



COMPTROLLER GENERAL OF THE UNITED STATES  
WASHINGTON, D.C. 20548

B-176392

October 10, 1972

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Dear Mr. Secretary:

Reference is made to letter SAOAS(I&L)-MO dated July 18, 1972, from the Assistant Deputy for Materiel Acquisition, Office of the Assistant Secretary, reporting on the protest of Jets Services, Inc., against the rejection of its bid under invitation for bids (IFB) No. DABFO7-72-B-0150, issued by the Department of the Army, Procurement Division, Fort Ord, California.

By reason of the withdrawal of the low bid, Jets Services became the low, eligible bidder at an estimated total bid of \$1,505,066.80, or \$253,234.00 less than that bid by the next eligible bidder. The contracting officer rejected the bid of Jets Services as nonresponsive for failure to comply with the bid guarantee provisions of the IFB and the Armed Services Procurement Regulation (ASPR).

Paragraph C-23 of the solicitation advised bidders that a bid guarantee in a penal sum equal to 20 percent of the bid price, or \$300,000, whichever is less, was required with each bid. Since 20 percent of the price bid by Jets Services exceeded \$300,000, the latter represents the penal amount of the bid guarantee for the firm. Jets Services elected to submit in response to the bid guarantee requirement a bid bond supported by two individual sureties in the penal amount of 20 percent of its bid price. The required affidavits of the individual sureties disclose that one individual surety listed a net worth in excess of the penal amount of the bond (\$625,500) while the other listed a net worth less than the penal amount (\$27,500). The rejection by the contracting officer of the Jets Services bid was bottomed on the failure of one of the individual sureties to have a net worth at least equal to the penal amount of the bond.

In support of this position, the contracting officer and legal officers of the Department of the Army invite our attention to the instructions on the reverse of the Affidavit of Individual Surety form which clearly advise that each individual surety must show net worth in a sum not less than the penal amount of the bond. Also, ASPR 10-201.2 provides in effect that the contracting officer must ascertain that each individual surety justifies a net worth in a sum not less than the penal amount of the bond. Furthermore, the contracting agency advises that regulation provides that individual sureties, of which there must be at

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least two, are jointly and severally liable in the event of a default by the principal. It is also pointed out by the agency that ASPR 2-404.2(h), ASPR 10-102.5(a) and paragraph C-29 of the IFB require the rejection of a bid not complying with the bid guarantee requirements.

We do not subscribe to the rationale for bid rejection and, for reasons set forth in more detail below, we conclude that the bid of Jets Services should not have been rejected as nonresponsive.

Commencing with our decision at 38 Comp. Gen. 532 (1959), our Office has consistently held that the requirement for a bid guarantee or bond in a formally advertised procurement, as here, is a material requirement which cannot be waived. See B-175477, August 3, 1972; and 46 Comp. Gen. 11 (1966). Since our decision at 38 Comp. Gen., supra, we have been confronted with and ruled upon the legal effects of varying degrees of bid bond deficiencies. We have remarked that waivable deviations from full compliance with bid bond requirements may not be of a character which would result in the Government obtaining less than the same full and complete protection as it would have under a bond in complete conformity. See B-167787, November 4, 1969.

In this case, even though one of the two individual sureties proffered did not show on his Affidavit of Individual Surety at bid opening a net worth at least equal to the penal sum of the bid bond, the bid bond itself is enforceable. Jets Services tendered with its bid an apparently valid bid bond, executed by two individual sureties, jointly and severally, in a penal amount sufficient to satisfy the requirements of the IFB. The failure of one of the two individual sureties to possess the requisite net worth at bid opening does not detract from the joint and several liability of the sureties on the bid bond.

Looking further into the bid guarantee requirement, a review of the individual affidavit in question and the regulations discloses that the contracting officer is not constricted to the four corners of the affidavit submitted with the bid bond to determine whether or not a surety possesses the requisite net worth. For example, the affidavit of individual surety form calls for a certificate of sufficiency executed by, inter alia, a bank or trust company officer attesting to the responsibility of the surety. The instructions to the affidavit state that further certificates showing additional assets or a new surety may be required to assure protection of the Government's interest. Also, ASPR 10-201.2(d)

permits the contracting officer to require an individual surety to furnish additional information on net worth, as well as the use of extrinsic evidence to assist in a determination of the net worth sufficiency of an individual surety.

Based on the above, we believe that the matter of the net worth of an individual surety on a bid bond is not one relating to the responsiveness of a bid but rather to the responsibility of the surety. The fact that an affidavit of an individual surety either has not been filed timely or has been filed timely but discloses assets insufficient to cover the penal amount of the bond does not affect the actual net worth of the surety. Since completion of the surety affidavit is solely for the benefit of the Government to disclose facts concerning the responsibility of the surety, we see no reason why contracting officials should not be able to ascertain, after bid opening but subject to the time restraints of the procurement, the acceptability of an individual surety based on required net worth. See B-172750, September 27, 1971.

By letter dated August 4, Jets Services forwarded to our Office a revised affidavit from the deficient individual surety (enclosed). We would have no objection to the consideration of the Jets Services bid if a review and investigation of that revised affidavit or any other relevant information disclose that the bid is, in fact, supported by at least two individual sureties possessing the requisite net worth.

We take this position notwithstanding the contentions by Jets Services that the Department of Defense arbitrarily requires two individual sureties with a net worth at least equalling the penal sum as opposed to the requirement of only one corporate surety.

To contrast the necessity for only one corporate surety, ASBR 10-201.2(a)(2) states that any corporate surety offered for a bond furnished the Government must appear on the Treasury Department List (TD Circular 570) and the amount of the bond must not be in excess of the underwriting limits stated in that list. Department of the Treasury regulations (31 CFR part 223) provide for strict compliance with specific requirements both before and after a corporate surety is issued a certificate of authority to do business with the Government on bonds and thereby placed on the approved surety departmental list--e.g., authorization under a charter or articles of incorporation to do business under the provisions of 5 U.S.C. 6-13 covering official and penal bonds; financial condition reflecting capital fully paid up in cash of not less than \$250,000; solvency and financial qualifications; engagement in the business of fidelity insurance

and suretyship and intention to participate actively in the execution of fidelity and surety bonds in favor of the United States; safely invested cash capital and other funds; filing of annual financial reports; and a limitation of risk on outstanding surety obligations. No such established qualifications or requirements are necessary when individual sureties are proffered in support of a bid bond. Absent these safeguards in the case of an individual surety, we believe that the Department of Defense requirement that there be at least two individual sureties possessing the requisite net worth is a valid and well-founded protective measure.

In addition, the Jets Services complaint against the alleged excessive amount of the bid guarantee as opposed to the lesser penal sums of the performance and payment bonds is not persuasive. This is so because the contracting officer exercised his discretion under ASPR 10-102.3 by requiring a bid bond in an amount not less than 20 percent of the bid price. In any event, that complaint is untimely under section 20.2 of our Interim Bid Protest Procedures and Standards, published in title 4 of the Code of Federal Regulations, which provides that "Protests based upon alleged improprieties in any type of solicitation which are apparent prior to bid opening shall be filed prior to bid opening."

Sincerely yours,

R.F. KELLER

Deputy Comptroller General  
of the United States

The Honorable  
The Secretary of the Army