



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Norse Inc.
File: B-233534
Date: March 22, 1989

DIGEST

An agency may not automatically reject the proposal of an offeror on a negotiated procurement solely for the reason that the individual sureties, who executed the bid guarantee included in the proposal, fail to identify one outstanding performance bond obligation, where this failure to disclose apparently resulted from a good faith error and not as part of any continuing pattern of nondisclosures by the individual sureties and where the nondisclosure should not cause the contracting officer to be concerned about the sufficiency of the sureties' net worth to cover the guarantee bond obligations.

DECISION

Norse Inc., protests the rejection of its proposal under request for proposals (RFP) No. DAKF48-88-R-0003, issued by the Army for an indefinite quantity of maintenance, repair, and construction work on real property at Fort Hood, Texas.

We sustain the protest.

The RFP, a small business set-aside, required offerors to furnish a "bid guarantee" in the amount of \$200,000 (20 percent of the \$1 million guaranteed minimum amount of the contract). In response to this requirement, Norse's proposal included a standard form (SF) No. 24 bid bond executed by two individual sureties. The Federal Acquisition Regulation (FAR) § 28.202-2(a) (1984), specifically provides that bid guarantee requirements can be satisfied by the submission of bid bonds by two individual sureties, so long as each surety has sufficient net worth to cover the penal amount of the bid bond. Additionally, in response to the requirement in FAR §§ 28.202-2(a) and (b) that bidders/offerors submit SF-28s whenever individual sureties are used so that the contracting officer can determine their acceptability, Norse submitted two SF-28s, "Affidavits of

044983/138266

Individual Surety," that had been filled out by each individual surety. The individual sureties used by Norse were husband and wife, who listed on separate SF-28s identical assets and liabilities that indicated each had a net worth of \$1,511,869.50. In response to item 10 of the SF-28, which requires the surety to identify "all other bonds" on which he or she is surety, each surety submitted a list of three bond contracts on which he and she were sureties; the listed bond obligations totaled \$431,523.05.

On November 3, the Army rejected Norse's proposal because the sureties had not disclosed all bonds on which they were sureties as required by item 10 of the SF-28, in that the sureties did not list their performance and payment bond obligation on one contract with an obligation amount for each individual of \$270,365. The Army also expressed concern that the sureties had listed identical assets.

On November 9, Norse protested to our Office the rejection of its proposal. The Army has indicated that it has proceeded with discussions with the other offerors, but no award has been made.

Since item 10 of the SF-28 provides space for the surety to list "all other bonds on which he is a surety," the duty of the individual surety to disclose all such obligations, without exception, is clear. Carson and Smith Constructors, Inc., B-232537, Dec. 5, 1988, 88-2 CPD ¶ 560. Here, the failure of the sureties to disclose all bond obligations violated these instructions.

Nevertheless, the SF-28, "Affidavit of Individual Surety," is a document separate from the bond itself, and serves solely as an aid in determining the responsibility of an individual surety. E.C. Development, Inc., B-231523, Sept. 26, 1988, 88-2 CPD ¶ 285. Although a contracting agency has the discretion to consider the failure of an individual surety to disclose all bond obligations as a factor in determining the responsibility of the bidder or offeror and its sureties, we have held that a surety's failure to list all bond obligations does not automatically warrant rejection of a bidder on a formally advertised procurement. STR Painting, Inc., B-233008, Dec. 29, 1988, 88-2 CPD ¶ 638; E.C. Development, Inc., B-231523, *supra*. A contracting officer only has a reasonable basis to reject a bidder or offeror as not responsible, where there is an indication of a continuing pattern of nondisclosures by an

individual surety, see Dan's Janitorial Service, 61 Comp. Gen. 592 (1982), 82-2 CPD ¶ 217; E.C. Development, Inc., B-231523, supra, or where the nondisclosure causes the contracting officer to be concerned about whether the surety's net worth is sufficient to cover the bond obligations. See E.C. Development, Inc., B-231523, supra; American Federal Contractor, Inc., B-222526, July 25, 1986, 86-2 CPD ¶ 114.

We have held that in the absence of such circumstances a contracting officer may not automatically reject a bidder on a formally advertised procurement, whose otherwise acceptable individual surety makes an apparent good faith effort to list its bond obligations, for the sole reason that the surety failed to list all other obligations. An inflexible policy that permits an agency to automatically reject bidders in this situation is tantamount to converting that which is clearly a matter of bidder responsibility to a matter of "bid responsiveness." E.C. Development, Inc., B-231523, supra; Transcontinental Enterprises, Inc., 66 Comp. Gen. 549 (1987), 87-2 CPD ¶ 3. Such an inflexible policy is even more inappropriate in the context of a negotiated procurement, where discussions are the general rule. See T.V. Travel, Inc.; World Travel Advisors, Inc.; General Services Administration--Request for Reconsideration, 65 Comp. Gen. 109 (1985), 85-2 CPD ¶ 640.

The Army has not identified any other instances where the individual sureties failed to disclose bond obligations, much less alleged that this is a part of a pattern of nondisclosure by these individual sureties. Indeed, in this instance, the record shows that an employee of the offeror freely disclosed the other bond obligation during a phone conversation with the contracting officer.

While the Army asserts that the sureties and Norse knew or should have known of this previous contract when the sureties filled out their SF-28s and that neither the sureties nor Norse made any attempt to amend or correct the SF-28s, there is no evidence that the sureties' failure to list the bond obligation on this offer was anything other than a good faith error. In this regard, Norse explains the failure to list the bond obligation was a clerical error. Also, the sureties disclosed three bond obligations totaling \$431,523.05 in response to item 10 of SF-28 and Norse voluntarily identified the bond obligation that the sureties failed to list. Although the Army claims the Norse representative misrepresented the status of the unlisted bond obligation when he identified it to the Army, the fact that he identified this bond, of which the Army was unaware, without being reminded is a strong indication of Norse's

good faith. Furthermore, Norse's representative has explained that the "misrepresentation" was not intentional, but based upon an error in his understanding of the fact in issue, that is, when the obligation on the undisclosed bond became effective.

The record also shows that the Army never attempted to contact the individual sureties themselves to discuss this omission or to ascertain whether the pledged assets were actually sufficient to cover the bid guarantee. See Hirt Co., B-230864, June 23, 1988, 88-1 CPD ¶ 605. Instead, the contracting officer made several phone calls to obtain the names of sureties on other Norse contracts and to ascertain the authority of the bank official who signed the SF-28s. In none of the documentation does the Army indicate that it discovered other instances where the individual sureties involved here had failed to disclose bond obligations.

The Army argues that this is not the first instance of nondisclosure by an individual surety used by Norse, citing Norse Construction, Inc., B-216978, Feb. 25, 1985, 85-1 CPD ¶ 232. However, the Army has misinterpreted our decisions; only a continuing pattern of nondisclosure on the part of a particular surety is relevant in determining the acceptability of that surety. Dan's Janitorial Service, Inc., 61 Comp. Gen. supra, at 594. A bidder's or offeror's prior use of an individual surety, who failed to disclose all bond obligations, cannot be relied upon to reject a different individual surety proposed by that bidder or offeror. To the extent the Army believes Norse's proposal of individual sureties, who fail to disclose all bond obligations, is an indication that Norse lacks integrity or is otherwise nonresponsible, this matter is subject to the Small Business Administration (SBA) certificate of competency (COC) procedures.^{1/}

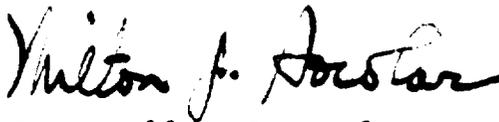
In this case, the Army also raised concerns about the joint ownership of the properties and assets claimed by the individual sureties, although this was not the basis on which the sureties were rejected. Our Office has held that

^{1/} In its report, the Army expressed several other concerns related to Norse's responsibility and integrity. To the extent the Army finds that Norse is not a responsible contractor, in its own right, these matters are subject to the SBA COC procedures. In any case, since the Army does not assert that any of these matters formed the basis for the rejection of Norse's proposal, we will not consider these concerns.

where two parties, such as husband and wife, jointly own property, they may both pledge the same property as long as each party still has an interest in the property pledged so that each surety can individually satisfy the bond amount. Fitts Construction Co., Inc., 62 Comp. Gen. 615 (1983), 83-2 CPD ¶ 190; American Construction, B-213199, July 24, 1984, 84-2 CPD ¶ 95. Here, the claimed \$1,511,869.50 net worth of each surety would be sufficient to satisfy this bid guarantee requirement, even accounting for the sureties' other bond obligations. Any remaining concerns that the Army has concerning the legitimacy or sufficiency of the sureties and their assets can be a subject of discussions.^{2/}

We recognize that a contracting officer has broad discretion in making responsibility determinations. The record here, however, indicates that the contracting officer, rather than investigating the sureties' acceptability, automatically rejected the offer. We therefore sustain the protest.

We recommend that the Army reinstate Norse in the competition.^{3/} Under the circumstances, we find that Norse is entitled to the costs of filing and pursuing its protest. STR Painting, Inc., B-233008, supra.



Acting Comptroller General
of the United States

^{2/} The Army recognizes that minor irregularities in sureties can be corrected during discussions.

^{3/} We decline to recommend the proposed remedy suggested by Norse that this procurement be delegated to another procuring activity; our Office is not authorized to advise agencies which activity should be responsible for a particular procurement.