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**Comptroller General
of the United States**

**United States General Accounting Office
Washington, DC 20548**

Decision

Matter of: Horizon Shipbuilding, Inc.

File: B-292992

Date: December 8, 2003

Travis R. Short for the protester.

Joseph J. Cox, Esq., and Madeline Shay, Esq., U.S. Army Corps of Engineers, for the agency.

Edward Goldstein, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency reasonably found protester's proposal unacceptable where protester's purported individual surety bid bond contained an ambiguity as to the identity of the surety and where the bond was not accompanied by Standard Form 28, Affidavit of Individual Surety, as required by the solicitation.

DECISION

Horizon Shipbuilding, Inc. protests the rejection of its proposal and the award of a contract to Marine Builders, Inc. under request for proposals (RFP) No. DACW61-03-R-0029, issued by the U.S. Army Corps of Engineers for an inland river towboat. The Corps rejected Horizon's proposal on the ground that the firm's bid guarantee was unacceptable. The protester principally asserts that its bid guarantee, in the form of a bid bond with an individual surety, was acceptable in all respects and alternatively argues that if the agency had any concerns about the bid guarantee, the agency should have provided protester with an opportunity to address any perceived deficiency.

In order to minimize financial risk to the government, the RFP required offerors to choose between obtaining bonding and receiving progress payments for contract work or financing the contract independently and waiting until after delivery and acceptance to receive complete payment. See RFP § L, at 14. Offerors choosing to obtain bonding were required to furnish with their proposals a bid guarantee in the lesser amount of 20 percent of the offeror's proposed contract price or \$3 million.

See RFP, amends. 1 and 2 (incorporating Federal Acquisition Regulation (FAR) § 52.228-1, Bid Guarantee, and modifying the bid guarantee amount, respectively).¹

The RFP instructed offerors to “furnish a bid guarantee in the form of a firm commitment (e.g., a bid bond)” and warned that the “[f]ailure to furnish a bid guarantee in the proper form and amount, by the time set for opening of bids, may be cause for rejection of the bid.” RFP, amend. 2. The RFP also incorporated FAR § 52.228-11, Pledges of Assets, requiring offerors that use an individual surety on a bid guarantee to obtain from the individual surety a “pledge of assets” and “Standard Form 28, Affidavit of Individual Surety.”

By the August 20, 2003 closing date, the agency had received a proposal from Horizon, as well as several other firms.² In its proposal, Horizon elected to obtain bonding and receive progress payments and therefore submitted a bid guarantee with its proposal in the form of a standard form (SF) 24 bid bond.³ The surety was listed on Horizon’s SF 24 as follows: “Global Bonding (Atty.-In-Fact for Robert Joe Hanson).” The signature “Robert Joe Hanson” appeared under the “Individual Surety(ies)” signature block; the typed name under the signature block appeared as follows: “Robert Joe Hanson, sec.”

Horizon’s bid guarantee did not include SF 28, Affidavit of Individual Surety, but instead included a document captioned “Power of Attorney.”⁴ This power of

¹ The RFP informed offerors that if they chose to obtain bonding, the following contract clauses applied: (1) “Clause H20 Progress Payment Based on Percentage or Stage of Completion”; (2) “Section I, 52.228-1 Bid Guarantee”; (3) “Section I, 52.228-14 Irrevocable Letter of Credit”; (4) “Section I, 52.228-16 Performance and Payment Bonds- Other than Construction.” RFP § L, at 14.

² The protester here proceeded pro se and thus did not have access to certain information in the record subject to protection from disclosure other than to counsel pursuant to the terms of a protective order. Accordingly, our discussion in some areas is necessarily general in nature in order to avoid reference to protected information (such as the number of proposals received). Our conclusions, however, are based on our review of the entire record.

³ The agency did not provide our Office with Horizon’s bid bond with its report because it had returned the bond to Horizon upon finding Horizon’s proposal unacceptable and making award to Marine Builders. Thus, our review of Horizon’s bid bond is based on the copy of the bond provided by protester with its protest.

⁴ The bottom line of the “Power of Attorney” reads “Affidavit of Individual Surety” and “Standard Form 28 (Rev. 6/96).” This form, however, is substantially different from Standard Form 28 (Rev. 6/96), prescribed by the General Services Administration (GSA) and published at FAR § 53.301-28. For example, Block 7 of the
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attorney was signed “Robert Joe Hanson, Attorney-in-Fact, Global Bonding” and identified “Global Bonding” as “attorney in fact” for Robert Joe Hanson. The power of attorney also contained a representation of assets identified as “Corporate Financial Debenture Note #2003-1, \$50,000,000.000 Hexagon Consolidated Companies of America.” In addition, Horizon’s bid bond included a document identifying Hexagon Consolidated Companies of America as a “guarantor” pledging \$50 million in the form of “Corporate Debenture Number Two Thousand Three dash One (2003-1), to back Global Bonding . . . Attorney in Fact for Robert Joe Hanson”

Upon evaluation of the proposals, the agency decided to make award, without holding discussions,⁵ to Marine Builders, Inc. in the amount of \$1,572,385. After learning of the agency’s decision, Horizon requested a debriefing, which the agency provided, in writing, on October 1. In Horizon’s debriefing letter, the contracting officer indicated that Horizon’s proposal was rejected because its individual surety bid bond was determined to be unacceptable.

Horizon protests the rejection of its proposal based on the agency’s determination that its bid bond was unacceptable. Horizon states that its bid bond complied with the solicitation’s requirements and asserts that if there were any deficiencies, it should have been afforded an opportunity to correct them. Horizon also suggests that the agency’s rejection of its bid guarantee was a mere pretext for eliminating Horizon from the competition in order to make an award to the “more established company,” Marine Builders. Protest at 4.

A bid guarantee is a form of security ensuring that a bidder will, if required, execute a written contract and furnish payment and performance bonds. FAR § 28.001; American Artisan Prods., Inc., B-292380, July 30, 2003, 2003 CPD ¶ 132 at 4. The guarantee is also available to offset the cost of procurement of the goods or services. Paradise Constr. Co., B-289144, Nov. 26, 2001, 2001 CPD ¶ 192 at 2. Where the guarantee is in the form of a bid bond, it secures the liability of the surety to the government if the holder of the bond fails to fulfill these obligations. Id. The surety for a bid bond can be either an individual surety or a corporate surety, although

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GSA form contains the statement: “The following is a true representation of the assets I have pledged to the United States in support of the attached bond.”

(Emphasis added.) The “Power of Attorney” submitted by Horizon merely states: “The following is a true representation of my present assets, liabilities, and net worth and does not include any financial interest that I have in the assets of the principle [sic] on the attached bond.” Thus, there is no indication that the assets listed on the power of attorney have been pledged to the United States.

⁵ The agency reserved the right to make award on the basis of initial proposals without discussions. RFP § M, at 1.

there are different requirements for each. See generally FAR Part 28, Bonds and Insurance. Ultimately, the determinative question as to the acceptability of a bid bond is whether the bid documents establish that the bond is enforceable against the surety should the contractor fail to meet its obligations. See Communications by Johnson, Inc., B-255478, Mar. 2, 1994, 94-1 CPD ¶ 163 at 5.

At the outset, it is significant to note that Horizon's comments on the agency report fail to provide a substantive reply to the agency's detailed responses in answer to Horizon's contention that its bid bond was acceptable. Rather, Horizon concedes that if its bid bond was unacceptable "the Contracting Officer had no other recourse than to make award to the next low bidder." Protester's Comments at 5. Because Horizon's bid bond created an ambiguity as to the identity of the surety and because Horizon failed to comply with the bid guarantee requirements set forth in the solicitation, the agency reasonably found Horizon's proposal unacceptable.

The agency maintains, and the record clearly reflects, that Horizon submitted a bid guarantee in the form of a bid bond and that the identity of the surety on Horizon's bid bond was ambiguous on its face. Horizon's bid bond identified Global Bonding, a business entity, as the surety, yet Robert Joe Hanson signed as an individual surety for the bond. Specifically, the section of Horizon's SF 24 calling for the identification of the surety's name and business address identifies Global Bonding (with the notation "Atty-In-Fact for Robert Joe Hanson") and lists the address for Global Bonding. However, Robert Joe Hanson signed the SF 24 under the "Individual Surety(ies)" heading, but under his signature, his typed name appeared with the notation "sec," suggesting that he was signing on behalf of Global Bonding in his capacity as "secretary" for Global Bonding.⁶ This confusion was compounded by the fact that the bond included a document from Hexagon Consolidated Companies of America stating that Hexagon was pledging "Corporate Debenture 2003-1" to back Global Bonding. However, there were no assets of any kind listed for Robert Joe Hanson, who Horizon maintains was the individual surety for the bond even though the RFP required individual sureties to provide a pledge of assets. Based on these facts, the agency reasonably questioned whether the surety was Global Bonding or Robert Joe Hanson.

The question of whether the surety was Global Bonding or Robert Joe Hanson was critical because Global Bonding did not qualify as an acceptable individual or corporate surety. FAR § 2.101 defines a surety as "an individual or corporation" and defines an individual surety as "one person, as distinguished from a business entity." The agency also correctly notes that according to Instruction 2 on the Affidavit of Individual Surety, SF 28, "no corporation, partnership, or other unincorporated

⁶ Horizon also submitted a document entitled "Surety Acknowledgment" identifying Robert Joe Hanson as Secretary for Global Bonding and as "Attorney-In-Fact for Robert Joe Hanson."

associations or firms, as such, are acceptable as individual sureties.” Because Global Bonding is a business entity, it could not act as an individual surety. Nor could it have qualified as a corporate surety because Global Bonding was not on the Department of Treasury’s list of approved sureties. See FAR § 28.202(a)(1), Acceptability of Corporate Sureties (stating that “Corporate sureties . . . must appear on the list contained in the Department of Treasury Circular 570, ‘Companies Holding Certificates of Authority as Acceptable Sureties on Federal Bonds and Acceptable Reinsuring Companies’”).

The record also clearly reflects that Horizon’s bid guarantee was not in the format required by the solicitation. Horizon maintains that the surety for its bid bond was Robert Joe Hanson, in his capacity as an individual surety. However, Horizon failed to submit an SF 28 with its bid guarantee as the RFP required for those offerors using an individual surety. The solicitation expressly warned that failure to furnish a bid guarantee in the proper format could result in rejection of an offeror’s proposal. Moreover, the agency notes that, consistent with FAR § 28.101-4, Noncompliance with Bid Guarantee Requirements, once it decided to make award without discussions, it could not allow Horizon to correct the perceived deficiencies with its bid guarantee. Section 28.101-4 states in relevant part (emphasis added):

(b) In negotiation, noncompliance with a solicitation requirement for a bid guarantee requires rejection of an initial proposal as unacceptable, if a determination is made to award the contract based on initial proposals without discussions, [except in situations under paragraph (c), which do not apply in this instance]

In sum, given that the identity of the surety for Horizon’s bid bond was unclear and the bid guarantee was materially deficient because it did not include an SF 28 as required by the solicitation, we see no basis to question the agency’s conclusion that Horizon’s proposal was unacceptable.⁷ See Communications by Johnson, Inc., supra, at 7.

The protest is denied.

Anthony H. Gamboa
General Counsel

⁷ We recognize that Horizon contends that the agency’s determinations were a mere pretext to allow award to be made to another offeror. Not only is there no evidence of bias or bad faith in the record, but it is clear that the agency’s determination that Horizon’s proposal was unacceptable was reasonably based on the deficiencies in the bid guarantee, for which Horizon itself is responsible.