



Decision

Matter of: Hostetter, Keach & Cassada Construction, LLC

File: B-403329

Date: October 15, 2010

Bonnie Keith Green, Esq., Shumaker, Loop & Kendrick, LLP, for the protester.
Kevin L. Pearson, Esq., Department of Veterans Affairs, for the agency.
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GAO, participated in the preparation of the decision.

DIGEST

Protester's bid is responsive despite a discrepancy in the names of the bidder and the bid bond principal, where the record shows that the bidder and bid bond principal are the same entity so that it is certain that the surety would be liable to the government in the event that the bidder withdrew its bid or failed to execute a written contract or to furnish required performance and payment bonds.

DECISION

Hostetter, Keach & Cassada Construction, LLC, of Pineville, North Carolina, protests the rejection of its bid as nonresponsive under invitation for bids (IFB) No. VA-246-10-IB-0089, issued by the Department of Veterans Affairs (VA) for a construction project at the VA Medical Center in Salem, Virginia. The VA rejected Hostetter's bid because of a discrepancy in the names of the bidding entity and of the principal on the required bid bond.

We sustain the protest.

BACKGROUND

The IFB, issued as a service-disabled, veteran-owned small business concerns set-aside, required bids to include a bid guarantee in the amount of 20 percent of the bid or \$3 million, whichever was the lesser amount, and included Federal Acquisition Regulation (FAR) clause 52.228-1, informing 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 5, 12.

The protester submitted the apparent low bid, identifying itself as “Hostetter, Keach & Cassada, LLC,” at 10200 Industrial Drive, Pineville, North Carolina, and further identifying the firm by a Data Universal Numbering System (DUNS) number.¹ The bid was signed by Gregory S. Keach, who identified himself as vice-president. With its bid, Hostetter provided a copy of its Online Representations & Certifications Application (ORCA), which indicated that “Hostetter, Keach & Cassada Construction, LLC” was a partnership.² Hostetter’s bid also included a certified copy of its North Carolina articles of incorporation as a limited liability corporation for “Hostetter, Keach & Cassada Construction, LLC.”

The bid bond submitted with Hostetter’s bid identified the principal to be “Hostetter, Keach & Cassada Construction, LLC” at the same address and signed by the same individual as vice-president. Hostetter identified itself on the bid bond as a corporation.

In reviewing Hostetter’s bid, the contracting officer noted the discrepancy in the names of the bidder and the bid bond principal, and noted that Hostetter represented itself as a partnership in ORCA but the bid bond identified the principal as a corporation. Agency Report (AR) at 2. The contracting officer rejected Hostetter’s bid, and this protest followed.

DISCUSSION

Hostetter argues that the discrepancies between its bid and bid bond are minor informalities that do not cast into doubt that the bidder and the bid bond principal are the same entity.

The VA disagrees that the discrepancy is a minor informality, arguing that because the names of the bidder and the bid bond principal are different, it is not clear that the bond would bind the surety. The VA states that VA’s Information Letter 049-05-11 provides guidance to the agency’s contracting officers regarding their review of surety bonds; this letter generally informs contracting officers that the name of the bid bond principal and the bidder must be the same, and that the type of organization shown on the bid bond must be the same as that on the bid or in ORCA. AR at 3-4.

¹ The DUNS numbering system is established by Dunn & Bradstreet Information Services, under which discrete 9-digit numbers are assigned for the purpose of establishing the precise identification of an offeror or contractor. See FAR §§ 4.605(b); 4.607. The DUNS number is used by the contracting officer to verify that the offeror is registered in the Central Contractor Registration database. See FAR clause 52.204-7(b)(2).

² After the protest was filed, Hostetter amended its ORCA representations to clarify that the firm was a corporation.

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. 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.³ 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. BW JV1, LLC, B-401841, Dec. 4, 2009, 2009 CPD ¶ 249 at 3. 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. Harris Excavating, B-284820, June 12, 2000, 2000 CPD ¶ 103 at 4.

³ 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).

Here, Hostetter's bid itself establishes that the bidder and the bid bond principal are the same entity.⁴ Although the bid identifies the bidder as "Hostetter, Keach & Cassada, LLC," the bid also includes a DUNS number, ORCA representations and certifications, and certified articles for incorporation that identify the bidder to be "Hostetter, Keach & Cassada Construction, LLC." Moreover, the address identified for the bidder and bid bond principal is the same, and the bid and bid bond are signed by the same individual, who identified himself as vice-president. The record thus shows that the bidder and bid bond principal are the same entity, despite the omission of "Construction" from the name of the bidder. This minor informality or irregularity should have been waived by the contracting officer.⁵ See FAR § 14.405.

We recommend that the VA make award to Hostetter, as the entity that submitted the lowest responsive bid, if the protester is otherwise found to be responsible. We also recommend that the VA reimburse the protester the reasonable costs of filing and pursuing the protest, including attorneys' fees. 4 C.F.R. § 21.8(d)(1) (2010). 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.

Lynn H. Gibson
Acting General Counsel

⁴ Extrinsic evidence that is reasonably or publicly available and in existence at the time of bid opening may also be provided to establish the identity of the bidder and bid bond principal as the same entity. Harris Excavating, *supra*, at 4; Gem Eng'g Co., B-251644, Mar. 29, 1993, 93-1 CPD ¶ 303 at 2.

⁵ With respect to the discrepancy between the "type of organization" identified for the protester (Hostetter indicated in ORCA that the firm was a partnership, but its bid bond identified the firm as a corporation), it is obvious that the protester is a corporation, given the designation "LLC," and that the same DUNS number that identifies entity as a corporation is used in the bid and in ORCA.