



The Comptroller General
of the United States

Washington, D.C. 20548

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Decision

Matter of: River Equipment Company, Inc.

File: B-227066

Date: July 24, 1987

DIGEST

Contracting agency reasonably found that bidder was nonresponsible where its individual sureties failed to disclose outstanding bond obligations in their Affidavit of Individual Surety, regardless of the risk of liability on those obligations.

DECISION

River Equipment Company, Inc., protests the determination that it was nonresponsible under invitation for bids (IFB) No. DACW38-87-B-0043, issued by the United States Army Engineer District, Vicksburg, Mississippi, for the lease of a cutterhead hydraulic pipeline dredge. The Army determined that River Equipment was nonresponsible because its individual surety failed to disclose all outstanding bond obligations and due to a pattern of nondisclosure and other surety problems that occurred on prior contracts.

We deny the protest.

The IFB required bidders to submit bid bonds equal to 20 percent of their bid prices. Since River Equipment was bonded by individual sureties (as opposed to corporate sureties), it was required to submit a completed Affidavit of Individual Surety (Standard Form 28) on each surety. Item 10 of the Affidavit required individual sureties to disclose all other bonds on which they were obligated at the time they executed the bid bond for River Equipment.

At bid opening, on March 19, 1987, River Equipment was the low responsive bidder. However, on April 1, 1987, the second low bidder protested award to River Equipment because

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River Equipment's surety, Ike Carter, III, allegedly did not disclose bid bond obligations on solicitation Nos. DACW03-87-B-0033 and DACW03-87-B-0034 issued by the Little Rock District of the Corps of Engineers and performance and payment bond obligations on contract No. DACW03-87-C-0009 at the Little Rock District of the Corps of Engineers.

In investigating the allegation, the contracting officer discovered that Ike Carter, III, appeared as surety for bid bonds on the two solicitations mentioned above at the time it executed the bid bonds here. Bid opening on the two solicitations occurred on March 11 and 12, 1987, and River Equipment was the second low bidder. Award was made to the low bidder on March 30. However, the contracting officer determined that at the time Ike Carter, III, executed the bid bond for this IFB on March 16, 1987, it was liable for the bid bonds on the Little Rock District solicitations and therefore these obligations should have been revealed in its affidavit.

Furthermore, the contracting officer found that the president of River Equipment, Ike Carter, Jr., who submitted the bid and accompanying bid bonds had been involved in a similar nondisclosure and other surety problems on two prior contracts let by the Vicksburg District to Carter Construction Company. Ike Carter, Jr., also is president of Carter Construction Company. On one contract, the individual surety did not establish its net worth until 66 percent of the contract was complete and on the other contract, in addition to having net worth problems, it was determined that the individual surety failed to reveal an outstanding bond obligation. Although River Equipment Company and Carter Construction Company are different companies, the contracting officer believed that the history of Carter Construction Company was relevant because of common ownership and personnel.^{1/} In view of the surety's failure to disclose the Little Rock District obligations on its affidavit and the problems encountered with Ike Carter, Jr., on prior contracts, the contracting officer determined that

^{1/} The Army reports that (1) River Equipment is a subsidiary corporation of Carter Companies, Inc; that according to Ike Carter, Jr., all of the stock in River Equipment is owned by Carter Companies and the children of Ike Carter, Jr. (including Ike Carter, III); (2) Carter Construction Company, Arkansas Valley Dredging Co., Inc., and Carter Companies all operate out of the same address as River Equipment; and (4) the corporate assets float freely between the corporations.

River Equipment was not a responsible bidder. Subsequent to the nonresponsibility determination, the contracting officer also discovered that the other surety, E. Art Thomas, also failed to reveal that he was acting as surety on the bid bonds for the Little Rock District solicitations. Moreover, Ike Carter, III, and E. Art Thomas, submitted an affidavit for River Equipment 5 days after the bid opening in this IFB, on March 24, 1987, on a solicitation issued by the Memphis District and neither surety listed the bid bond on the Vicksburg IFB as an outstanding obligation.

River Equipment essentially contends that the nonresponsibility determination was unreasonable because it was not in line for award on the Little Rock District solicitations. Specifically, River Equipment advises that the reason that it did not list these obligations on its affidavit was because a contract specialist and the Assistant, Chief, Construction Operations Divisions at the Little Rock District advised it on March 16 that award was going to be made to the low bidder. Thus, it contends that it had been officially released from the award and therefore was not required to list these obligations because they had expired. River Equipment further believes that the determination was unreasonable because, notwithstanding the failure to disclose these obligations, the individual sureties still had sufficient net worth for the bonds. In this regard, River Equipment contends that Federal Acquisition Regulation (FAR), 48 C.F.R. § 28.101-4(b) (1986), required the contracting officer to waive its failure to accurately complete the affidavit because its sureties had sufficient net worth to cover this solicitation. Moreover, River Equipment contends that it was inappropriate for the contracting officer to have concluded that there was a pattern of nondisclosure on the part of River Equipment because Carter Construction Company inadvertently failed to disclose an outstanding bond obligation since the two companies are separate entities.

The Affidavit Of Individual Surety is a document separate from the bid bond itself and serves solely as an aid in determining the responsibility of an individual surety. Consolidated Services, Inc., B-206413-3, Feb. 28, 1983, 83-1 C.P.D. ¶ 192. Therefore, a contracting agency may properly consider the failure of an individual surety to disclose outstanding bond obligations as a factor in determining the responsibility of the bidder. Singleton Contracting Corp., B-216536, Mar. 27, 1987, 87-1 C.P.D. ¶ 355. A surety must disclose all other bond obligations under Item 10 of the affidavit, regardless of the actual risk of liability on those obligations, to enable the contracting officer to make an informed determination concerning the sureties' financial soundness. Since Item 10 of the affidavit provides space

for the surety to list "all other bonds on which [he is] surety," we believe that the duty of the individual surety to disclose all such obligations, without exception is clear. Id. On a bid bond, a surety's obligation runs from the time the bid is submitted by the principal and continues for the duration of the bid acceptance period. MZP Inc., B-224860, et al., Dec. 19, 1986, 86-2 C.P.D. ¶ 690.

In reviewing a bidder's responsibility, the contracting officer is vested with a wide range of discretion and business judgment, and this Office will defer to the contracting officer's decision unless the protester shows that there was bad faith by the procuring agency or that there was no reasonable basis for the determination. Eastern Metal Products & Fabricators, Inc., B-220549.2, et al., Jan. 8 1986, 86-1 C.P.D. ¶ 18.

Since award under the Little Rock District solicitations was not made until March 30, we find that River Equipment was obligated to disclose the bid bonds for these solicitations, notwithstanding the advice provided by the contract specialist and Assistant Chief of Construction. While River Equipment may have believed that it was released from liability on these bonds because of the advice that it received about the award, the fact remains that River Equipment's sureties were liable on the bonds as long as it had the potential of being awarded these contracts. See MZP Inc., B-224860, et al., supra. The impact of outstanding bond obligations is a decision to be made by the contracting officer, not by the sureties themselves through the selective disclosure of their potential liabilities. See Consolidated Marketing Network, Inc.--Request for Reconsideration, B-218104.2, June 12, 1985, 85-1 C.P.D. ¶ 675.

Although River Equipment argues that it was improper to attribute a pattern of nondisclosure to it based on what occurred with Carter Construction, the Federal Acquisition Regulation (FAR), 48 C.F.R. § 9.104-3(d), specifically provides that affiliated concerns are normally considered separate entities in determining whether the concern that is to perform the contract meets the applicable standards for responsibility; however, the contracting officer shall consider the affiliate's past performance and integrity when they may adversely affect the prospective contractor's responsibility.^{2/} Given that Ike Carter, Jr., is president

^{2/} FAR, 48 C.F.R. § 19.101, defines "affiliates" as follows:

"[B]usiness concerns are affiliates of each other if, directly or indirectly, (a) either one controls or has the

of both Carter Construction and River Equipment, it was not inappropriate for the contracting officer to have concluded that there was a nexus between the nondisclosure of River Equipment's surety and the surety problems encountered with Carter Construction. Nevertheless, even if we accept that it was improper for the contracting officer to have attributed a pattern of nondisclosure to River Equipment, the fact that its sureties failed to disclose all outstanding obligations in itself was a sufficient basis to reject it as nonresponsible. See American Federal Contractor, Inc., B-222526, July 25, 1986, 86-2 C.P.D. ¶ 114; Singleton Contracting Corp., B-216536, supra.

River Equipment is mistaken in applying FAR, 48 C.F.R. § 28.101-4(b), to the situation here. The regulation permits the contracting officer to waive the failure to comply with a bid bond requirement where a bidder submits a bid bond insufficient in amount but which is equal to or greater than the difference between the bid price and the next higher acceptable bid. This regulation concerns a question of responsiveness. As indicated previously, the failure to disclose outstanding bond obligations is considered in determining the acceptability of the sureties, which relates to the responsibility of the bidder. Here, River Equipment was found to be nonresponsible because its surety failed to disclose an outstanding obligation, not due to its failure to comply with the bid bond amount requirement.

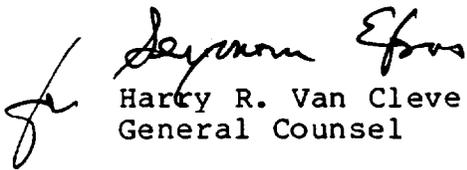
River Equipment states that the contracting officer was required to consider the net worth of its surety up until the time of the award since its responsibility was being considered and therefore the fact that the undisclosed obligations in fact had expired should have been considered in determining the acceptability of its surety. While this statement is in part true, we have stated that it is not the duty of the contracting officer to attempt to determine each and every outstanding obligation of the surety as part of the responsibility determination, rather it is the obligation of the surety to initially disclose all outstanding obligations. See MZP Inc., B-224860, et al., supra, 86-2 C.P.D. ¶ 690 at 3. The fact that an undisclosed obligation has expired may have some bearing on the net worth of individual sureties; however, it does not cure the cloud

power to control the other or (b) another concern controls or has the power to control both. In determining whether affiliation exists, consideration is given to all appropriate factors including common ownership, common management, and contractual relationships. . . ."

created over the integrity of the individual sureties from initially failing to disclose outstanding obligations.

Since River Equipment did not disclose the Little Rock District obligations, the contracting officer had no way of knowing whether or not it had failed to disclose other outstanding obligations. See American Federal Contractor, Inc., B-222526, supra, 86-2 C.P.D. ¶ 114 at 2. Therefore, we find that the contracting officer acted reasonably in determining that River Equipment was nonresponsible.

The protest is denied.

 Harry R. Van Cleve
General Counsel