



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: T&A Painting, Inc.
File: B-224222
Date: January 23, 1987

DIGEST

1. In determining the outstanding obligation of an individual surety under payment and performance bonds, the contracting officer properly may consider the full penal amount of the bond until completion of the contract and the expiration of any mandatory warranty period under the contract.

2. The contracting agency improperly rejected the protester's bid as nonresponsive where individual sureties' net worths were insufficient to cover the penal amount of required bonds, because surety net worth involves a matter of responsibility. Since a bidder's responsibility may be demonstrated any time prior to contract award, and no award has been made during the pendency of the protest, the contracting agency should consider the financial capability of the sureties based on current information before determining whether to reject the bid.

DECISION

T&A Painting, Inc. (T&A), protests the rejection of its bid in response to invitation for bids (IFB) No. N62766-85-B-2170 issued by the Department of the Navy (Navy), Naval Facilities Engineering Command for the painting of barracks, a dining facility and walkways at the U.S. Naval Station, Guam, Marianas Islands. T&A's bid was rejected as nonresponsive upon the contracting officer's determination that T&A had failed to provide responsible individual sureties since the sureties' obligations exceeded the sureties' net worths so that they were unable to guarantee the penal amounts of the bonds. T&A contends that the Navy improperly calculated the individual sureties' potential liability under other outstanding bonds because he failed to consider the fact that some projects were either completed or partially completed. T&A also maintains that the government incorrectly regarded the sureties as remaining obligated under the bonds during the

warranty period following contract completion. T&A further contends that the determination of nonresponsiveness was incorrect because the net worth of a surety involves a matter of responsibility which can be determined any time prior to award, and that the Navy should consider the sureties' net worth based on current information.

The protest is denied, but we recommend that the Navy reconsider the sureties' financial capabilities based on current information.

T&A is correct that the net worth of its sureties does not involve a matter of its bid's nonresponsiveness, but involves a matter of responsibility which may be established any time before award. Clear Thru Maint., Inc., 61 Comp. Gen. 456 (1982), 82-1 CPD ¶ 581. A bid cannot be rejected as nonresponsive on the basis that the individual sureties' net worths are insufficient to cover the penal amount of the performance and payment bonds. The SF 28 and the financial statement serve only to assist the contracting officer in determining the responsibility of the surety and do not affect the responsiveness of the bid itself. See Hispanic Maintenance Serv., B-218199, Apr. 22, 1985, 85-1 CPD ¶ 461.

The IFB required a performance bond (SF 25) in a penal sum -- equal to 100 percent of the bid price and a payment bond (SF 25A) in a penal sum, as pertains here, equaling 40 percent of a bid price exceeding \$1 million but not exceeding \$5 million. The SF 25 for the performance bond states that the surety remains obligated for the full amount of the penal sum until the contractor fully performs and during the life of any guaranty required under the contract. The SF 25A for the payment bond states that the surety is liable for the full amount of the penal sum until all payments for labor and material have been made. Since T&A was bonded by two individual sureties rather than a corporate surety, a completed affidavit of individual surety (SF 28) for each individual surety was required to accompany the bonds. See Federal Acquisition Regulation (FAR) § 28.202-2 (1985).

The sureties' SF 28's--executed on January 20, 1986, approximately 6-1/2 months before the July 8 bid opening--showed outstanding obligations under bonds for other contracts, including the warranty period, that exceeded their net worth. To ascertain the current status of the sureties' obligations, the Navy reviewed SF 28's executed July 5 by the same sureties under another IFB, and determined that as of July 5, 1986, the two individual sureties each had a total of \$3,490,996 obligated on open contracts or encumbered due to the 1 year

warranty period following contract completion. The Navy found that one surety had a net worth of \$2,048,915 and thus was overextended by \$1,442,081, while the other surety had a net worth of \$2,050,100 and was overextended by \$1,440,896. The two sureties were rejected because their assets were insufficient to satisfy the requirements of the FAR, 48 C.F.R. § 28.202-2(a), which require that "the net worth of each individual surety must equal or exceed" the penal amount of the bond.

Regarding the proper consideration of partial performance or the warranty period under other contracts, the contracting agency is not required to consider the percentage of project completion since under the terms of the SF 25, sureties are obligated for the full penal amount of the performance bond until the expiration of the warranty after contract completion. Am. Fed. Contractor, Inc., B-225526, July 25, 1986, 86-2 CPD ¶ 114. Similarly, under the payment bond's terms, the sureties remain obligated for the entire penal amount until all payments for material and labor have been made, notwithstanding the fact that contract performance has been completed. The Navy therefore properly computed the sureties' obligations based on the warranty period during which liability under either bond could be incurred.

Since the record indicates that at the time the bids were being evaluated for contract award purposes, T&As proposed sureties did not have sufficient net worths to cover their bond obligations the agency had a sufficient basis for not awarding T&A the contract. See Singleton Contracting Corp., B-216536, Mar. 27, 1985, 85-1 CPD ¶ 355. The protest is denied.

However, since the determination of responsibility may be made any time prior to contract award and an award has not been made, we recommend that the Navy assess the sureties' current net worth and obligations under other contracts before determining whether to reject T&A's bid. See Bruno-N.Y. Indus. Corp., 59 Comp. Gen. 512 (1980), 80-1 CPD ¶ 388.

for *Seymour Ebers*
Harry R. Van Cleve
General Counsel