

COMPTROLLER GENERAL OF THE UNITED STATES

WASHINGTON, D.C. 20548



B-176849 (1)

JAN 2. 1973

Advance Building Maintenance Company
5611 Columbia Pike
Bailey's Cross Roads, Virginia 22041

Attention: Mr. Floyd Braman, Jr.
President

Gentlemen:

Reference is made to your telegram of August 24, 1972, and supplemental letters dated August 25 and October 2, 1972, protesting against the award of a contract to any other firm under Invitation for Bids (IFB) N62477-72-C-0586, issued by the Naval Facilities Engineering Command, Washington, D. C.

The above solicitation, issued on July 19, 1972, covered janitorial services for various buildings at the Naval Ship Research and Development Center. Bid opening was originally scheduled for August 16, 1972, but was later extended to August 22, 1972. Nationwide Building Maintenance, Inc. (Nationwide), was the low bidder at \$149,739.94, and your firm was second low with a bid price of \$164,005. The contract was awarded to Nationwide on August 31, 1972.

The invitation called for a 20 percent bid guaranty, or \$29,947.98 on Nationwide's bid. Nationwide submitted a bid bond executed by two individual sureties, rather than a single corporate surety. Instruction No. 4(b) on the reverse of the bid bond form (Standard Form 24) requires each individual surety to execute an Affidavit of Individual Surety (Standard Form 28). The affidavit form provides for a listing of the individual surety's assets, including solely owned real estate and other property, together with the values of such property, and a listing of all other bonds on which he is a surety. It further provides that property exempt from execution and sale for any reason should not be shown. The surety's interest in community property may be included if not so exempt. The affidavit form is designed

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in the singular, and clearly indicates that it should be executed and signed by one person.

It is your contention that certain property, which is located in Virginia and listed by one of the individual sureties, cannot be counted as part of the net worth of the surety for the purposes of the bid bond. You say that it is apparent from the face of the affidavit (which is signed by the President of Nationwide and another party, presumably his wife) that the property is jointly owned by the husband and wife. You point out that if the property is jointly owned by the couple with right of survivorship, the courts of Virginia construe such ownership as a tenancy by the entirety and the property would be exempt from execution and cannot be partitioned except by consent of both spouses. You also point out that Virginia homestead laws exempt certain property from execution to satisfy creditors, and that the portion of the listed assets to which the homestead law applies cannot be counted as part of the surety's net worth for bid bond purposes. Additionally, you allege that both of Nationwide's sureties are presently sureties on other bonds not disclosed, but which should have been listed, in block 10 of their affidavits.

Finally, you contend that the two Cashier's Checks, each in the amount of \$14,974, furnished by the sureties do not affect the validity of your protest because the checks were submitted after bid opening and after the award of the contract, and Navy afforded Nationwide a "second bite at the apple" by accepting those checks as a cure for the deficiencies in the bid bond affidavits.

In the evaluation of bonds, paragraph 10-201.2(d) of the Armed Services Procurement Regulations (ASPR) requires that the contracting officer must first ascertain that the affidavits of individual sureties (Standard Form 28) have been completely filled out and are properly executed. He must next ascertain that each individual surety justifies his net worth "in a sum not less than the penalty of the bond" (Instruction No. 4 of Standard Form 28). The contracting officer is also required to scrutinize closely the information entered in block 10 on Standard Form 28, as the amount of outstanding bond obligations of an individual surety may have a substantial bearing on the financial position of such individual surety, and to scrutinize closely the affidavits in any case where an individual is underwriting a bond for a principal for whom that surety has

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underwritten other outstanding bonds. ASPR 10-201.2(d) further provides that, as a general rule, the contracting officer should not require extrinsic evidence of an individual surety's net worth (other than Standard Form 28) unless Standard Form 28 is not filled out completely or properly, or unless the contracting officer has reason to believe that the individual surety's statements on Standard Form 28 do not reflect his true worth.

We have been advised by the procuring activity that, as a matter of practice, the bid bond and affidavits of the individual surety are examined to determine whether, on their faces, they meet the requirements of the invitation, and that jointly owned property is taken at half the stated value to determine whether the amount of net worth is sufficient to cover the bond. It is further reported that in the present case the bid bond and supporting affidavits on their faces showed that the requirements of the IFB were met and that the assets listed by the individual sureties were sufficient to cover the bid bond. However, one discrepancy was noted and that was the failure of either surety to list, in block 10, the other outstanding bonds on which the individuals were sureties, indicating that additional investigation was required by the contracting officer. Subsequent to the bid opening the sureties presented additional evidence to the contracting officer of their financial responsibility in the form of the two Cashier's Checks in the amount of \$14,974, each. It was considered that the evidence thus presented by the sureties was sufficient to meet the requirements and intent of ASPR 10-201.2(d) in establishing the financial ability of the sureties to honor the bond. The record indicates that both of Nationwide's individual sureties for the present procurement had outstanding bond obligations on other Nationwide contracts when the instant affidavits were executed.

We concur with your contention that the property values shown on the affidavit (Standard Form 28) signed by the President of Nationwide and, presumably, his wife, could not be properly accepted as establishing the individual surety's net worth. As stated above, the Affidavit of Individual Surety is designed for completion and signature by one person, i.e., the individual surety specified therein. The signing of the form by a second individual is not only contrary to the singular expressions of the form but clearly indicates an interest of that second party in the property described thereon. Thus, the dual

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signatures on the affidavit submitted by the President of Nationwide raise a question as to the nature and extent of his interest in the property, which defeats the principal purpose of the affidavit, that is, to provide the contracting officer with a sworn statement by the individual surety concerned of the fair value of his property, and interests in property, which are not exempt from execution and sale for any reason.

Since the affidavit by the President of Nationwide was not properly filled out or executed, and the affidavit of the other surety was also defective in that her outstanding bond obligations were not shown in block 10, the two individual surety affidavits did not conform to the provisions of the form or the provisions of ASPR 10-201.2(d). Under these circumstances the cited regulation contemplates that the contracting officer will obtain additional information or evidence of financial worth from the individual sureties. The record indicates that additional evidence of financial responsibility was subsequently submitted by the sureties in the form of the above-mentioned Cashier's Checks. Although you allege that the checks were received by the procuring activity after the contract was awarded on August 31, 1972, we have been informally advised by Navy that the checks, which were dated August 28, 1972, were, in fact, delivered to the procuring activity prior to the award, in response to the contracting officer's further inquiry into the financial worth of the sureties.

In regard to the contracting officer's acceptance of the two Cashier's Checks after bid opening as evidence of the financial responsibility of the sureties, this Office has held in several decisions that bid bond deficiencies, which render a bid nonresponsive, cannot be cured after the opening of bids. 38 Comp. Gen. 532 (1959); B-175679, May 17, 1972; B-148309, March 19, 1962; B-159554, September 2, 1966. However, we have also held that the matter of the net worth of an individual surety on a bid bond does not affect the responsiveness of the bid but concerns the responsibility of the surety, a matter which can be determined pursuant to evidence and information submitted after bid opening. 52 Comp. Gen. 134 (B-176392, October 10, 1972). Thus, we cannot conclude that the contracting officer acted improperly in accepting the two Cashier's Checks as evidence of the sureties' financial situations in making his determination that the sureties were financially responsible.

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It is also our view that the checks constituted sufficient evidence for such determination since they provided readily available cash in the total penal amount of the bond.

In your letter of October 2, you point out that the procuring activity violated the express terms of ASPR 2-407.8(b)(2) when it made the award to Nationwide. ASPR 2-407.8(b)(2) requires that notice be given to the Comptroller General of intent to make an award prior to the final disposition of a protest by this Office. We have no record of such notice having been given in the present case. While the procuring activity's failure to notify this Office of the proposed award was a violation of the cited regulation, we are of the view that in the present instance it should be regarded as a procedural defect not affecting the legality of the contract. However, we are bringing this matter to the attention of the Secretary of the Navy to assure future compliance by the procuring activity with ASPR 2-407.8(b)(2).

For the above reasons, your protest is denied.

Very truly yours,

R.F.KELLER

Deputy Comptroller General
of the United States