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AGC of America
THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA
Quality People. Quality Projects.



October 24, 2014

Col. Charles H. Klinge, Jr.
U.S. Army Corps of Engineers, Fort Worth District
819 Taylor Street
P.O. Box 17300
Fort Worth, Texas 76102

Dear Colonel Klinge,

On behalf of the Associated General Contractors of America (AGC) and its over 25,000 commercial construction company members, I would like to bring two critical contracting issues to your attention. Specifically, we (1) urge you to review contracting officers' approval of individual surety bonds on U.S. Army Corps of Engineers (USACE) projects; and (2) pay subcontractors for the work completed on a USACE project at Ft. Hood for which a fraudulent individual surety payment bonds was issued. In addition, I respectfully request to speak with you briefly on these matters at your convenience.

Background

USACE Ft. Worth District awarded an access control panel MATOC (W9126G-09-0100 DO:0004) to RMA Land Construction, Inc. (hereafter "RMA") based in Anaheim, California. Prior to this award, RMA reportedly had a history of problems on a USACE project involving a Ft. Hood or sports complex, including late or non-payment of subcontractors and violations of Buy American Act (41 U.S.C. §§ 8301–8305).

For the access control panel project, RMA hired A-1 American Fence Co., Inc., (hereafter "A-1 Fence") as a subcontractor. RMA failed to pay A-1 Fence and other subcontractors for work completed under the project for four consecutive months. A-1 Fence repeated spoke with USACE Ft. Worth employee Ray Proske about this situation.

USACE removed RMA as the prime contractor on the project. However, subcontractors, including A-1 Fence, did not receive payment for work they completed by RMA or USACE. A-1 Fence completed a significant amount of work on the access control panel project amounting to \$155,976.37 without payment.

A-1 Fence sought indemnity through the performance bond mandated on this federal project as required by the federal Miller Act. 40 U.S.C. § 3131. However, the individual surety backed-bond was far from sufficient, as the bondsman issuing such bonds was widely known throughout the construction industry for using extremely inflated, hard to value assets to back such bonds. That individual went bankrupt and, as a result, A-1 cannot be fully indemnified for its work.

Review Contracting Officer's Approval of Individual Surety Bonds on USACE Projects

Under the Federal Acquisition Regulation (FAR), a "contracting officer shall determine the acceptability of individuals proposed as sureties, and shall ensure that the surety's pledged assets are sufficient to cover the bond obligation." FAR 28.203(a). AGC is extremely concerned that contracting officer on this project did not sufficiently investigate the individual surety company—IBCS Fidelity—and its owner Edmond C. Scarborough.

Mr. Scarborough and his company are widely known throughout the construction industry. He—and other notorious individual sureties like him—run their businesses like Ponzi schemes. They back federally required surety bonds with hard-to-value and often difficult to liquidate assets, like real estate—homes or land—and

personal property—like stamp collections. They collect revenue from bond fees and more often than not do not have to pay out on the bonds as the general risk of contractor default is low. However, when a default does occur and indemnification is sought on the bonds, these individuals often go bankrupt, leaving the federal government—on performance bonds—and subcontractors—on payment bonds—without means of payment.

In the case of Mr. Scarborough, the Engineering News Record (ENR) magazine earlier this year published a series of stories on him. He backed his bonds with about 15 million tons of Kentucky and West Virginia usable coal waste.¹ He valued that coal waste at \$190 million. However, his recent bankruptcy filings report those assets to be worth \$120,000.²

While AGC understands that hindsight is 20/20, this particular individual and his bonds were widely known to be highly suspect. We strongly urge you to review the approval process for this individual surety and consider working with AGC and other reputable construction associations with expertise on individual sureties to help ensure it does not happen again.

USACE Reimbursement of Subcontractors for Work Completed on Access Control Panel Project

USACE contracts generally include a FAR clause providing for a retainage of payment from prime contractors “when satisfactory progress has not been achieved by a [prime] contractor.” FAR 32.103. That retainage could be and often is about 10 percent of the estimated amount of the contract. In the event USACE collected a retaining fee from RMA on this project, AGC would urge USACE to promptly use those funds to pay subcontractors, including A-1 Fence, for the work they completed on the project.

AGC also requests that USACE determine if adequate consideration was given to RMA’s past performance during the access control project source selection, given RMA’s history of issues at Ft. Hood.

Conclusion

The problem with individual sureties is not a new one. While AGC understands the seemingly endless requirements, reviews and approvals federal contracting officers must handle to procure and manage a construction project, the approval of individual sureties must be given close attention. The situation above is the usual consequence when such notorious individual sureties are utilized. As such, AGC would urge USACE remedy the non-payment of subcontractors through any retainage on the access control panel project.

Again, I respectfully request to speak with you briefly on these matters at your convenience. Thank you for your time and consideration.

Sincerely,

Jimmy Christianson

Jimmy Christianson
Director, Federal & Heavy Construction Division
Associated General Contractors of America

¹ http://enr.construction.com/business_management/ethics_corruption/2013/0225-a-bold-individual-surety-claims-his-coal-backed-bonds-are-rock-solid.asp

² http://enr.construction.com/business_management/finance/2014/0805-outspoken-individual-surety-files-for-bankruptcy-protection.asp