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**Comptroller General
of the United States**

**United States Government Accountability Office
Washington, DC 20548**

Decision

Matter of: K.C. Electrical Construction

File: B-411591

Date: August 31, 2015

Daniel Klaus for the protester.

Pawandeep K. Chatha, Esq., and William D. Robinson, Esq., Department of Justice, Federal Bureau of Prisons, for the agency.

Lois Hanshaw, Esq., and Christina Sklarew, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that a bid was improperly rejected based on a failure to furnish documentation establishing a security interest by an individual surety is denied where the agency reasonably found the surety unacceptable and properly rejected the bid.

DECISION

K.C. Electrical Construction (K.C. Electrical), of Midlothian, Illinois, protests the rejection of its apparent low bid as nonresponsive for lack of a valid bid bond under invitation for bids (IFB) No. IFBP04011500002, issued by the Department of Justice, Federal Bureau of Prisons (BOP) for the replacement of secondary electrical panels. K.C. Electrical contends that its bid complied with the requirements of Federal Acquisition Regulation (FAR) § 28.203.

We deny the protest.

BACKGROUND

The IFB was issued on March 2, 2015 as a small-business set-aside and contemplated the award of a fixed-price contract. IFB at 1-2, 29.¹ The IFB required

¹ The BOP used a Bates numbering system for individual tabs in preparing the agency report; our citations are to those numbers.

each bidder to submit with its bid a separate bid bond,² Standard Form 24 (SF 24), with good and sufficient surety or sureties acceptable to the government. Id. at 15. The security was to be for an amount equal to 20 percent of the bid price or \$3 million, whichever was less. Id. The IFB allowed bidders to furnish individual surety bonds. Id. Where individual sureties are involved, SF 24 states that a completed Affidavit of Individual Surety, SF 28, shall accompany the bond and that the government may require the surety to furnish additional substantiating information concerning its financial capability. Id. at 144. The IFB stated that failure to furnish all required information could result in the bidder being determined nonresponsive and ineligible for award. Id. at 2.

Six bids were timely submitted and opened on April 9. Contracting Officer's (CO) Statement at 1. K.C. Electrical was selected as the apparent low bidder. As required, the bid contained a completed Affidavit of Individual Surety, SF 28, on which the surety, the president of K.C. Electrical, listed as assets an escrow account with an escrow account number (#15A04097), a Federal Deposit Insurance Corporation (FDIC) number (#27006), and the amount of the bond (\$119,000). Agency Report (AR), Tab 4, K.C. Electrical Bid, at 43. Attached to the Affidavit was an "Irrevocable Pledge of Escrow" (Irrevocable Pledge) from The Escrow Company, signed by the surety trustee, which stated:

Know all men by these presents, that The Escrow Company existing under and by virtue of the laws of the State of Illinois, in the United States of America and having its principal office at 233 South Wacker Dr., 84th Floor, Chicago, IL 60606, desiring to comply with Clause 28-102, Federal Acquisition Regulations, hereby acknowledges and irrevocably assigns all proceeds of Escrow Account 15A04097 (FDIC 27006) up to Twenty percent of US Federal Bureau of Prisons, IFB P04011500002, not to exceed \$119,000.

Id. at 44.

² 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 there are different requirements for each. See generally FAR Part 28, Bonds and Insurance.

In reviewing the documents attached to K.C. Electrical's bid bond, the CO was unable to find a direct connection between The Escrow Company, the escrow account, and the FDIC number. On May 13, after unsuccessful attempts to contact The Escrow Company, the CO informed K.C. Electrical that she could not conclude that the documentation provided for the individual surety met the requirements set forth in FAR § 28.203-1, Security Interests by an Individual Surety, and FAR § 28.203-2, Acceptability of Assets. AR, Tab 6, Agency Request for Clarification, at 3. The CO also requested documentation showing that The Escrow Company was a federally-insured institution. Id.

In response, the CO received three letters on, or around, May 14. The first letter, from The Escrow Company, stated that the FDIC number provided in the Irrevocable Pledge belonged to American Chartered Bank and that The Escrow Company was the escrow trustee for the escrow account associated with the bid bond. AR, Tab 6, Agency Request for Clarification, at 9. The letter also provided assurance that The Escrow Company was a valid organization and that \$199,000--\$80,000 more than the bid bond had pledged--was in an escrow account reserved for the bid. Id. The second letter, from American Chartered Bank, addressed to a James Victory, was sent to confirm that The Escrow Company had an open and active account at the bank with a balance of \$119,000.³ Id. at 7. The final letter was from James Victory, and indicated that Mr. Victory was a licensed insurance producer and stated that K.C. Electrical had established a \$1.5 million surety line of credit with a Treasury Listed (Circular 570) insurance company for an individual bond limit.⁴ Id. at 15.

After consultation with legal counsel, the CO notified K.C. Electrical that its bid guarantee had been rejected because it failed to show that the escrow account was in the name of the contracting agency or met the requirements of FAR §§ 28.203-1, 28.203-2. AR, Tab 8, Consultation with Legal Counsel at 1-2; Tab 10, K.C. Rejection Letter, at 1. K.C. Electrical's protest to our Office followed.

DISCUSSION

The protester asserts that its bid guarantee met the requirements of FAR § 28.203, and that it provided documentation that assigned the CO sole and unrestricted authority to draw on the funds. Protest at 2. The agency contends that the CO's rejection of the bid was reasonable, based on the individual surety's failure to meet the requirements for providing an escrow account as a security interest pursuant to

³ The account number provided by American Charter Bank differed from the account number referenced in the Irrevocable Pledge.

⁴ Under FAR § 28.202, Treasury Circular 570 is used to determine the acceptability of corporate sureties.

FAR § 28.203-1(b). Specifically, the agency contends that K.C. Electrical's bid did not: (1) create an escrow account in the contracting agency's name; (2) provide the CO with the sole and unrestricted right to draw upon any or all funds deposited in the account; and (3) provide that the terms of the escrow account could not be amended without the CO's consent. Legal Memorandum at 4. We have examined the protester's various arguments and find that none has merit.⁵

The CO is vested with a wide degree of discretion and business judgment in determining the acceptability of an individual surety, including the adequacy of the surety's assets, and we will not question such a determination so long as it is reasonable. Jay Jackson & Assoc., B-271236.3, Sept. 10, 1996, 96-2 CPD ¶ 111 at 3. An individual surety may be accepted only if a security interest in acceptable assets is provided to the government by the individual surety. FAR § 28.203-1(a). One individual surety is adequate support for a bond, provided the unencumbered value of the assets pledged by that surety equals or exceeds the amount of the bond. FAR § 28.203(b). The value at which the CO accepts the assets pledged must be equal to or greater than the aggregate penal amounts of the bonds required by the solicitation. FAR § 28.203-1(b). As relevant here, assets may be provided through an escrow account with a federally-insured financial institution in the name of the contracting agency and must, at a minimum, provide the contracting officer the sole and unrestricted right to draw upon all or any part of the funds deposited in the account and indicate that the terms of the escrow account cannot be amended without the consent of the CO. FAR § 28.203-1(b)(1)(i), (vi). To satisfy the underlying bond obligations, the government will accept from

⁵ For example, the protester asserts that its letter from James Victory, providing a line of credit with a corporate surety listed in Treasury Circular 570, should have been seen as a substitute of assets under FAR § 28.203-4. Protest at 2. Contrary to the protester's assertions, substitution of assets does not occur simply because the protester contends that it provided information which it believes should qualify as a substitution. See FAR § 28.203-4; Tip Top Constr. Corp., B-311305, May 2, 2008, 2008 CPD ¶ 91 at 5 (protester is only entitled to the right to request asset substitution and such substitution--if granted by the CO, in consultation with legal counsel--is not appropriate where the remedy of defects involves the wholesale substitution of assets). Additionally, because Treasury Circular 570 is used to determine the acceptability of corporate sureties pursuant to FAR § 28.202, it is unclear whether the protester is arguing that it intended to substitute assets or to provide a corporate surety. However, we need not reach a conclusion on this issue because, in addition to the reasons stated above, even assuming that the protester is asserting that its letter provided for a corporate surety, the letter omitted the name of the company and would not have provided the CO with enough information to determine the acceptability of the corporate surety, in accordance with FAR § 28.202.

individual sureties only acceptable assets, such as cash or irrevocable letters of credit, from a federally-insured financial institution. FAR § 28.203-2(a), (b). A CO may, but is not required to, allow a bidder a reasonable amount of time to augment surety information previously requested by the solicitation. Santurce Constr. Corp., B-240728, Dec. 10, 1990, 90-2 CPD ¶ 469 at 5.

The protester's assertions are not supported by the record. The FAR requires that an escrow account, submitted as an individual surety's security interest, be in the name of the contracting agency and provide the CO with the sole and unrestricted right to draw on all or part of the funds in the account. Here, the Irrevocable Pledge states that The Escrow Company "hereby acknowledges and irrevocably assigns all proceeds of Escrow Account 15A04097 (FDIC 27006) up to Twenty percent of US Federal Bureau of Prisons, IFB P04011500002, not to exceed \$119,000,00." Despite the protester's assertions to the contrary, this statement neither shows that the escrow account is in the agency's name, nor assigns to the CO the sole and unrestricted right to draw on the funds, as required by FAR § 28.203-1(b). The information provided in the protester's three clarification letters similarly failed to resolve these concerns. On this record, it was reasonable for the CO to find the individual surety on the bid bond unacceptable and reject K.C. Electrical's bid, where its individual surety failed to meet at least two of the requirements for providing a security interest through an escrow account.⁶

The protest is denied.

Susan A. Poling
General Counsel

⁶ To the extent the protester argues in its comments that the CO's May 13 request for clarification on the bid bond was unclear, we find this argument to be untimely. Our Bid Protest Regulations require that protests, not based on improprieties in the solicitation, be raised not later than 10 days after the basis of protest is known or should have been known, whichever is earlier. 4 C.F.R. § 21.2(a)(2). The record shows that the agency notified the protester on May 13 that its bid bond did not meet the requirements of FAR §§ 28.203-1, 28.203-2. See AR, Tab 6, Agency Request for Clarification. If the protester was unclear about the information the CO was seeking to evaluate the bid bond, the protester should have asked questions at that time or raised this challenge in its initial protest. Its failure to do either renders this protest untimely.