

Protest of) Date: December 31, 1987
)
 LUTHER BENJAMIN)
 AND ASSOCIATES)
)
 Solicitation No. 428460-87-A-0007) P.S. Protest No. 87-99

DECISION

Luther Benjamin and Associates (Luther Benjamin) protests the rejection of its bid as nonresponsive for not complying with the bid bond requirements of Invitation for Bids No. 428460-87-A-0007 (IFB) for the expansion of the Kingshill, VI, post office.

The IFB, issued by Support Services, Caribbean Division, required that bids be accompanied by a bid bond in the amount of 20% of the bid and included a blank PS Form 7324, Bid Bond, for the bidder's use. The instructions on the reverse of that form, in paragraph 4(b), provided:

Where individual sureties execute the bond, they shall be two or more responsible persons. A completed Affidavit of Individual Surety (PS Form 7328), for each individual surety, shall accompany the bond. Such sureties may be required to furnish additional substantiating information concerning their assets and financial capability as the Postal Service may require.

Bids were opened as scheduled August 17, and Luther Benjamin was low at \$2,320,380. Luther Benjamin's submission included a bid bond on PS Form 7324 which indicated the bond was executed by individual sureties and that Luther Benjamin is a partnership. The bid bond was signed by Carl Christopher who is identified as the co-owner, vice president and general manager of the company. The bid bond was also signed by Mr. Christopher on behalf of Mr. Benjamin, who is identified as the principal owner and president of the company.^{1/} The bidder did not include with its bonds an Affidavit of Individual Surety, PS Form 7328, for either of the individual sureties. On the bid form, PS Form 7388, the bidder identified the amount of its bid guarantee as \$464,076 consisting of:

Individual Surety Guarantee by Partners of following Real Estate
Properties: Combine value of \$1,200,000.00 (one-million-two hundred

^{1/} Because of the resolution of this protest, it is not necessary to discuss the effect, if any, of an individual surety signing a bid guarantee on behalf of another individual surety.

thousand dollars)

1. Business Office & Complex
#2 Kongens Tvaer, Charlotte
Amalie, St. Thomas, U.S.V.I. 00801
Owner Luther Benjamin
2. #13 AA Sprat Hall
F'sted, St. Croix, 00840
Consisting of 2 story residence
on 44.48 Acres of Land.

On September 10, the Manager, Support Services, sent a letter to the protester advising that its bid had been rejected based on his determination that the sureties on its bid bond were unacceptable and the bid nonresponsive according to the requirements of the Invitation for Bids and Postal Contracting Manual (PCM) 2-404.2 (g) and 10-103.4.

By letter dated September 18 to the contracting officer, Mr. Christopher protested the rejection of Luther Benjamin's bid and alleged that at the prebid conference a representative of the Postal Service told him that individual sureties would be acceptable for the bid bond. Mr. Christopher states that he assumed that all necessary bid documents would be included in the bid package, or would be forwarded to bidders. The protester stated that by submitting the bid bond the firm had pledged its real estate assets for twenty percent of the amount of the bid, and that at bid opening, the contracting officer confirmed that Luther Benjamin's bid documents had been submitted in compliance with the specifications.^{1/} The protester further alleged that the Postal Service had taken actions against it in the selection process which discriminated against black, native contractors. The contracting officer responded September 29, finding the protest to be obviously without merit.^{1/} The stated reasons for rejecting the bid were that no Affidavit of Individual Surety was submitted as required by PS Form 7324; that the sureties were also partners in the company; and that if the protester's representatives had read the instructions on the bid bond, they would have obtained the Affidavit of Individual Surety.

That form notes:

1. This form shall be used whenever sureties on bonds to be executed in connection with Postal Service contracts are individual sureties, as provided in governing regulations. . .

^{2/} The contracting officer disputes that the protester was told that it had submitted all of the bid documents in accordance with the specifications. In resolving the conflicting statements in this record, we give the statements of the contracting officer a "presumption of correctness," which is the protester's burden to overcome. Garden State Copy Company, P.S. Protest No. 84-31, July 5, 1984. The protester has brought forward no evidence to overcome this burden. In any event, such advice, even if given, could not have served to correct or waive deficiencies in the bid. Cf. DWS, Inc., P.S. Protest No. 87-100, November 6, 1987 (That the bid opening official mistakenly declared a bid to be nonresponsive does not make it nonresponsive if it is, in fact, responsive.)

^{3/} The file does not reflect that the contracting officer obtained the approvals of the Head of the Procuring Activity and counsel, which are necessary for the exercise of this authority. See PCM 2-407.8 e.

2. A corporation, partnership, or other business association or firm as such, will not be accepted as a surety, nor will a partner be accepted as a surety for copartners or for a firm of which he is a member. Stockholders of a corporate principal may be accepted as sureties provided their qualifications as such are independent of their stockholdings therein. . .

In a September 29 letter to the contracting officer and this office, Luther Benjamin repeated its protest and stated that the individuals who completed the bid bond had assets sufficient to support the bid bond requirement, that the corporation^{4/} should have been given the opportunity to furnish the payment and performance bonds, and that the issues involved are matters of responsibility, not responsiveness.

Discussion

Although the protester characterizes its protest as a matter of responsibility, whether a bid bond is sufficient is generally a matter of bid responsiveness, not responsibility. See Porter Contracting Co., Inc., P.S. Protest No. 87-82, October 23, 1987; Design Engineers, Comp. Gen. Dec. B-214658, April 10, 1984, 84-1 CPD & 408. The determination as to whether a bid bond is acceptable must be based solely on the bid documents themselves as they appear at bid opening. Hydro-Dredge Corp., Comp. Gen. Dec. B-214408, April 9, 1984, 84-1 CPD & 400.

The sufficiency of a bid bond is measured by determining whether the Postal Service obtains the same protection in all material respects under the bond actually submitted as it would have under a bond complying completely with the instructions on the bond form. See Mil-Pak Company, Inc., P.S. Protest No. 79-10, May 23, 1979, on reconsideration, July 13, 1979; Keehn Brothers, Incorporated, P.S. Protest No. 87-10, April 3, 1987. Porter Contracting Co., Inc., supra. The bonds furnished in this instance do not meet that test.

The purpose of a bid guarantee is to protect the Postal Service from loss in the event of contractor default in the period between contract award and the Postal Service's receipt of the payment and performance bonds required by the contract. See PCM 10-103.2 and the text of the bid bond, PS Form 7324.

Suretyship is a tripartite relationship created by agreement between the party insured (the government), the principal obligor (the bidder), and the surety or guarantor (a third party). Federal Acquisition Regulation 48 C.F.R. ' 28.001 (1984). A surety necessarily must be distinct from the principal, as the surety undertakes to pay the debt or to perform an act for which the principal has bound himself, should the principal default. 74 Am. Jur. 2d. Suretyship ' 3 (1974). Thus, a bidder, who is the principal on the bid bond cannot be his own surety. See also Standard Form 28, Instruction 2 (covering the unacceptability of partners as a surety where the partnership or an individual partner is the principal obligor on the bond).

^{4/} Although the protester in that letter characterizes the company as a corporation, the bid bond that it submitted indicates that it is in fact a partnership. The protester also identified itself as a partnership on PS Form 7319-B, Representations and Certifications, submitted with its bid.

The determinative question as to the acceptability of such a bond is whether the bidding documents establish that the bond could be enforced if the bidder does not execute the contract. Minority Enterprises, Inc., B-216667, Jan. 18, 1985, 85-1 CPD & 57. As the creditor, the government's right to maintain an action against the principal exists independently of its rights against the surety. 72 C.J.S. Principal and Surety ' 245 (1951). Therefore, the fundamental purpose of the bid bond is frustrated where the bidder/ principal is the same person as the surety.

F & F Pizano, Comp. Gen. Dec. B-219591.2, B-219594.2, on reconsideration, August 27, 1985, 85-2 CPD & 234.

When a partnership is awarded a contract, the partnership assets and personal assets of the general partners are committed to the project, and, therefore, a bid guarantee from a partner does not provide the Postal Service additional and different commitments. The assets Luther Benjamin pledged as surety for the execution of the contract and providing performance and payment bonds are the same assets which secure the partnership's obligation to do so. Had the protester been awarded the contract, the Postal Service would not have received the additional protection it sought to obtain by the requirement of a bid bond.^{1/}

The protester has additionally alleged that the Postal Service sought to discriminate against black, local and native contractors by requiring that bid packages be obtained in Puerto Rico, holding a mandatory pre-bid conference in Puerto Rico and holding the bid-opening in Puerto Rico. The protester's allegations of discrimination are baseless. Of the ten bid packages distributed for this solicitation, eight were obtained by firms with addresses on St. Croix. The three bids actually submitted for this job were from firms with addresses on St. Croix. The protester has submitted no evidence which suggests the Postal Service discriminated against it. "[P]rejudicial motives will not be attributed to individuals on the basis of inference or supposition." Hunter L. Todd, d/b/a Courier Express Mail & Package Delivery Service, P.S. Protest No. 85-78, October 18, 1985, quoting from University of New Orleans, Comp. Gen. Dec. B-184194, May 26, 1978, 78-1 CPD & 401.

The protest is denied.

William J. Jones
Associate General Counsel
Office of Contracts and Property Law

[Compared to original 3/15/93 WJJ]

^{5/} Since a corporation is a legal entity, separate from its owners, a different rule applies with respect to corporate owners as individual sureties. Porter Contracting Co., Inc., supra.