



The Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

Matter of: Cascade Leasing, Inc.  
File: B-231848.2  
Date: January 10, 1989

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### DIGEST

1. Rejection of protester's bid was proper where agency reasonably found that protester failed to provide sufficient information to permit finding the individual sureties on its bid bond acceptable.
2. Nonresponsibility determination based on unacceptability of individual surety on required bid bond need not be referred to the Small Business Administration for review under the certificate of competency procedure, since such determinations are based solely on the qualifications of the surety, not the small business offeror.

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### DECISION

Cascade Leasing, Inc., a small business concern, protests the rejection of its bid under invitation for bids (IFB) No. DACA85-88-B-0002, issued by the United States Army Corps of Engineers, for the construction of a diesel fuel storage and water system at Shemya Air Force Base in Alaska. The Corps rejected Cascade's bid because the two individual sureties on its bid bond failed to submit sufficient proof of ownership and value of the assets claimed in support of surety net worth.

We deny the protest.

At bid opening, on June 15, 1988, Cascade was the low bidder for schedule A of the solicitation, one of three solicitation schedules, in the amount of \$5,674,122. 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 Cascade's bid totalled \$1,134,824. Cascade submitted a bid bond naming two individual sureties. Accordingly, under the solicitation, it was required to provide a completed Affidavit of Individual Surety (Standard Form (28)) for each surety. Further, the net worth of each

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surety was required to equal or exceed the obligation on all bonds on which the individual was surety. The solicitation provided that ownership of real property listed as an asset on the SF 28 must be evidenced by a litigation report prepared by a title insurance company authorized to do business in the state where the land is located, and that the value of listed real estate and personal property must be substantiated by an appraisal.

Cascade proposed as individual sureties Arthur and Irene Kreiter. In his SF 28, Arthur Kreiter listed his net worth as \$2,950,000. He claimed to own real estate, described as "Lots 5-9, Block P, Woodland Park Subdivision, Anchorage, Alaska," with a fair market value of \$3,100,000 and subject to a \$1,400,000 mortgage. He also claimed to own personal property, described as a "large fleet of construction equipment and machinery and rental car fleet," with a fair market value of \$1,300,000. Irene Kreiter listed her net worth as \$1,860,000. She claimed \$1,820,000 in equity in real estate, described as "Lot 2 Mcree Subdivision, Anchorage, Alaska; Tract A, King Street Industrial Park, Anchorage, Alaska," with a fair market value of \$3,607,000 and subject to mortgages totaling \$1,787,000. She also claimed to own unspecified personal property with a fair market value of \$40,000. Pursuant to the solicitation requirement for a Certificate of Sufficiency, an officer of the First National Bank of Anchorage certified that the sureties were known to her and that to the best of her knowledge the facts in the SF 28s were true.

Shortly after bid opening the Corps requested Cascade to submit proof of title and evidence of value for the property listed on the SF 28s as required by the solicitation. After initially disputing the need for the information, Cascade ultimately agreed to provide it by July 5. The Corps renewed its request when Cascade failed to furnish the information by the promised date. Twice more, Cascade promised to supply the information by a particular date-- July 8 and July 13--and failed to do so. Finally, by letter dated July 26, the Corps informed Cascade that proof of the ownership and value of the assets claimed by the sureties must be provided by August 4 or the firm would be found nonresponsible.

Meanwhile, an unsuccessful bidder under the solicitation, MMC Construction, Inc., had protested to our Office alleging that Cascade's sureties were unacceptable. As proof that their assets were inadequate MMC offered title reports showing that neither surety owned the real estate claimed. MMC also alleged that municipal tax records indicated an appraised value of only \$123,000 for the real property

valued by Mr. Kreiter at \$3,100,000. MMC claimed, and the Corps has confirmed, that this appraisal is intended by the municipality to reflect 100 percent of fair market value, rather than a reduced percentage. Cascade was advised of the protest by the agency and given an opportunity to respond.

Although Cascade missed the August 4 deadline for submitting proof of ownership and value, it furnished some information the next day. Cascade submitted an appraisal report on the value of the heavy equipment listed in Mr. Kreiter's SF 28; this opinion, furnished by the Anchorage Auction Company, valued the equipment at \$1,470,000 and stated that to the best of the appraiser's knowledge, there were no liens on the equipment. The report cautioned, however, that there had been no personal inspection of the equipment listed by Mr. Kreiter. Cascade also provided a letter from Benefax Insurance Service, addressed to the contracting activity, which stated that it was an irrevocable letter of credit in an amount not to exceed \$1,200,000, payable upon written demand by the Corps, and was being provided in support of Ms. Kreiter's Affidavit of Individual Surety.

Cascade, however, did not provide any evidence that the signer of the letter of credit, whose title had not been specified, was authorized to bind Benefax, or that Benefax possessed adequate resources to stand behind the letter. Cascade also did not provide any information concerning the ownership and value of the listed real property. Moreover, further investigation by the Corps revealed that the equipment appraiser had relied only upon photographs of the equipment and information provided by Mr. Kreiter's mechanic, and had not verified ownership or checked for liens. In addition, on August 12, the First National Bank of Anchorage informed the Corps that the bank officer who had signed the Certificates of Sufficiency for both sureties was not authorized to do so as an officer of the bank. Finally, the officer of the bank authorized to sign the Certificates of Sufficiency stated that he would have refused to do so based on information in the bank's records regarding a bankruptcy of another company with which Mr. Kreiter was associated and a lack of personal knowledge about Ms. Kreiter.

Based upon the available evidence, the contracting officer found that there was insufficient information to permit finding the individual sureties acceptable. In particular, the contracting officer noted that the requested information concerning title and value had not been provided, the appraisal of Mr. Kreiter's construction equipment was not based upon the personal knowledge of the appraiser, the

Certificates of Sufficiency were not signed by an officer of the First National Bank of Anchorage authorized to sign for the bank, and no information had been provided to establish the financial capacity of Benefax Insurance Services, which was not a financial institution, or the authority of the signer of the letter of credit to bind Benefax. On August 17, as a result of the unacceptability of its sureties, Cascade was determined to be nonresponsible.

Cascade protests that it was deprived of an adequate opportunity to establish the net worth of its sureties. According to the protester, the Corps (1) failed to take advantage of an offer purportedly made by Benefax to supply more information in support of the letter of credit, (2) failed to take advantage of Cascade's offer in its August 5 letter (responding to the agency's earlier request for more information) to provide still further information if requested, and (3) erroneously advised the firm on September 2 that the responsibility issue would be referred to the Small Business Administration (SBA), thus leading Cascade to assume that no further submissions were required. In any case, Cascade notes that the Federal Acquisition Regulation (FAR) provides that the failure to furnish a bid guarantee in an amount required by the solicitation should be waived if the amount of the bid guarantee submitted is at least equal to the difference between the bid price and the next low bid, unless the contracting officer determines in writing that acceptance of the bid would be detrimental to the government's interest. FAR § 28.101-4(b). Cascade claims that a net worth in an amount at least equal to the difference in bid prices, \$276,411, was established by the appraisal of the construction equipment listed by Mr. Kreiter and by the submission of the Benefax letter of credit on behalf of Ms. Kreiter.

A bid guarantee's purpose is to secure the liability of a surety to the government in the event that the bidder fails to fulfill its obligation to execute a written contract and to provide payment and performance bonds. Whether a surety is clearly bound by the terms of the bid bond is a question of responsiveness to be determined from an examination of the face of the bid bond. Transcontinental Enterprises, Inc., 66 Comp. Gen. 549 (1987), 87-2 CPD ¶ 3.

The accuracy of the information contained in the SF 28, however, which is the issue here, is a matter of responsibility. See Id. A determination of nonresponsibility based upon the financial acceptability of an individual surety may be based upon information submitted any time prior to award, and no award may be made without an

affirmative determination of responsibility. T&A Painting, Inc., 66 Comp. Gen. 214 (1987), 87-1 CPD ¶ 86. In determining surety acceptability the contracting officer is not limited to consideration of information contained in the SF 28 and may go beyond that information where necessary in making his decision. Transcontinental Enterprises, Inc., 66 Comp. Gen., supra. Moreover, the contracting officer is vested with a wide degree of discretion and business judgment in making this determination, and we will defer to this judgment unless the protester shows that the decision was without a reasonable basis. See Eastern Metal & Products Fabricators, Inc., B-220549.2 et al., Jan. 8, 1986, 86-1 CPD ¶ 18. In our view, the record here reflects a reasonable basis for the nonresponsibility determination.

Here, the contracting officer attempted to verify both the ownership and the value of the listed assets. Despite his repeated requests during June and July and Cascade's promises to cooperate, additional information was not provided by Cascade until more than 7 weeks after bid opening. Even then, the furnished information in no way established Mr. Kreiter's and Ms. Kreiter's ownership of the listed assets. Cascade did not submit the required litigation reports from a title company or otherwise refute the title reports furnished by MMC stating that Mr. Kreiter and Ms. Kreiter did not hold title of record to the listed real property. In this regard, Cascade now concedes that ownership of the real property is under litigation. Nor has Cascade provided, either then or now, any bills of sale or other documentary evidence that Mr. Kreiter in fact holds clear title to the listed personal property. In this regard, notwithstanding Cascade's claims to the contrary, it was not unreasonable for the contracting officer to require more evidence to this effect rather than a mere statement from Mr. Kreiter or the opinions of third parties not based on personal knowledge. The appraiser advised the Corps he had not verified the ownership of, or the absence of liens on, the construction equipment and Cascade submitted no evidence that the bank officer who signed the Certificate of Sufficiency had examined the title to the equipment. In addition, Cascade provided no information concerning the other listed personal property.

Although an agency may, in its discretion, allow a prospective awardee a reasonable time after bid opening to cure a responsibility defect, it is not required to delay award indefinitely while a bidder attempts to cure the problem. Eastern Maintenance and Services, Inc., B-229734, Mar. 15, 1988, 88-1 CPD ¶ 266. Here, Cascade was afforded over 2 months to comply with the Corps' requests for proof of ownership; a nonresponsibility determination was not made

until August 17. In view of the fact that the required documents establishing ownership of the listed assets were not submitted, we believe the contracting officer acted reasonably in finding Mr. Kreiter unacceptable as an individual surety.

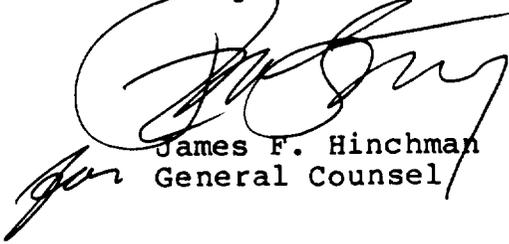
Both the solicitation and the FAR § 28.202(a) require that at least two individual sureties execute the bond and that the net worth of each individual equal or exceed the penal amount of the bond. As indicated above, Cascade failed to establish that Mr. Kreiter possessed clear title to the listed assets. Since one of the two proposed individual sureties was unacceptable, the contracting officer properly found the firm to be nonresponsible. Accordingly, we need not consider Ms. Kreiter's acceptability.

Cascade argues that the Corps was required to refer this matter to the SBA for a conclusive review of the firm's responsibility under the certificate of competency (COC) procedure. Cascade recognizes that in Clear Thru Maintenance, Inc., 61 Comp. Gen. 456 (1982), 82-1 CPD ¶ 581, we held that surety acceptability is only technically a matter of the bidder's responsibility, since the determination is based exclusively on the qualifications of the surety and in no way brands the bidder, and thus need not be referred to the SBA for COC consideration. Cascade contends, however, that the Clear Thru decision has been superceded by the Small Business and Federal Procurement Enhancement Act of 1984, 15 U.S.C. § 637(b)(7)(c) (Supp. IV 1986), which prohibits establishment by the SBA of an exemption from COC referral.

We find no evidence that the act was intended to bring the qualifications of individual sureties under the scrutiny of the SBA. Rather, our review indicates that the act was intended only to eliminate an exemption from the COC program that had been created for procurements under \$10,000. S. Rep. No. 523, 98th Cong., 2d Sess. 53-58, 65. Therefore, we remain of the opinion that such determinations need not

be referred to SBA under the COC procedure. See generally Professional Coatings--Reconsideration, B-224222.2, Mar. 4, 1987, 87-1 CPD ¶ 244; American Federal Contractor, Inc., B-222526, July 25, 1986, 86-2 CPD ¶ 114.

The protest is denied.



James F. Hinchman  
General Counsel