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Comptroller General
of the United States

Washington, D.C. 20549

Decision

Matter of: Consolidated Industrial Skills Corporation

File: B-236239.2

Date: October 6, 1989

DIGEST

Solicitation provision which requires offerors providing individual sureties to submit a certified public accountant's certified balance sheet(s) and income statement(s) with a signed opinion for each surety is not legally objectionable as unduly restrictive of competition where the accuracy of sureties' net worths is often called into question by offerors' failure to submit sufficient supporting information.

DECISION

Consolidated Industrial Skills Corporation protests the provision in request for proposals (RFP) No. N62467-89-R-0516, issued by the Department of the Navy, which requires those offerors who provide individual sureties to submit a certified public accountant's (CPA's) audited financial statement evidencing each surety's net worth. The solicitation is for base maintenance and utilities operation at the Naval Station Complex in Mayport, Florida. Consolidated contends that this requirement effectively eliminates individual sureties as a viable means of obtaining bonding and as such is unduly restrictive of competition.

We deny the protest.

The solicitation, issued as a small business set-aside, requires a performance bond and a payment bond. In this regard, the RFP contains an "Individual Surety Clause" which states that in order for the contracting officer to determine the acceptability of individuals proposed as sureties, all offerors providing bonds which are executed by individual sureties are required to submit, after receipt of

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information in support of Standard Form (SF 28), "Affidavit of Individual Surety":

- (1) A complete description of property offered, supported by title or deed, and appraisal or tax assessment;
- (2) A current list of all other bonds on which the individual is a surety and bonds for which the individual is requesting to be a surety;
- (3) Independent certification of net value of property offered;
- (4) Independent certification of liens or other encumbrances which exist against all property listed;
- (5) CPA-certified balance sheet(s) and income statement(s) with a signed opinion for each individual surety.

It is the last requirement to which the protester objects.

Consolidated contends that the requirement to provide a CPA audited income statement and balance sheet and a signed unqualified opinion for each individual surety is excessive and unreasonable. The protester contends that this requirement is not in accordance with either Federal Acquisition Regulation (FAR) § 28.202-2 (FAC 84-42) or the instructions in the SF 28.

Consolidated alleges that this requirement is so onerous that it effectively eliminates the opportunity to use individual sureties. In support of its allegation, Consolidated has submitted letters from two CPA's in which they state that they have never prepared an audited personal financial statement, but "routinely" or on "numerous" occasions have prepared "compiled" personal financial statements. The difference between an audited financial statement and a compiled one is that the information contained in the latter is supplied by the individual surety and is not independently verified or attested to by the CPA.

A contracting officer, pursuant to FAR § 28.202-2, is obligated to "determine the acceptability of individuals proposed as sureties." Since the regulation states that the information provided in the SF 28 is "helpful" in determining the net worth of proposed individual sureties, we have consistently held that the contracting officer is therefore not limited to the consideration of information contained in

the SF 28, but may go beyond that information when necessary in making the decision. Hughes & Hughes, B-235723, Sept. 6, 1989, 89-2 CPD ¶ ____.

The determination of the acceptability of an individual surety is a factor in determining responsibility and a question of business judgment, and as such the contracting officer is vested with a wide degree of discretion in making this determination. Id. In general, therefore, the contracting officer may decide what specific financial qualifications and information to consider in determining the individual surety's responsibility. Southern California Eng'g Co., Inc., B-234515.2, Aug. 21, 1989, 89-2 CPD ¶ ____.

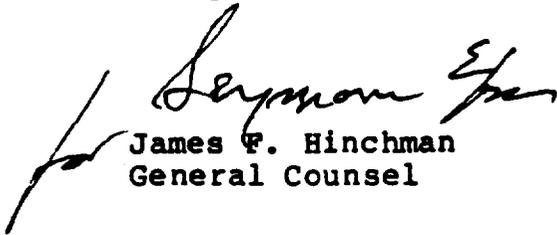
A contracting officer, however, does not have unfettered discretion to decide what is necessary to establish an individual surety's acceptability. For example, we have held that a blanket requirement that all individual sureties provide a primary security interest in real property listed on an SF 28, as well as proof of title and appraisal of value, was not reasonably related to the minimum needs of the agency, and was therefore overly restrictive. Altex Enters., Inc., 67 Comp. Gen. 184 (1988), 88-1 CPD ¶ 7. We stated that the requirement of a primary security interest effectively prohibited the use of individual sureties, without a demonstrated need to do so in the particular procurement, which we indicated was inconsistent with FAR § 28.202-2, which expressly permits the use of individual sureties. There is a balance to be drawn, therefore, between a bidder's right to use individual sureties and a contracting agency's need to reasonably assure itself of the acceptability of the individual sureties proposed.

We do not find that requiring a CPA audited financial statement is an overly restrictive requirement which effectively prohibits the use of individual sureties. The contracting officer noted that her experience with SF 28 Affidavits of Individual Sureties has demonstrated that people signing the certificate of sufficiency do not understand what they are signing and do not have personal knowledge of the surety's net worth. The Navy states that since SF 28s are less than reliable, it seeks a certified CPA opinion in order to obtain an unbiased, professional opinion of the surety's net worth.

We have consistently upheld contracting agency's nonresponsibility determinations where the SF 28 contents created doubt as to the true net worth of an individual surety, and the bidder or offeror failed to supply an audited financial statement. Hughes & Hughes, B-235723, supra. A review of our cases shows that the crux of the problem is that the manner in which individual sureties complete the SF 28 often

leaves the agency in doubt as to the validity of the surety's self-stated net worth^{1/}. In these cases we have recognized that financial statements "compiled" by a CPA and based on information provided by the surety are of limited value in determining the surety's net worth. Id. Although it may be, as the protester states, that "few individuals have their net worth audited," we think that when one decides to engage in the business of being an individual surety--and it is a business--one should be prepared to provide an independent verification of the net worth claimed. Although the cited cases are distinguishable from the present circumstance in that in those cases it was only after the contracting agency received the SF 28 that it requested additional information, we do not find it legally objectionable that here the Navy advised offerors through its solicitation and in advance of submitting a proposal that a CPA's audit of the individual sureties would later be required.

The protest is denied.



James F. Hinchman
General Counsel

^{1/} See, e.g., Ram II General Contractor, Inc., B-234613, June 7, 1989, 89-1 CPD ¶ 532; Construct Sun, Inc., B-234068, May 8, 1989, 89-1 CPD ¶ 431; J & J Eng'g, Inc., B-233463.2, Feb. 13, 1989, 89-1 CPD ¶ 147; Labco Constr., Inc., B-232986 et al., Feb. 9, 1989, 89-1 CPD ¶ 135; Jerry Eaton, Inc., B-233458, Jan. 24, 1989, 89-1 CPD ¶ 71; Cascade Leasing, Inc., B-231848.2, Jan. 10, 1989, 89-1 CPD ¶ 20.