



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: John Peeples
File: B-233167
Date: February 21, 1989

DIGEST

Agency determination to reject bid as nonresponsive merely because one of bidder's sureties is a government employee is improper since this would not prevent the contracting officer from satisfactorily obtaining performance on a defaulted contract by recourse to this surety.

DECISION

John Peeples protests the rejection of its bid and the award of a contract to W. A. Hunt Construction Co., Inc., under invitation for bids (IFB) No. N62467-88-B-4055, issued by the Naval Weapons Station, Charleston, South Carolina, for the construction of a car garage.

We sustain the protest.

The Navy rejected Peeples' bid and denied Peeples' subsequent agency-level protest because Peeples' bid bond, guaranteed by individual sureties, was determined unacceptable. One of Peeples two sureties is a government employee and the Navy determined that Federal Acquisition Regulation (FAR) § 3.601 (FAC 84-18), prohibiting the award of federal contracts to federal employees except when there is a compelling reason to do so, precludes the use of federal employees as sureties since, in the event of a default, the government could turn to the surety for contract performance.

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Peeples contends that the FAR does not prohibit federal employees from being sureties and that the Navy unreasonably rejected its bid as nonresponsive.

The FAR prohibition against awarding federal contracts to government employees is stated to be a matter of policy intended to avoid any conflict of interest that might arise from such an award. We have consistently held that the responsibility for determining whether a firm has a conflict of interest and to what extent a firm should be excluded from competition rests with the procuring agency, and we will overturn such a determination only when it is shown to be unreasonable. Defense Forecasts, Inc., 65 Comp. Gen. 87 (1985), 85-2 CPD ¶ 629. Further, a contracting agency may impose a variety of restrictions, not explicitly provided for in applicable law or regulations, when the needs of the agency or the nature of the procurement dictate the use of such restriction, even where the restriction has the effect of disqualifying particular firms from receiving an award because of a conflict of interest. Id. However, we do not believe that the automatic exclusion of a bidder from competition because of a remote possibility that such a conflict might arise under a possible default situation constitutes an appropriate restriction.

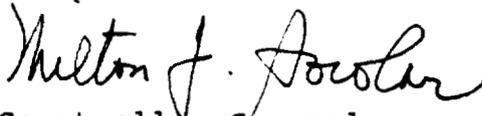
The Navy has cited our decision in Revet Environment & Analytical Laboratories, Inc., B-221002.2; B-221003.2, July 24, 1986, 86-2 CPD ¶ 102 as stating that a government employee who is a surety or creditor of a bidder may result in the rejection of the bid for conflict of interest. That decision dealt with the situation of a government employee, the husband of the president of the company, who, through the sale of stock to his wife had become a creditor of the bidder. The only time the word surety was used in the decision was in a statement of an argument by the protester.

Allowing a bid bond surety to arrange to complete a contract on which it was pledged is a permissible means of reprocurement under FAR § 49.404(b). See Arrow, Inc., B-231001, July 13, 1988, 88-2 CPD ¶ 44. That is not to say, however, that this is the only option available to the contracting officer to obtain performance on a defaulted contract. The contracting officer could award to the next low bidder, FAR § 49.402-6(b) (FAC 84-5), or accept payment on the bond from the surety, in which case the contracting officer could then award a new contract to another party. FAR § 49.405 (FAC 84-5).

Here, although the FAR prohibition might preclude the contracting officer from having a surety who is a government employee actually complete the contract (normally the surety arranges to have another party complete the contract), this does not prevent the contracting officer from satisfactorily obtaining performance on a defaulted contract by other means. This surety has not limited his obligation under the bid bond in any manner. Since the contracting officer has other viable options for reprocurement, allowing the use of a surety who is a government employee would only remotely limit the contracting officer's choices for reprocurement.

In view of the remoteness of the possible problem, we do not think it reasonable for the Navy to absolutely preclude the use of a bid bond surety who also happens to be a government employee. Accordingly, we sustain Peeples' protest and recommend that the Navy make award to Peeples, if otherwise appropriate. In addition, Peeples is entitled to the costs of filing and pursuing the protest. 4 C.F.R. § 21.6(d)(1) (1988).

The protest is sustained.

for 
Comptroller General
of the United States