



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Altex Enterprises, Inc.

File: B-228200

Date: January 6, 1988

DIGEST

A blanket solicitation requirement in a small business set-aside that all individual sureties provide a security interest consisting of a first deed of trust on the unencumbered value of real property listed on an affidavit of individual surety, or obtain a subrogation agreement from the party holding a first deed of trust on encumbered real property, as well as a requirement to furnish proof of title and an appraisal of value of the real property, is not reasonably related to the minimum needs of the agency and is restrictive of competition where there are no unusual circumstances justifying the requirement.

DECISION

Altex Enterprises, Inc. protests the award of a contract to any other bidder under invitation for bids (IFB) No. DACA85-87-B-0005, issued by the United States Army Engineer District, Alaska, for construction of a satellite communication ground terminal at Clear Air Force Station, Alaska. The contracting officer found Altex to be nonresponsible based on the failure of its sureties to grant the agency a security interest in real property listed on the standard form (SF) 28, Affidavit of Individual Surety,^{1/} submitted with Altex's bid.

We sustain the protest.

^{1/} SF 28 is a form prescribed by the Federal Acquisition Regulation (FAR), 48 C.F.R. § 53.301-28 (1987), which is used by individual sureties to a bond to list their assets and which, in turn, is used by the contracting agency to determine the net worth of proposed individual sureties.

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The IFB, issued on July 14, 1987, required bidders to furnish a bid guarantee as well as performance and payment bonds. The IFB stated that if individual sureties are used for bid, performance, and payment bonds as permitted by FAR, 48 C.F.R. § 28.202-2, the individual sureties must meet the following requirements "in addition to execution of [SF 28]:"

"(4) A security interest shall be provided in any or all of the assets listed in SF 28 and refusal to provide such security interest shall render the surety unacceptable. The security must be equal to the penal amounts of the performance and payment bonds required by this solicitation and may be provided by one or a combination of the following methods:

"(i) Escrow account in the name of the U.S. Army Corps of Engineers, Alaska District, for the duration of the contract and for 90 days after final settlement Acceptable securities in escrow would include, but not be limited to cash, treasury notes, bearer instruments having a specific value, and money market certificates.

"(ii) First Deed of Trust with U.S. Army Corps of Engineers, Alaska District, as beneficiary, against the unencumbered value of real property, or an agreement by a second party, holding deeds of trust, mortgage, lien, or judgment interests to subrogate their interests to that of the U.S. Army Corps of Engineers on the real property which has been offered by the individual surety."

Additionally, the individual sureties were required by the IFB to evidence ownership of real property with a "litigation report" prepared by a title insurance company and to furnish an appraisal by a "member of either the American Institute of Real Estate Appraisers or the Society of Real Estate Appraisers."2/

The agency opened bids on August 19; all six bids received were lower than the government estimate. Altex and Ghemm Company, Inc. and Associates (Ghemm) submitted the low and

2/ None of these requirements are prescribed by FAR; rather, they were generated locally by the Corps' district office in Alaska.

second low bids, \$889,750 and \$1,013,600, respectively. The contracting officer reviewed Altex's SF 24 (bid bond) and SF 28, which listed Merrill Blake and Barbara Iles of Shelley, Idaho, as individual sureties and provided a listing of the sureties' principal assets, primarily real estate but including a substantial amount of personalty such as furniture, precious metals, antiques and paintings.^{3/} The individual sureties did not provide any security interest in their property.

The contracting officer contacted Altex on August 21 to ask that Altex's sureties provide the security interest required by the IFB. On August 31, Altex responded by letter advising the agency that Altex's underwriters were unwilling to grant security interests as required by the IFB.

On September 3, the contracting officer determined Altex to be nonresponsible for failure to submit the required "bonding information" for individual sureties. The agency advised Altex of this determination by letter dated September 8 and awarded a contract to Ghemm on September 16. This protest followed.

On an initial matter, the agency argues that the protest is untimely because the instructions to bidders clearly set forth the requirements for individual sureties and under our Bid Protest Regulations, protests based upon improprieties in a solicitation which are apparent prior to bid opening shall be filed prior to bid opening. 4 C.F.R. § 21.2(a)(1) (1987). The issue of whether an agency may impose a requirement restricting the use of individual sureties has not previously arisen in this context. As an issue of first impression with widespread significance to the procurement community, we believe that the instant case deserves the invoking of the exception to our timeliness rules at 4 C.F.R. § 21.2(c).

Generally, Altex contends that FAR, 48 C.F.R. Subpart 28.2, does not give contracting officers the discretion to require security interests on an across-the-board, routine basis and that this requirement is unduly restrictive of competition and discriminates both against the use of individual versus corporate sureties and against companies who must use individual sureties, primarily small businesses. We agree.

^{3/} Merrill Blake listed real estate with a value of \$3,812,000, encumbered by a mortgage of \$759,307; Barbara Iles listed real property worth \$1,053,000, encumbered by a mortgage of \$103,000.

Where a solicitation requirement is challenged as unduly restrictive of competition, the procuring activity must establish prima facie support for its contention that the restriction is reasonably related to its minimum needs. Software City, B-217542, Apr. 26, 1985, 85-1 CPD ¶ 475. This requirement reflects the agency's statutory obligation to employ solicitation terms that permit full and open competition consistent with the agency's actual needs. See Southern Technologies, Inc., B-224328, Jan. 9, 1987, 87-1 CPD ¶ 42. The agency argues that the suretyship requirements were an exercise of the contracting officer's discretion and that the contracting officer has the responsibility for safeguarding the interests of the United States in its contractual relationships.

Significantly, the contracting officer does not allege that any unusual circumstances here justify these requirements; rather, he claims to have the discretion to apply these requirements on a routine, across-the-board basis regardless of the financial qualifications of a small business bidder's individual sureties. In this regard, the contracting officer does not believe that the FAR regulatory framework governing individual sureties provides sufficient protection for the government. For example, the agency argues that the SF 28 bears serious weaknesses in that it does not provide for proof of title to the listed assets, does not require any independent appraisal of the assets' fair market value and relies upon a certification by a postmaster or U. S. Attorney who may have no personal acquaintance with the surety. In addition, according to the agency, there is no assurance that an individual surety will maintain his net worth throughout contract performance.

We find that the agency has failed to demonstrate prima facie support for these stringent requirements at issue. We recognize that in particular circumstances, a contracting officer may establish very specific and very strict financial qualifications for a particular firm to demonstrate its financial responsibility. See Nova International, Inc., B-227696, Sept. 21, 1987, 87-2 CPD ¶ 284. However, the regulations simply require that agencies obtain "adequate security for bonds" (see FAR, 48 C.F.R. § 28.201(a)); they do not contemplate obtaining perfected liens from all bidders as a condition for bidding. Here, the contracting officer is attempting to impose a provision, regardless of the particular financial circumstances or qualifications of sureties, that places a heavy burden upon an entire class of bidders--those who use individual sureties. The following illustrates the restrictiveness of the present requirement. For example, an individual surety may have a \$40,000 mortgage on a \$400,000 house; under the IFB, he is required to ask his lender to subordinate its security interest to

the government's. If the lender will not do so, the bidder is nonresponsible even though its individual surety has \$360,000 net worth which would otherwise be acceptable. Similarly, if the surety owns a house outright, he can only pledge it once until his obligation is discharged (an event that does not occur until all payments for labor and materials have been made and all warranty periods have expired, see T&A Painting, Inc., B-224222, Jan. 23, 1987, 66 Comp. Gen. _____, 87-1 CPD ¶ 86), even if he has substantial equity remaining.

We think the solicitation requirement comes close to being a prohibition against the use of individual sureties, a prohibition that would clearly conflict with FAR provisions allowing the use of individual sureties. In this regard, we have held that as long as each surety has a net worth adequate to cover the penal amount of a bond, a bid is acceptable so long as it establishes the sureties' joint and several liabilities, even if sureties pledge the same assets. Argus Services, Inc., B-226164, Apr. 21, 1987, 87-1 CPD ¶ 429. The contracting officer here made no attempt to determine the sureties' net worth; he had no reason to doubt nor did he question the sureties' title to property listed on the SF 28 or their appraisal of its value. Thus, in the instant case, the contracting officer simply has not demonstrated a need for the extraordinary measures here required of bidders relying on individual sureties.

We conclude that the solicitation requirement that all individual sureties submit a security interest in all real property listed on the SF 28 constitutes an undue restriction on full and open competition.

With regard to a remedy, the Army has suspended performance of the awardee's contract. We recommend that Altex's responsibility be evaluated without consideration of the additional solicitation requirements concerning security interest. In this connection, we have noted that the contracting officer has broad discretion to determine the responsibility of an individual surety. See Eastern Metal Products & Fabricators, Inc., B-220549.2, et al., Jan. 8, 1986, 86-1 CPD ¶ 18. If the Army finds Altex is responsible, it should terminate for the convenience of the government Ghemm's contract and award to Altex. We further recommend that, absent a compelling reason for such a requirement, the Army refrain from future use of this provision.

Accordingly, by separate letter today, we are advising the Secretary of the Army of our decision and recommendation.

The protest is sustained.

Wilton J. Foster
for Comptroller General
of the United States