



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Coliseum Construction, Inc.

File: B-228597

Date: February 9, 1988

DIGEST

Solicitation provision which, in accordance with a deviation from the Federal Acquisition Regulation (FAR), precludes the use of individuals as security for bid, payment and performance bonds unless they deposit adequate tangible assets with the government is not objectionable where the deviation properly was authorized under the FAR, and is a temporary element of a pilot contracting program aimed at improving the efficiency of the agency's procurement efforts.

DECISION

Coliseum Construction, Inc., protests the provision in invitation for bids (IFB) No. N62471-87-B-2338, issued by the Department of the Navy, that bonds executed by individual sureties without the deposit of tangible securities would not be acceptable. The solicitation is for the repair and interior painting of a building at the Naval Shipyard in Pearl Harbor, Hawaii. Coliseum contends that the prohibition on individual sureties unduly restricts competition.

We deny the protest.

The IFB required the successful bidder to furnish performance and payment bonds within 10 days of contract award. The IFB provided that an individual surety would be acceptable only if it deposited with the contracting officer cash, bonds, or notes of the United States, or such other security as the contracting officer deemed necessary, for the required amount of the guaranty; the collateral so deposited would remain in the possession and control of the government for at least 1 year after completion of the contract. The IFB further stated that the acceptability of an individual surety could not be based on an "Affidavit of Individual Surety." Such affidavit is a document, separate from the bond itself, in which the individual pledges

assets, such as real estate, that serves as an aid in determining the responsibility of an individual surety. See River Equipment Co., Inc., B-227066, July 24, 1987, 87-2 CPD ¶ 84. By supplying information required by the affidavit, the individual surety must show a net worth not less than the penal amount of the bond. Federal Acquisition Regulation (FAR) § 28.202(a) (FAC 84-8).

Coliseum protests that the IFB makes it almost impossible for bidders to use individuals as sureties. The protester points out that FAR § 28.201(b) states that solicitations shall not preclude offerors from using the types of surety or security permitted by FAR subpart 28.2, which includes individual sureties, unless prohibited by law or regulation. Coliseum argues that the Navy improperly has deviated from that provision.

The Navy responds that, in accordance with his authority to authorize class deviations from the FAR, the Under Secretary of Defense for Research and Engineering (Acquisition Management) established a pilot contracting activity program to enable contracting personnel to acquire supplies and services more quickly and easily, and delegated the authority to grant class deviations to the Assistant Secretary of the Navy (Shipbuilding and Logistics). The Navy also states that the Assistant Secretary then approved the request of the Commander, Pacific Naval Facilities Engineering Command, for a class deviation to permit the exclusion of individual sureties as security for payment, performance and bid bonds.

The Navy further responds that the protested class deviation was requested because the procedure to determine the acceptability of individuals proposed as sureties was time-consuming, cumbersome and unreliable. The justification for the request states the view that contracting officers have no practical means of validating: (a) the net worth of individual sureties; (b) the number and amounts of other existing bonds utilizing the same individuals as security; (c) the status of other contracts for which the individuals have furnished bonds; (d) the continuing acceptability of the individual sureties; or (e) the continuing availability and value of the sureties' assets in the event of claims.^{1/} The Commander concluded that individual sureties do not provide an acceptable level of security, and argued that a contracting officer should have the authority to exclude the

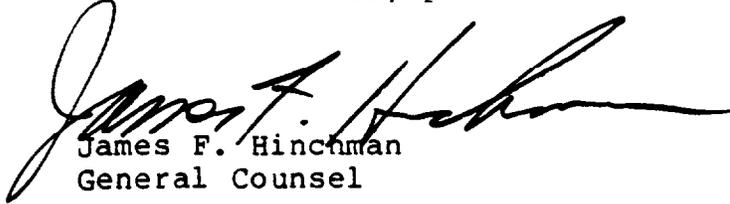
^{1/} FAR § 28.202-2 requires verification of the individual sureties' acceptability.

use of individual sureties where appropriate. The deviation was granted on September 24, 1987, for the period ending on September 30, 1988.

In our recent decision in Altex Enterprises, Inc., B-228200, Jan. 6, 1988, 88-1 CPD ¶ ____, we sustained a protest of a finding that the bidder was nonresponsible because its sureties would not grant the agency a security interest in real property listed on the Affidavit of Individual Surety, as required by the invitation. We agreed that the requirement, which was generated by the local contracting activity, unduly restricted competition and discriminated against the use of individual versus corporate sureties and against companies that had to use individual sureties, primarily small businesses. We rejected the contracting officer's position that he had the discretion, even absent any unusual circumstances, to apply requirements that effectively made the use of individual sureties impossible on a routine, across-the-board basis, regardless of the particular bidder's individual sureties; we pointed out that this position was inconsistent with FAR § 28.202-2, which expressly permits the use of individual sureties.

As indicated in that decision, we are concerned with the effect on competition of a solicitation provision that effectively prohibits the use of individual sureties absent a demonstrated need to do so in a particular procurement. We nevertheless will not object to the present solicitation on that basis. In Altex, the prohibition was generated locally, and the contracting officer's inclusion of it was directly inconsistent with the FAR. Here, in contrast, the prohibition was authorized through the Department of Defense's authority in FAR § 1.404 to grant deviations from the FAR, and the record shows that the Navy properly processed the deviation in accordance with applicable guidelines and regulations. Further, the deviation was granted as part of a pilot program developed by the Navy to improve its contracting efforts, and will expire at the end of September 1988. We think the implementation of the deviation should not be subject to our objection during the period in which the Navy is gathering information on its effect and effectiveness.

The protest therefore is denied. We point out, however, that should the Navy desire to extend the deviation past September, it should propose an appropriate FAR revision to cover the matter, pursuant to FAR § 1.404.



James F. Hinchman
General Counsel