

DECISION**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

27640

FILE: B-213955; B-213955.2 **DATE:** March 9, 1984**MATTER OF:** Andersen Construction Co.; Rapp
Constructors, Inc.**DIGEST:**

1. Under surety law, no one incurs a liability to pay the debts or to perform the duty of another unless he expressly agrees to be bound, and a surety under a bond in the name of several principals is not liable for the default of one of them. Therefore, GAO consistently has held that a bid bond naming a principal different from the nominal bidder is deficient, and the defect generally may not be waived as a minor informality.
2. When a bid is submitted in the name of a corporation, but a bid bond is in the name of a joint venture consisting of the corporation and its president in his individual capacity, the bid bond is materially deficient, and the bid must be rejected as nonresponsive.

This decision responds to pre-award protests by the low and second-low bidders for a contract for construction of a conveyance channel north of the town of Alamosa, Colorado. Known as the San Luis Valley Project, the 10-mile long channel will convey water from a shallow, unconfined aquifer to the Rio Grande River.

Andersen Construction Co., the low bidder, and Rapp Constructors, Inc., the second-low bidder under solicitation 3-SB-5D-00490/DC7571, issued by the Bureau of Reclamation, Department of the Interior, each protest the award to any firm other than themselves.

Although Rapp has alleged that Andersen's bid is deficient in five different ways, the dispositive issue here is the legal sufficiency of Andersen's bid bond. We find that the bond may not bind Andersen's surety, and we therefore sustain Rapp's protest. Andersen asserts only that it is entitled to award; we deny its protest.

028234

B-213955; B-213955.2

There is no dispute as to the facts. Eight bids were opened on December 6, 1983; of these, Andersen's was low at \$3,047,675.85. Because two items for step-ladder quantities were priced higher than the solicitation permitted, Andersen's bid was corrected in accord with the special provisions of the solicitation to \$3,016,675.85. Rapp's bid was second-low at \$3,348,491. In a memo dated December 7, 1983, the bid opening board advised the Bureau of Reclamation's Southwest Regional Director that Andersen had satisfactorily completed previous work for the San Luis Valley Project and was highly qualified to perform the work required; it recommended that Andersen be awarded the contract "provided the bid is legally sufficient."

An examination of the bid itself (Standard Form 21) reveals that the bidder is identified as follows:

Andersen Construction Company
P.O. Box 1107
Alamosa, CO. 81101.

On the back of the form, the exact same name and address is repeated twice, once in the box for name of bidder and again in the box for the bidder's business address. The form is signed by Dale S. Andersen, President. On Standard Form 19B, the Andersen Construction Company name and address is again repeated; the box indicating that the firm is a corporation is checked, and Colorado is shown as the place of incorporation.

The bid bond (Standard Form 24) submitted with the bid, however, is made out as follows:

Dale Andersen, Individually, and
Dale Andersen Construction Co., a Joint Venture.

The bond is signed by Dale S. Andersen, President, as principal; it also is signed by Dale S. Andersen (no title) as an individual surety. The corporate surety is identified as the Fidelity and Deposit Company of Maryland, the surety has a Denver, Colorado, address, and its Attorney-in-Fact has signed for it. In the box indicating type of organization, joint venture is checked.

In a protest filed simultaneously with the contracting officer and with our Office, Rapp argues that Andersen's bid should be rejected because, among other things, the bond is for a joint venture made up of two entities as principal (rather than for a Colorado corporation, as stated on SF 19B), neither of which is the same as the bidder. Rapp also has submitted a document signed by the Colorado Secretary of State to the effect that there is no corporation, domestic or foreign, operating in Colorado under the name of Dale Andersen Construction Co. Even assuming for the sake of argument that the discrepancy between the Andersen Construction Company and the Dale Andersen Construction Co. can be overlooked, Rapp argues that under the decisions of our Office, Andersen's bid is nonresponsive.

Andersen's protest indicates that it intended to bid as a Colorado corporation. It appears that Andersen's surety first issued the bond in the corporation's name, but immediately before bid opening provided a substitute bond and instructed Andersen to use it, which it did. Andersen argues that the name and signatures on the second bond were to establish that Dale Andersen was guaranteeing it individually as well as in his capacity as president of the corporation, of which he owns 100 percent of the capital stock. Any discrepancy between the bid and the bid bond, Andersen concludes, is a minor informality that can be corrected without prejudice to other bidders. In support of its position, Andersen has provided a letter dated December 28, 1983, from the surety's Denver agents to the contracting officer, confirming that upon award of the contract to Dale Andersen and Dale Andersen Construction Company, they will be providing the required performance and payment bonds.

The contracting officer's report to our Office states that it is "apparent that the Andersen Company and the bonding company had every intent to be bonded and bound by the bid." After reviewing the decisions cited by Rapp, however, the contracting officer concludes that the bid bond is not acceptable, stating that he has no alternative but to make award to Rapp unless otherwise directed by our Office.

The law of suretyship is very clear: no one incurs a liability to pay the debts or to perform the duty of another unless he expressly agrees to be bound. Moreover, a surety under a bond in the name of several principals is not liable for the default of one of them. See A. D. Roe Company, Inc., (54 Comp. Gen. 271 (1974)), 74-2 CPD 194 and cases cited therein. For this reason, we consistently have held that a bid bond naming a principal different from the nominal bidder is deficient, and the defect generally may not be waived as a minor informality. Id.

We reaffirmed this principle most recently in Atlas Contractors, Inc./Norman T. Hardee, a Joint Venture, B-208331, January 19, 1983, 83-1 CPD 69. In that case, as here, the bid was in the name of a corporation and was signed by its president in that capacity; the bond, however, identified both the corporation and the president, the latter not by title but as an individual, and indicated that they were organized as a joint venture. Although the protester argued that it had intended to bid as a joint venture, we held that the bid was at best ambiguous and therefore could properly be rejected.

In an earlier case involving a bid submitted in a corporate name, accompanied by a bond issued to a joint venture consisting of the corporation and its president as an individual, the protester also had advised the contracting officer that its surety (again Fidelity and Deposit Company of Maryland) would not provide the required coverage unless both the corporation's and the president's personal assets were included on the bond. There too the corporation bore the name of the president, who was its sole owner. In addition, the surety subsequently submitted assurances that it would be no problem to change the bid bond to conform with any required wording. We could not conclude that the surety would be bound, and we held that the bid properly had been rejected as nonresponsive. See Villarreal Construction Co., Inc., B-184409, November 28, 1975, 75-2 CPD 351.

In this case, if following award the president of Andersen Construction Company refused to execute the contract and to provide the required performance and payment bonds, we believe the surety might successfully argue that it was not bound by a bond issued to Dale Andersen, Individually and Dale Andersen Construction Co., a Joint

B-213955; B-213955.2

Venture. Further, Andersen's post-opening attempts to cure the deficiency may not be considered, since the responsiveness of a bid must be determined as of the time of opening. A. D. Roe Company, Inc., supra.

We therefore find that the award must go to Rapp if it is otherwise determined to be a responsive and responsible bidder.

Rapp's protest is sustained; Andersen's is denied.

for Milton J. Acosta
Comptroller General
of the United States