



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: C. E. Wylie Construction Company

File: B-234225; B-234227

Date: May 5, 1989

DIGEST

1. A bid cannot be rejected as nonresponsive on the basis that the surety affidavits which accompanied the bid bond allegedly contained false information regarding each surety's net worth. If the bond as submitted is proper on its face, the bid is responsive, and the matter instead is one of responsibility, which may be established any time before award.

2. Post-award protest against affirmative determination of responsibility regarding agency's acceptance of awardee's individual sureties is denied where protester fails to show bad faith on the part of the procuring officials.

DECISION

C. E. Wylie Construction Company protests the award of a contract to Pharaoh Construction, Inc., under invitation for bids (IFB) No. N62474-88-B-4256, issued by the Navy for the construction of a tactical vehicle maintenance facility at the Marine Corps Base, Camp Pendleton, California. Wylie also protests an award under IFB No. N62474-86-B-0619 to Kardan Construction Company, Inc., for the construction of military housing at the same installation. Wylie contends that both awardees' bids must be rejected as nonresponsive because the individual bid bond sureties proposed are unacceptable.

We deny the protests.

Both IFBs required a bid guarantee in an amount equal to 20 percent of the bid. The solicitations provided, in accordance with Federal Acquisition Regulation (FAR) § 28.202-2, that the guarantee could be satisfied by the submission of bid bonds by two individual sureties, so long as each surety could demonstrate sufficient net worth to

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cover the penal amounts of the bonds. The low bidders under these IFBs, Pharaoh and Kardan 1/, each submitted two individuals as sureties in satisfaction of the bid guarantee requirement. The bidders furnished for each surety a completed Affidavit of Individual Surety, which listed the surety's assets, liabilities and net worth, and a Certificate of Sufficiency from a bank or trust company officer attesting to the truth of the surety's representations. The sureties listed sufficient net worth to meet the penal sum of the bid bonds they executed.

In December 1988, prior to award of the contracts, Wylie filed agency-level protests, contesting the accuracy of the surety affidavits which accompanied each bid. Wylie alleged that the bids submitted by Pharaoh and Kardan must be rejected as nonresponsive because their sureties lacked adequate net worths to cover the full amount of their respective bid bonds. The Navy reviewed the bids and denied Wylie's protests upon finding that the bid bonds were properly executed and that the sureties claimed sufficient resources to cover the required penal sum of the bonds. To ensure prompt completion of the projects, the Navy proceeded with award to Pharaoh on January 12, 1989, and made award to Kardan on January 13.2/ On January 23, Wylie filed these protests with our Office, including supporting information gathered after award and not previously provided to the Navy.

The protester essentially contends that since the individual bid bond sureties proposed by the awardees misrepresented having sufficient net worth, the bids are nonresponsive and Kardan and Pharaoh thus are not eligible for award.

Initially, we note in regard to both protests that the sufficiency of a bid guarantee depends on whether a surety is clearly bound by its terms. Where a required bid bond

1/ After Kardan, the next apparent low bidder was Walking Stick, Inc. Wylie also contends that the sureties proposed by Walking Stick are unacceptable. Since we deny Wylie's protest against Kardan's sureties in this decision, we will not review Wylie's challenge to the acceptability of Walking Stick's sureties.

2/ While Wylie asserts that the Navy failed to make an affirmative determination of responsibility for Kardan and Pharaoh, the awards to these bidders constitute such determinations. See Synthes (U.S.A.), B-231748, Aug. 19, 1988, 88-2 CPD ¶ 164.

under a solicitation is found to be proper on its face, the bid is responsive. CWC, Inc., B-209383, Oct. 19, 1982, 82-2 CPD ¶ 347.

Here, each bid bond was proper on its face. Both Kardan's and Pharaoh's bid bonds were duly executed under oath by two individual sureties whose affidavits indicated that they had net worths at least equal to the penal amount of the bond and that they were willing to be bound by their surety agreements. The bids therefore meet the invitations' bonding requirements, and the bonds are legally sufficient to establish the joint and several liability of the sureties in the event of default on the bids by Pharaoh or Kardan. Consequently, we find no reason to question the Navy's determination that the bids are responsive. See Clear Thru Maintenance, Inc., B-203608, June 10, 1982, 82-1 CPD ¶ 581.

The financial acceptability of an individual surety, including the accuracy of information concerning the surety's financial condition, is a matter of responsibility which may be determined any time before contract award. Clear Thru Maintenance, Inc., B-203608, supra. The contracting officer is vested with a wide degree of discretion and business judgment in considering responsibility matters, and we will not object to the contracting officer's affirmative responsibility determination in this type of case unless the protester, who bears the burden of proving its case, shows that the procuring officials acted in bad faith. See C.E. Wylie Construction Co., B-234123, Apr. 25, 1989, 89-1 CPD ¶ ____. Wylie has not made the necessary showing of bad faith.

Generally, a contracting officer may rely on initial and subsequently furnished information regarding net worth submitted by a surety without further conducting his own independent investigation. See Northwest Piping, Inc., B-233796, Mar. 30, 1989, 89-1 CPD ¶ ____. As a responsibility matter, our review of the Navy's acceptance of Pharaoh's and Kardan's individual sureties is limited to whether the information which the Navy possessed at the time of the award warranted further review or investigation, and whether the contracting officer's determination not to conduct such an investigation constituted bad faith.

In its agency-level protest against Pharaoh prior to award, the record shows that Wylie failed to submit any specific information to support its general allegation that Pharaoh's individual sureties were unacceptable. Rather, Wylie simply stated that it did not "believe" that the net worth of the sureties was sufficient and stated that it would submit information and documentation "in the near future." The

contracting officer considered this allegation to be a "bald assertion," and, when Wylie still had failed to provide specific information 3 weeks after the agency-level protest was received, the contracting officer proceeded to award to Pharaoh.

We agree with the Navy that since there was no apparent defect on the face of the documents to have alerted the contracting officer to question their veracity, and absent any specific information to the contrary, the contracting officer reasonably considered the surety affidavits as adequate and accurate. We therefore find no reason to question the contracting officer's determination to award the contract to Pharaoh.

Similarly, we find Wylie has failed to show that the contracting officer acted in bad faith in determining that the information submitted by Wylie in its agency-level protest against Kardan's sureties did not warrant further investigation of the sureties' acceptability. This information includes a brief letter from an employee of Dean Witter Reynolds, Inc., addressed to Wylie's attorney, stating that "no market" existed as of November 11, 1988, for four stocks which were included in the Kardan sureties' statements of net worth. Wylie also submitted a statement by a private investigator apparently hired by Wylie contending that the sureties' addresses, as listed on their affidavits, are "suspect" since one surety lists as his home address an office at a rental storage facility. He also claimed that the Securities and Exchange Commission (SEC) recently seized records from Kardan's sureties regarding Alliance Capital Corporation, a company in which both sureties have a substantial claimed stock interest.

The contracting officer reports that this information was "scrutinized carefully and evaluated for its usefulness." Specifically, the contracting officer discounted, as conclusionary and unsubstantiated, the allegation that several stocks had no value because they had "no market" for a single day. The contracting officer determined that lack of trading for a single day was not an indication of value over a period of time. The contracting officer noted that Wylie failed to provide a record of changes in stock values over a period of time--a month, quarter or a year--which would have provided a more reliable and rational assessment of stock value. We think the contracting officer's explanations are reasonable.

We also find reasonable the contracting officer's determination that the information concerning the surety's address did not pose a serious challenge to the surety's

acceptability and that the alleged SEC investigation was unsubstantiated, especially in light of the Navy's familiarity with and prior examination of these businesses listed by the sureties.

While Wylie continues to challenge the Navy's subjective business judgment in accepting these sureties, we find that the record indicates that the contracting officer's actions were within her wide degree of discretion in making the affirmative determinations of responsibility. The protester has not made the necessary showing of bad faith on the part of the procuring officials. We therefore find no reason to disturb the awards to Pharaoh and Kardan.

The protests are denied.


R James F. Hinchman
General Counsel