



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Southern California Engineering Co., Inc.
File: B-234515.2
Date: August 21, 1989

DIGEST

1. Protester was properly found nonresponsible where it failed to provide sufficient information to permit finding that the individual sureties on its bid bond were acceptable and the record shows the contracting officer's nonresponsibility determination was reasonable.
2. Even though an individual surety may have been accepted by a contracting agency, this does not compel another agency to accept the surety where based on the information presented to it the second agency reasonably determined the surety to be unacceptable.
3. A bidder may not, after bid opening, substitute an acceptable corporate surety for individual sureties found unacceptable because the liability of the sureties is an element of responsiveness established at bid opening and as such cannot be changed after bid opening.

DECISION

Southern California Engineering Co., Inc., protests the rejection of its bid under invitation for bids (IFB) No. DACA85-89-B-0011, issued by the United States Army Engineer District, Alaska, for additions and alterations to electric systems at Clear Air Force Station. Southern argues that it was improperly rejected as nonresponsible based on the Engineers' finding that the individual sureties on Southern's bid guarantee were unacceptable.

We deny the protest.

The IFB required each bidder to provide a bid guarantee in an amount equal to 20 percent of the bid or \$3 million, whichever was less. Eight bids were received at the bid opening on February 7, 1989. Southern submitted the low bid

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of \$5,270,000, with a bid bond naming two individual sureties in response to the IFB bid guarantee requirement. In accordance with the solicitation, Southern was required to and did submit a completed Affidavit of Individual Surety (Standard Form 28) for each surety. The solicitation also provided that ownership of real property listed as an asset on the SF 28 must be evidenced by a title report prepared by a title insurance company authorized to do business in the state where the land is located, and that the value of listed real estate and personal property must be substantiated by an appraisal.

On one of Southern's affidavits, the surety indicated her net worth as \$37,924,800, with listed assets consisting primarily of \$52,774,900 in securities in Amistad, Inc., a closely-held corporation. The other surety indicated his net worth as \$38,536,000 on his SF 28, consisting mainly of \$52,831,600 in securities in Amistad, Inc. As required by the solicitation each surety submitted a Certification of Sufficiency. Each certificate was completed by an officer of the Metropolitan Security Bank, Ltd. The SF 28 stated that Metropolitan is domiciled in the British West Indies.

Each surety also furnished a document identified as an "Accountant's Review Report," prepared by a certified public accountant in Dallas, Texas. The accountant noted in each report that "[a]ll" information included in this financial statement is the representation of [the surety]," and that the procedure used in preparing the reports was "substantially less in scope than an examination in accordance with generally accepted auditing standards." The reports also noted the value of the sureties' investment in Amistad, Inc., was "based upon the present value of future net revenues derived from the extraction of underground water . . . plus the approximate surface value."

The contracting officer states that a number of inquiries were made regarding the information provided on the SF 28s. The Texas Water Development Board was contacted, and a representative of the Board informed the contracting officer that the existence of, and legal rights to, the underground water on which the sureties based much of the value of Amistad, Inc., is questionable. The contracting officer also states that he was informed by the Texas Banking Department that Metropolitan Security Bank is not registered to do business in Texas, and "had been asked to cease and desist from permitting its officers to sign certificates of sufficiency" to accompany affidavits of individual surety. Further, upon attempts to verify information contained in

their affidavits, the sureties told contracting personnel that they were sureties on projects not listed in their SF 28s.

Because of questions concerning the value of the land and its ownership by Amistad, the certificates of sufficiency executed by an officer of Metropolitan, and possible inaccuracies on the SF 28s regarding the sureties' bond obligations on other projects, the contracting officer informed Southern by letter dated May 5 that the sureties were unacceptable. The contracting officer outlined what documentation Southern needed to provide to make the sureties acceptable and referred that firm to the section of the IFB which details the documentation required of individual sureties.

Southern replied through its counsel by letter of May 18, assuring the contracting officer first that "Texas completely recognizes the ownership of underground water." This letter referred, without any substantive explanation, to sections of the Texas Code Annotated to substantiate Southern's position that Amistad's legal rights to the underground water is secure. As proof of Amistad's ownership of the land, Southern provided: (1) a deed dated 1971 conveying land to Aquila, Inc.; (2) a title opinion concerning this land dated 1971; (3) copies of stock certificates showing ownership in Aquila, Inc., by the sureties; (4) articles of amendment dated 1975 changing Aquila, Inc.'s name to Amistad, Inc.; and (5) an affidavit of ownership executed in December 1988 showing that all outstanding shares in Amistad, Inc., are owned by the two sureties. As proof of the value of Amistad's land, Southern's counsel submitted unidentified, unsigned, handwritten tables which appear to record water elevation and reservoir elevation and well depth, from various nearby bodies of water with various monthly dates from 1968 to 1985, presumably to demonstrate the amount of water located under Amistad's land. Southern's counsel then suggested that the contracting officer perform a "quick check of the surrounding communities" to verify the market rate for water, and provided an undocumented, unsubstantiated estimation of what these communities were currently paying for water.

Southern's counsel addressed the contracting officer's concerns regarding the execution of the certificate of sufficiency by simply stating that Metropolitan Security Bank, Ltd. is a bank, and the individuals who signed the certificates are officers of the bank, and therefore they are authorized to sign the certification of sufficiency.

Finally, Southern's counsel contended that the sureties had in fact disclosed all other bonds on which they are sureties.

After reviewing the supplemental information submitted by Southern's counsel, the contracting officer informed Southern by letter of June 2 that he had concluded that the sureties were unacceptable. The contracting officer explained that this finding was based on Southern's failure to provide a current title report showing that Amistad is presently the sole owner of the land and that the land is not alienated or encumbered, on the speculative nature of the sureties' claim as to the value of Amistad's land and the lack of any appraisal which establishes the land's value, and on the fact that the certificates of sufficiency were signed by officers of a bank which is neither state or federally regulated. Furthermore, the contracting officer noted that the supplemental information Southern's counsel did provide in regard to the sureties' assets was not the information required by the solicitation, and was not the information the contracting officer had requested.

Southern contends that its individual sureties showed net worths that were sufficient to satisfy the requirements of Federal Acquisition Regulation (FAR) § 28.202-2(a), which specifies that "the net worth of each individual must equal or exceed the penal amount of the bond." According to Southern, it submitted more than adequate evidence detailing ownership and the relative value of Amistad, Inc., and its land, the main asset held by its sureties. Southern also claims that its sureties have been accepted by other government agencies. Finally, Southern claims that when the adequacy of its individual sureties was first questioned, it offered to substitute a corporate surety, and that the Engineers did not respond to this offer.

The question of the acceptability of a surety is a factor in determining the responsibility of the bidder and may be established at any time prior to contract award. Labco Constr., Inc., B-232986 et al., Feb. 9, 1989, 89-1 CPD ¶ 135. In reviewing a bidder's responsibility, the contracting officer has broad discretion and absent bad faith or the lack of any reasonable basis for his determination, the contracting officer may decide what specific financial qualifications to consider in determining responsibility. Id. It is the sureties' obligation to provide the contracting officer with sufficient information to clearly establish their responsibility; that is, that they

have sufficient financial resources to meet their bond obligations. Hirt Co., B-230864, June 23, 1988, 88-1 CPD ¶ 605.

Despite the solicitation's instructions and the contracting officer's request, Southern did not submit a title report prepared by a title insurance company in order to verify ownership of the land, nor did it submit an appraisal to substantiate the land's claimed value. Because of Southern's failure to provide this documentary evidence, and in view of the speculative nature of the sureties' primary asset, along with the questionable nature of the sufficiency certifications, we do not find the contracting officer's finding of nonresponsibility unreasonable.

As to Southern's comment that its sureties have been accepted by other contracting agencies, the acceptance of a protester's surety in another procurement by another contracting agency does not compel the contracting officer here to do so where based on the information presented to him he reasonably determines the surety is unacceptable. C.W. Constr., Inc., B-233086 et al., Feb. 14, 1989, 89-1 CPD ¶ 153.

Finally, Southern states in its comments on the agency report that when the agency initially questioned the acceptability of its sureties, Southern offered to substitute a corporate surety. Southern states that the agency never responded to this offer. While acceptability of an individual surety may be established, time permitting, any time prior to award, Hirt Co., B-230864, supra, the replacement of an unacceptable surety after bid opening is generally not allowable since the liability of the sureties is an element of responsiveness which must be established at the time of bid opening. Management Servs. Group, Inc., B-234412, May 24, 1989, 89-1 CPD ¶ 499. Elements of a bid which go to a bid's responsiveness cannot be changed after bid opening. Texas Elevator Co., Inc., B-233009, Oct. 25, 1988, 88-2 CPD ¶ 393. Therefore, because the agency could not have permitted Southern to substitute a corporate surety, it is irrelevant whether or not the agency responded to Southern's offer.

The protest is denied.



James F. Hinchman
General Counsel