to disclose fully all outstanding bond obligations as a factor in its responsibility determination. Id.

Here, it is undisputed that the surety failed to list at least three outstanding bond obligations and that this same surety failed to disclose its outstanding obligations under at least two prior procurements. We believe that, regardless of the actual liability that may remain on any outstanding bond, the pattern of nondisclosure of the bond obligations of Eaton's individual surety under this solicitation and under prior solicitations provided the contracting officer with a reasonable basis upon which to find the surety nonresponsible and to reject the bid. Excavators, Inc., B-232066, Nov. 1, 1988, 88-2 CPD ¶ 421. Concerning the protester's complaint that it should have been provided an opportunity to correct the defects, we have held that while an agency may afford a bidder a reasonable amount of time to correct defects relating to its bid bond, it need not delay award indefinitely in the process. Eastern Maintenance and Services, Inc., B-229734, Mar. 15, 1988, 88-1 CPD ¶ 266. In any event, we do not see how the surety could have corrected or explained the pattern of past nondisclosure had it been given extra time to do so. There is nothing in the protest submission which responds in any material way to the problem.

Eaton also objects to the fact that the award to PEM was made so quickly due to the end of the fiscal year. The agency notes that while there may be a general procurement policy which discourages excessive expenditures at the end of the fiscal year, there is no legal prohibition against such an award. We agree. We see nothing improper in the award here which was made 10 days after bid opening. In

any event, as discussed above, Eaton's bid was properly rejected.

The protest is denied.



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