

George Ruppert



**The Comptroller General  
of the United States**

Washington, D.C. 20548

**Decision**

**Matter of:** Construct Sun, Inc.

**File:** B-234068

**Date:** May 8, 1989

**DIGEST**

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 reasonably based.

**DECISION**

Construct Sun, Inc., protests the rejection of its bid under invitation for bids (IFB) No. N62467-88-B-0379, issued by the Department of the Navy, for the closure of industrial sludge drying beds and a surge pond at the Naval Air Station in Pensacola, Florida. The Navy rejected Construct's bid on the basis that the two individual sureties on its bid bond failed to submit sufficient proof of ownership and the value of the assets claimed in support of surety net worth.

We deny the protest.

At bid opening, on December 15, 1988, Construct was the low bidder in the amount of \$1,567,246, which was \$52,509 less than the second low bid of \$1,619,755, submitted by Tricil Environmental Response, Inc. 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; 20 percent of Construct's bid totaled \$313,449. Construct submitted a bid bond naming two individual sureties and, as required by the IFB, provided a completed Affidavit of Individual Surety (SF 28) for each surety. The solicitation further provided that a balance sheet and income statement certified by a certified public accountant (C.P.A.) must be provided for each surety, that ownership of real property listed as an asset on the SF 28 must be evidenced by a title report or abstract, that the net value of the property listed must be substantiated by an independent, certified appraisal, and that an attorney or title company must certify as to whether

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any liens or encumbrances exist with respect to all listed property. Bidders were warned that failure to furnish this information could result in rejection of the surety and a determination of nonresponsibility.

Construct proposed as individual sureties Virgil Smith and Edgar Powell. While the SF 28s submitted for Mr. Smith and Mr. Powell listed their net worths as \$41,469,591 and \$12,732,999, respectively, Construct did not submit any documentation establishing the current ownership or value of the claimed assets. Further, while additional documentation concerning the net worth of Mr. Smith was available to the Navy (having been submitted in response to an earlier 1988 Navy solicitation for which Mr. Smith had been proposed as an individual surety), contracting officials nevertheless concluded that the information failed to establish the ownership and value of the assets listed on the SF 28 as required by the solicitation. For example, in this regard, although the financial statement that had been submitted for Mr. Smith, dated August 25, 1988, indicated a net worth of \$41,929,707, the C.P.A. who prepared the statement cautioned that it was merely a compilation of information furnished by Mr. Smith, without independent audit or verification.

In addition, the Navy concluded that the integrity and financial responsibility of both sureties was called into question by the results of the agency's review of the Certificates of Sufficiency furnished as part of their SF 28s. That form requires sureties to provide a certificate signed by an officer of a bank or trust company, or by a public official, in which the officer or official certifies that, based on his personal investigation, the surety is responsible and the facts stated by the surety in the SF 28 are true. The agency reports that contracting officials were advised by the bank officer who signed Mr. Smith's Certificate of Sufficiency that she intended merely to verify Mr. Smith's signature on the affidavit and had no personal knowledge of Mr. Smith's net worth. Further, the State of Texas Department of Banking advised that the Texas institution for which the individual who signed Mr. Powell's certificate worked was not a bank or trust company under Texas law (and had been ordered to cease and desist from so representing itself).

Accordingly, based on the advice of counsel, and without requesting additional information from Construct or the sureties, the contracting officer determined that the available evidence did not permit finding the individual sureties acceptable. She therefore found Construct nonresponsible and made award to Tricil on December 30.

Sometime after the nonresponsibility determination, the contracting officer received additional information concerning Mr. Smith's assets which she believed further called into question his acceptability as a surety.

In its protest, Construct disputes the Navy's assessment of the validity of the Certificates of Sufficiency. Construct argues in this connection that the bank officer's duty of personal investigation, as set forth in the SF 28, did not require her to know the details of Mr. Smith's net worth and assets, and that the institution whose officer signed Mr. Powell's Certificate was not required to qualify as a bank or trust company under state law for the signature to be valid. Primarily, however, Construct argues that the Navy acted improperly in finding the sureties unacceptable without having first asked for additional information from Construct or the sureties.

Federal Acquisition Regulation (FAR) § 28.202-2(a) requires the contracting officer to determine the acceptability of individuals proposed as sureties, and states that the information provided in the SF 28 is helpful in determining the net worth of proposed individual sureties. The contracting officer is not limited to consideration of the information in the SF 28, however, and may go beyond it where necessary in making his decision. J & J Engineering, Inc., B-233463.2, Feb. 13, 1989, 89-1 CPD ¶ 147; Transcontinental Enterprises, Inc., 66 Comp. Gen. 549 (1987), 87-2 CPD ¶ 3. Moreover, the contracting officer is vested with a wide degree of discretion and business judgment in determining surety acceptability, and when he finds a surety unacceptable we will defer to this judgment unless the protester shows that the determination was without a reasonable basis. Cascade Leasing, Inc., B-231848.2, Jan. 10, 1989, 89-1 CPD ¶ 20. Construct has not shown that the contracting officer's determination here was unreasonable.

First, in requiring that a C.P.A. prepare and certify a balance sheet for each surety, the solicitation clearly required that the C.P.A. certify to the accuracy of the amounts; merely relying on figures provided by the surety without independent verification, as done here for Mr. Smith's financial statement, does not meet this requirement. In a similar vein, whether or not the officer who signed Mr. Smith's Certificate of Sufficiency was required to possess personal knowledge of the surety's assets, the fact that the officer advised the Navy that she in fact had no such knowledge gave the Navy sufficient cause to discount the certificate as evidence verifying the surety's assets.

Further, the Navy has obtained information that leads it to question whether Construct has sufficiently established the current value of Mr. Smith's primary asset--100 percent of the stock of the Ace Petroleum Company, Inc., valued by Smith at \$40,897,700--such that it could be considered in calculating Mr. Smith's net worth. In this regard, although Mr. Smith submitted a geologist's report estimating the extent of the recoverable oil and gas reserves owned by Ace, it appears from the record that in fact Ace may own no more than approximately 40 percent of the reserves upon which the claimed value of Ace was calculated. At the same time, the financial statement submitted for Ace, based solely on the representations of Ace's management (1) lists total assets of \$256,613 (without consideration of the claimed reserves, but including \$83,168 in unamortized drilling costs) and liabilities (other than shareholder's equity) of \$280,101, resulting in a deficit in shareholders' equity of \$23,488, and (2) lists Ace's income from the sale of oil and gas for the year ending June 30, 1988, as only \$65,980, other income (primarily from the sale of an interest in oil wells) as only \$61,082, and expenses as \$129,635, thus resulting in a net loss of \$2,573. Since Construct has not shown that the Ace stock is publicly traded or otherwise has value, and in view of the speculative character of the corporation's primary asset, we do not find unreasonable the agency's refusal to consider the stock in calculating Mr. Smith's assets.

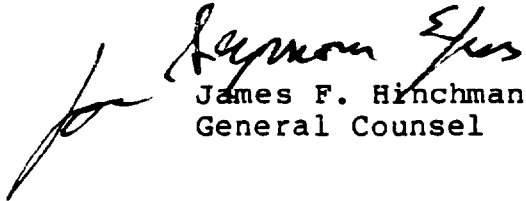
In addition, although Mr. Smith also claimed current ownership of real property with a value of \$661,000, he has provided no proof of ownership or current value besides 1987 tax notices assessing his property at only \$179,100. Mr. Smith also failed to provide the required independent certification by an attorney or title company as to the existence of any liens or encumbrances on the real property or on the Ace stock. Finally, Mr. Smith listed actual liabilities of \$176,609 and outstanding bonds of approximately \$3,811,906, an amount exceeding the value of his proven assets, aside from the Ace petroleum stock.

In these circumstances, since the documents required by the solicitation to establish the ownership and value of the listed assets have not been submitted, and Mr. Smith's SF 28 indicates liabilities or potential liabilities which exceed the substantiated value of his proven assets, we find that the Navy acted reasonably in determining Mr. Smith unacceptable as an individual surety. Both the solicitation and FAR § 28.202 require that at least two acceptable individual sureties execute the bond. Since at least one of Construct's two proposed individual sureties is unacceptable,

the contracting officer properly found the firm nonresponsible.

As for the contracting officer's failure to request additional information from Construct concerning Mr. Smith, there is no evidence in the record that, had she requested such information, Construct could have established the financial acceptability of Mr. Smith. See generally Hirt Co., B-230864, June 23, 1988, 88-1 CPD ¶ 605. Although the solicitation required bidders to furnish with their bids independent documentary evidence, in addition to the SF 28, establishing ownership, the extent of encumbrances, and net value of listed assets, Construct made no attempt to do so. Moreover, although it could have done so in responding to the agency's report on this protest, Construct still has not submitted the required documentation.

The protest is denied.

  
James F. Hinchman  
General Counsel