

R. White



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Leeth Construction, Ltd.

File: B-236275

Date: November 13, 1989

DIGEST

Agency properly rejected low bid on the basis that the individual bid bond sureties were not responsible where the contracting officer reasonably determined that the proposed sureties claimed excessively overvalued assets and supported those claims with documents containing material omissions and inconsistencies.

DECISION

Leeth Construction, Ltd., protests the rejection of its bid under invitation for bids (IFB) No. DAHA44-89-B-0003, issued by the United States Property and Fiscal Officer, Virginia Army National Guard for construction of an armory at Sandston, Virginia. The National Guard rejected Leeth's bid based on its finding that Leeth's individual bid bond sureties were nonresponsible.

We deny the protest.

The IFB required each bidder to provide a bid guarantee in an amount equal to 20 percent of the bid price or \$3 million, whichever was less. In the event the required bid bond named individuals as sureties rather than a corporation, two or more responsible sureties were required to execute the bid bond, and the bidder was required to provide a completed Standard Form (SF) 28, Affidavit of Individual Surety, for each individual. See Federal Acquisition Regulation (FAR) § 28.202-2(a) (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). SF 28 includes a Certificate of Sufficiency that must be executed by specified bank officers or government officials.

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At bid opening, on June 8, 1989, 12 bids were received ranging from a high of \$3,275,000 to the apparent low bid of \$2,266,602, submitted by Leeth. In response to the requirements of the IFB, Leeth submitted three bid bonds guaranteed by three individual sureties: Harry C. Perry, Delbert E. Cook, and Phil W. Hatch. An Affidavit of Individual Surety was submitted for each surety indicating a net worth of \$21,445,458 for Mr. Perry, \$1,263,940 for Mr. Cook, and \$22,384,818 for Mr. Hatch. Each of the three sureties also provided a fully-executed Certificate of Sufficiency.

By letter dated July 14, the National Guard determined that Leeth's bid was unacceptable because all three of its individual bid bond sureties were nonresponsible. The contracting officer's determination was based on a finding that each of the affidavits and accompanying financial statements and audit reports contained excessively inflated values for assets, and numerous material inconsistencies, contradictions and omissions. The contracting officer decided these findings raised reasonable questions about the credibility and integrity of the sureties and the independent auditor who prepared the financial statements attached to each surety's affidavit.

On July 21, Leeth protested the rejection of its bid. According to Leeth, the National Guard (1) improperly determined that the individual sureties were nonresponsible because Leeth provided sufficient financial information to permit the agency to conclude that each surety had a net worth in excess of the penal amount of the bond; (2) inadequately investigated the financial position of each surety; (3) improperly concluded that individuals signing the Certificates of Sufficiency were required to affirmatively investigate or verify the veracity of the Affidavits of Individual Surety; (4) improperly determined that joint ownership of property with a spouse decreased the net value of such property; (5) mistakenly concluded that the individual sureties had withheld information when such information was provided in supporting documents; and (6) improperly determined that assets set forth in the Affidavits of Individual Surety were overvalued.

A bid guarantee is a firm commitment from a bidder that if its bid is accepted it will execute the contractual documents and provide the payment and performance bonds required in the contract. See FAR § 28.101. Its purpose is to secure the surety's liability to the government for excess procurement costs in the event the bidder fails to honor its bid in these respects.

The FAR permits bidders to use two individual sureties, rather than a corporate surety, provided each individual surety completes an Affidavit of Individual Surety. See FAR § 28.202-2(a). The contracting officer is then required to make an affirmative determination of responsibility based upon the financial acceptability of the surety before an award is made. FAR § 28.202(a); Cascade Leasing, Inc., B-231848.2, Jan. 10, 1989, 89-1 CPD ¶ 20. Contracting officers are vested with a wide range of discretion and business judgment when determining responsibility, and we will defer to their determinations unless the protester can demonstrate that those decisions are made in bad faith or without a reasonable basis. Allied Production Management Co., Inc., B-235686, Sept. 29, 1989, 89-2 CPD ¶ ____.

The contracting officer made a determination in this case that Leeth's bid was not acceptable because the three sureties proposed lacked sufficient integrity to assure the government that its procurement costs would be covered if the bidder failed to execute the contract and provide the necessary payment and performance bonds. Based on our review of the record, we find that the contracting officer's determination was reasonable.

For the first surety, Perry, the financial statement listed the fair market value of real estate, described as three single-family residences (\$1.9 million), a mobile home park (\$1.4 million), eight duplex lots (\$169,500), and forty townhouses (\$3.4 million); Perry claimed these properties were subject to mortgages and encumbrances of \$3,500,000. Perry also claimed 50 percent ownership of two closely-held real estate investment companies, with his interest valued at \$15,780,412, an undivided one-half interest in three real estate projects, with his interest valued at \$2,126,890, and cash assets of \$168,656.

The contracting officer questioned the claimed fair market value of \$1.9 million for the three single-family homes constructed by Perry. The supporting documents indicate the homes were built on lots purchased for \$481,825, but include no evidence to substantiate the claim of a sales value of \$1.9 million, no evidence that construction ever took place on the lots, no evidence of any construction loans or liens against the property, and no evidence of releases for certain trusts listed on the settlement sheet for the purchase of the lots. A report from a real estate listing service provided by Perry also indicates that this property was owned by Perry jointly with his wife; however, there is no mention of joint ownership in the affidavit or elsewhere in the documents, and no explanation of the discrepancy. The contracting officer further noted that the Perry

documents assert Perry is the sole owner of a mobile home park, yet the official who certified Perry's affidavit informed the contracting officer's representative that it was her belief that Perry was not the sole owner of the mobile home park. Since the certifying official states that she believes the facts provided in the Affidavit of Individual Surety are true, to the best of her knowledge, her statement raised questions about both Perry's and her credibility. Upon reviewing these facts and documents, the contracting officer concluded that Perry's assets were excessively overvalued, and that the documents submitted contained sufficient inconsistencies to tarnish the credibility of Perry's affidavit, and thus, the responsibility of Perry as a surety.

The second surety, Cook, claimed a total net worth of \$1,263,940. Cook stated that his personal residence, two residential lots, 9.95 acres of commercially-zoned land, and a welding/metal fabrication shop had a fair market value of \$1,146,000, less mortgages and encumbrances of \$138,180. Cook also claimed ownership of miscellaneous other property with a net value of \$256,120. With respect to the 9.95 acre parcel of land, the contracting officer noted a six-fold difference in value between the claimed value in the affidavit, supported by a 1985 appraisal report indicating a fair market value for the land of \$600,000, and a 1987 tax report assessing the property at \$102,906. In addition, a May 6, 1988, title report on this land indicates the presence of three deeds of trust against the land that are not disclosed in the affidavit, or otherwise explained. The contracting officer also noted that the affidavit fails to disclose that all three properties listed by Cook are jointly owned with his spouse.

The third surety, Hatch, claimed a net worth of \$22,384,818, consisting mainly of his personal residence (\$49,750), and stock in the Zona Gold Corporation (\$22,317,306). Zona Gold Corporation is a Nevada corporation, wholly-owned by Hatch and his wife, engaged in real estate development and mining in the State of Arizona. The contracting officer questioned the credibility of Hatch's affidavit after noting that the value of the Zona Gold Corporation, Hatch's only asset of sufficient worth to meet the penal value of the bid bond, was valued four times greater than claimed in an affidavit submitted on a different procurement 7 months earlier. In addition, the contracting officer observed that 77 percent of the assets of the Zona Gold Corporation were tied to the Golden Wonder Mine Claim, for which Zona Gold Corporation had only a 3-year lease, which the corporation's financial statement failed to mention. The financial statement also does not reveal the monthly lease fee and royalty

commitment. The contracting officer also noted that Hatch had failed to disclose a prior bid guarantee supported by the same assets.

In addition to the above, all three sureties listed in Leeth's bid submitted an audited financial statement and an independent auditor's report prepared by the same Certified Public Accountant (CPA), Richard L. Widger. The contracting officer concluded that the inconsistencies and omissions in the affidavits and financial statements called into question the credibility of both the sureties and the CPA who prepared the audited financial statement. As a result of this information, the contracting officer forwarded the three affidavits and accompanying financial statements to the appropriate government authorities for criminal investigation.^{1/}

Leeth argues that the contracting officer acted unreasonably in rejecting its sureties because even discounting the assets the contracting officer found questionable, each surety provided sufficient financial information to show a net worth in excess of the penal amount of the bond. Once the accuracy of the sureties' representations reasonably has been called into question, however, the agency is justified in rejecting the sureties, notwithstanding the adequacy of other assets. Hughes & Hughes, B-235723, Sept. 6, 1989, 89-2 CPD ¶ _____. This reflects the great reliance an agency is entitled to place on the accuracy, thoroughness, and verity of surety financial information provided for government procurements. See Farinha Enters., Inc., B-235474, Sept. 6, 1989, 68 Comp. Gen. ____, 89-2 CPD ¶ _____.

Leeth also contends that the contracting officer based his determination on an inadequate review of the financial positions of each surety. We have specifically held that a contracting officer may rely on the initial and subsequently furnished information regarding net worth submitted by the surety without further conducting an independent investigation. See KASDT Corp., B-235620, Aug. 21, 1989, 89-2 CPD ¶ 162. In the instant case, however, the record shows the contracting officer went well beyond the sureties' documents in attempting to verify the responsibility of the sureties. The contracting officer's representative contacted each

^{1/} Although not indicated in the record of this protest, we note that Mr. Widger, the CPA who prepared the audited financial statements in this case, is the subject of an active federal investigation into allegations that he submitted false or fictitious financial statements to a federal agency on a different procurement.

official who signed the Certificate of Sufficiency submitted with the affidavit, and in one case was given information that contradicted the certificate and the affidavit; the contracting officer researched other government sources regarding the responsibility of the sureties; and the contracting officer contacted, or attempted to contact, the sureties themselves. In our view, the record here reflects a reasonable basis for the contracting officer's determination that the sureties were nonresponsible. Further, with respect to Leeth's assertion that, contrary to the contracting officer's conclusion, individuals signing a Certificate of Sufficiency are not required to personally investigate the accuracy of information provided on the Affidavit of Individual Surety, that argument has no bearing on the reasonableness of the contracting officer's determination that the sureties otherwise are not responsible.

Leeth also argues that the contracting officer improperly concluded that the net value of certain assets stated in the affidavits was incorrect because the assets were jointly owned with a spouse. All three affidavits failed to reveal joint ownership with spouses of property claimed to be solely-owned. Although we agree with Leeth's assertion that this omission does not render the stated net worth of the property inaccurate, we find that it is relevant to the credibility of the sureties' affidavits. Although the omissions, taken by themselves, might not alone support a finding of nonresponsibility, they are appropriately considered with other evidence to determine the responsibility of the sureties.

Leeth further contends that the contracting officer acted improperly in concluding that the individual sureties had withheld information when such information in fact was provided in supporting documentation, and in concluding that the assets were overvalued. We disagree. First, the supporting information provided by the sureties highlighted material omissions and inconsistencies in the affidavits. The contracting officer appropriately based a finding of nonresponsibility on these omissions and inconsistencies. The fact that the sureties themselves provided the information that revealed the omissions and inconsistencies does not change the fact that such omissions and inconsistencies, once noted, raise serious questions about the accuracy of the affidavits. Second, as previously discussed, the contracting officer clearly had a reasonable basis for concluding that many of the assets claimed by the sureties were overvalued.

Finally, in its comments on the agency report, Leeth for the first time argues that the contracting officer acted in bad

faith in finding Leeth's sureties nonresponsible. According to Leeth, the contracting officer's investigation focused on finding information which would justify rejecting the sureties. Leeth's bare assertions of bad faith on the contracting officer's part simply are not supported by the record; on the contrary, the numerous inconsistencies and omissions in the documents clearly support the contracting officer's determination that Leeth's sureties are nonresponsible.

The protest is denied.


James F. Hinchman
General Counsel