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**Comptroller General  
of the United States**

**Washington, D.C. 20548**

## **Decision**

**Matter of:** S.J. Amoroso Construction Company, Inc.

**File:** B-240687

**Date:** November 27, 1990

James A. Reuben, Esq., Reuben, Quint & Valkevich, P.C., for the protester.

Donald R. Jayne, Esq., General Services Administration, for the agency.

Anne B. Perry, Esq., and John F. Mitchell, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

### **DIGEST**

1. Where bid bond provided is less than is required by the solicitation, but is greater than the difference between the bid price and the next higher acceptable bid agency may waive the noncompliance and accept the bid.
2. Where a bid bond does not list the United States as the obligee, but correctly identifies the offeror, the solicitation number and the name of the location of the project involved, and is otherwise acceptable, the agency may waive the noncompliance and accept the bid.

### **DECISION**

S.J. Amoroso Construction Company, Inc. protests the award of a contract to N.L. Barnes Construction Company, Inc. under invitation for bids (IFB) No. GS-O9P-90-KTC-0100 issued by the General Services Administration (GSA) for construction of tenant improvements (renovations) on floors 9, 10, and 11 of the Philip Burton Federal Building located at 450 Golden Gate Avenue, San Francisco, California. This contract is part of a multi-phased asbestos abatement program throughout this occupied, 20-story building. Amoroso asserts that the agency improperly waived the awardee's submission of an inadequate bid bond.

We deny the protest.

The IFB required each bidder to submit with its bid a bid bond in the amount of 20 percent of the total bid price. The

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agency received four bids in response to the solicitation on the bid opening date of July 5, 1990. Barnes was the apparent low bidder, with a price, including options, of \$8,928,000. Barnes submitted a bid bond in the amount of 10 percent of its total bid price on a state of California bid bond form. Amoroso was the apparent second low bidder with a price which included options of \$9,046,000.

Amoroso challenges the award of a contract to Barnes on the grounds that Barnes' bid is nonresponsive for failing to provide an adequate bid bond.<sup>1/</sup> Specifically, the protester argues that the bid bond submitted by Barnes mistakenly identifies the state of California, Department of General Services, as the obligee on the bond instead of the federal government. In addition, Amoroso states that Barnes' bid bond is in an inadequate amount, since it only equals 10 percent of its bid and not 20 percent as is required by the IFB.

Federal Acquisition Regulation (FAR) § 28.101-4(b) provides that noncompliance with a bid guarantee requirement should be waived when the amount of the bid guarantee is less than is required by the IFB, but is equal to or greater than the difference between the bid price and the next higher acceptable bid. Here, Barnes' bid guarantee in the amount of \$892,800 was greater than the \$118,000 difference between Barnes' bid price and that of Amoroso, the next higher acceptable bid. Under the FAR, therefore, Barnes' bid guarantee, though lower than the amount required in the solicitation, was acceptable. Faulk Mechanical Contractors, 68 Comp. Gen. 592 (1989), 89-2 CPD ¶ 120.

The FAR further provides that when a bid guarantee does not list the United States as the obligee, but correctly identifies the offeror, the solicitation number and the name of the location of the project involved, and is otherwise acceptable, the agency may waive the noncompliance. FAR § 28.101-4(i); Nationwide Roofing and Sheet Metal, Inc., 64 Comp. Gen. 474 (1985), 85-1 CPD ¶ 454 (use of United States Postal Service bid bond form for General Services

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<sup>1/</sup> Amoroso initially filed an agency-level protest on July 10, but since it did not receive a response by August 6, Amoroso filed a protest in our Office raising the identical issues. The agency did respond to Amoroso by a letter dated August 7, but received on August 10, and denied the protest. GSA then made award to Barnes, which occurred before the contracting officer was actually notified of the protest filed at the GAO. The agency has determined that urgent and compelling circumstances warrant proceeding with the contract as awarded to Barnes, notwithstanding Amoroso's pending protest.

Administration procurement). Although the bid guarantee submitted by Barnes identified the state of California as the obligee, it correctly identified Barnes as the offeror, the solicitation number, and the name of the project, including that it was at the Federal Building located at 450 Golden Gate Avenue, San Francisco. Under these circumstances, the intention of the surety and the principal to be bound by the bond and the identity of the United States as the intended and true obligee were clearly shown by the bond itself, such that the surety could not successfully deny its liability under the bond. Accordingly, we think the bid bond is enforceable as submitted and therefore acceptable. FAR § 28.101-4(i); Nationwide Roofing and Sheet Metal, Inc., supra.

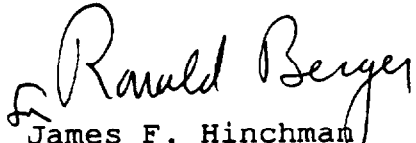
Amoroso maintains that even if each of these defects is waivable by itself, the combination of these inadequacies renders Barnes' bid guarantee fatally defective. In support of its position the protester points to the statement in FAR § 28.101-4(i) which provides that failing to specifically identify the United States as the obligee may be waived "so long as it [the bid bond] is acceptable in all other respects." Amoroso argues that since Barnes' bid bond is also in an inadequate amount, it is not acceptable in all other respects.

We disagree. Barnes' bid bond is acceptable in all other respects since the only other nonconformance is that it is in the amount of 10 percent of its bid price, but as we previously stated this is a waivable noncompliance since it is greater than the difference between its bid price and the next higher price. The applicable FAR provision states that "Noncompliance with a solicitation requirement for a bid guarantee requires rejection of the bid, except in the following situations when the noncompliance shall be waived, unless the contracting officer determines in writing that acceptance of the bid would be detrimental to the Government's interest." (Emphasis added.) This provision continues by identifying nine situations in which the contracting officer shall waive the noncompliances, among these are the two which are herein applied. This regulation neither limits the number of these nonconformances that may apply, nor states that in order for one exception to apply, the bid guarantee has to comply with the exact requirements of the solicitation. See e.g., Professional Restoration Servs., Inc., B-232424, Jan. 9, 1989, 89-1 CPD ¶ 13.

The only limitation on the applicability of this regulation is that acceptance of the bid may not be detrimental to the interests of the government. As we previously stated, the government is fully protected under this bid guarantee, a fact

not even challenged by the protester, and therefore, waiver of these nonconformances is not detrimental to the government's interests.

The protest is denied.

  
James F. Hinchman  
General Counsel