

DECISION

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

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FILE: B-213199**DATE:** July 24, 1984**MATTER OF:** American Construction**DIGEST:**

1. Questions concerning an individual surety's financial acceptability are matters of responsibility rather than responsiveness.
2. Net worth of individual sureties on a bid bond need only be in the amount of the difference between the price stated in the bid and the price stated in the next higher acceptable bid since the bid bond need only be in that amount.
3. Where an agency's rejection of the protester's low responsive bid was arbitrary and capricious, protester is entitled to bid preparation costs if protester can demonstrate to agency that each individual surety had adequate net worth excluding property interests in the principal and property exempt from execution and sale equal to difference between protester's low bid and next higher acceptable bid.

American Construction (American) protests the rejection of its low bid as nonresponsive under invitation for bids (IFB) No. NA600-9602 issued by the United States Department of the Interior, Bureau of Indian Affairs (BIA), for the construction of roadway.

We sustain the protest.

Bidders were required to submit a bid bond for 20 percent of the bid price. American executed Standard Form 24, "Bid Bond" (See Federal Procurement Regulations (FPR), 41 C.F.R. § 1-16.801(a)(1) (1983)). Because American was bonded by individual rather than corporate sureties, a completed Affidavit of Individual Surety (Standard Form 28) for each individual surety was required to accompany the bond.

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The individual sureties for American's bid bond were the general manager and owner of American, who are husband and wife. In filling out standard form (SF) 28, both sureties listed on separate forms identical assets and liabilities, resulting in a net worth of \$836,310.50 each.

In a letter sent to American the contracting officer (CO) stated that American's bid was determined to be nonresponsive because:

"The last sentence of paragraph 2 of the instructions of SF-28 states that an individual surety will not include any financial interest he may have in the assets of the principal on the bonds.

"Since both sureties are in fact the principal, the bond violates the instructions of SF-28."

We agree that the bonds violated the instructions of SF-28 because the sureties involved their financial interest in the assets of the bidder. However, we do not agree that American's bid was nonresponsive. Responsiveness involves whether the bid as submitted is an offer to perform, without exception, the exact thing called for in the invitation, so that acceptance will bind the contractor to meet all of the IFB's material terms and conditions. 49 Comp. Gen. 553, 556 (1970).

Notwithstanding the violation of SF-28, American's bid was responsive because the adequacy of American's bond, which met the requirements of listing two individual sureties representing net worths in excess of the penal sum of the bond, is a matter of responsibility and not one of responsiveness. The acceptability of the sureties may be established any time before award. See Clear Thru Maintenance, Inc., 61 Comp. Gen. 456 (1982), 82-1 C.P.D. ¶ 581; CWC, Inc., B-209383, Oct. 19, 1982, 82-2 C.P.D. ¶ 347.

In addition, the agency failed to consider that the net worth of individual sureties on the bid bond need only be in the amount of the difference between the price stated in the

bid and the price stated in the next higher acceptable bid. See Western Roofing Service; Rite-Way Contractors, Inc., B-186017, Sept. 29, 1976, 76-2 C.P.D. ¶ 291; FPR, 41 C.F.R. § 1-10.103-4(b) (1983). American's bid was \$1,699,233.25 and the next higher acceptable bid price, that of the awardee, was \$1,710,375. Under the circumstances here, American's sureties should have been each required to have a net worth equal to the difference between these two bid prices, \$11,341.75.

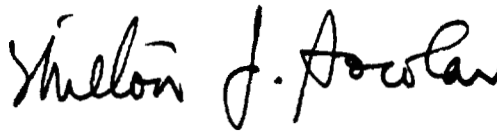
The asset that BIA contested on the sureties' affidavits was \$635,000, representing commercial property believed by BIA to be American's business location. According to the affidavits, among other assets \$229,000 involves a personal residence. We note that SF-28 does not permit the inclusion of property exempt from execution and sale for any reason. In addition, the affidavits are unclear as to how the various assets and liabilities are allotted between property in the principal, American, and other property. Finally, although we have held that where two parties, such as husband and wife, jointly own property, they may both pledge the same property, each party must still have an interest in the property pledged that is great enough so that each surety can individually satisfy the bond amount. See Fitts Construction Co., Inc., 62 Comp. Gen. 615 (1983), 83-2 C.P.D. ¶ 190.

In view of the advanced state of performance, American has asked to be compensated for damages. It is well established, however, that costs other than bid preparation costs may not be awarded. See Hub Testing Laboratories--Claim for Costs, B-199368.3, June 18, 1982, 82-1 C.P.D. ¶ 602. For example, anticipated profits or the legal fees incurred in pursuing a bid protest at the General Accounting Office are not compensable. Hub Testing Laboratories--Claim for Costs, id. The standard for entitlement to bid preparation costs is whether the procurement agency's actions with respect to the claimant's bid were arbitrary and capricious--that is, were not taken in good faith, were contrary to law or regulation, or had no reasonable basis--and, but for those actions, the claimant would have had a substantial chance of receiving the award. See Richard Hoffman Corporation, B-212775.3, Apr. 9, 1984, 84-1 C.P.D. ¶ 393; DaNeal Construction, Inc., B-208469.3, Dec. 14, 1983, 83-2 C.P.D. ¶ 682. We think that BIA's actions in this case lacked a reasonable basis.

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American should submit to the BIA appropriate data so that the agency may ascertain if the assets of each surety, excluding property in the principal (American) and property exempt from execution and sale at least equal the \$11,341.75 required. See 52 Comp. Gen. 184 (1972). The protester should also submit data in support of its claim for bid preparation costs directly to the agency. The agency should then review the acceptability of the sureties and claimed costs consistent with this decision.

The protest and claim for bid preparation costs are sustained. The claim for damages is denied.

for 
Comptroller General
of the United States