



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Hughes & Hughes

File: B-235723

Date: September 6, 1989

DIGEST

1. Agency properly found protester not responsible and rejected its bid where protester failed to provide sufficient information to permit a finding that the individual sureties on its bid bond were acceptable and the record shows the contracting officer's nonresponsibility determination was reasonably based.
2. Agency properly rejected protester's individual sureties as unacceptable where the accuracy of the sureties' representations has been called into question and where the information submitted by protester was insufficient to establish that its bid guarantee was equal to or greater than the difference between its bid and the next acceptable bid.

DECISION

Hughes & Hughes (H&H) protests the award of a contract to Massey Sand & Rock Co. under invitation for bids (IFB) No. 62474-86-B-0522, issued by the Western Division, Naval Facilities Engineering Command, for certain road improvements at the Marine Corps Air Ground Combat Center, Twenty-nine Palms, California. H&H contends that its low bid was improperly rejected based upon an unwarranted finding that the individual sureties on its bid bond were not acceptable.

We deny the protest.

The IFB required each bidder to provide a bid bond in an amount equal to 20 percent of its bid price and H&H submitted a bid bond naming two individual sureties. H&H's bid bond appeared sufficient on its face and its bid was considered responsive. Upon review of the affidavits of individual surety, Standard Form (SF) 28, financial statements, and other documents submitted on behalf of the sureties, the agency determined that there was insufficient information to support the claimed net worths of the

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sureties. Accordingly, the agency requested H&H to provide additional documentation of the individuals' net worths, advising that H&H had 5 working days from receipt of that request to furnish the information.

The request sought a certified public accountant (CPA) "audited financial statement" verifying income, assets, and liabilities of the individual, together with a signed opinion by a CPA stating the degree of liquidity of the assets and attesting to having personally reviewed all surety assets and liabilities. It also requested a complete list of liabilities and pending lawsuits; evidence of current ownership and current fair market value of all property, assets, and financial interests listed; and a complete list of bond obligations. The letter specifically warned that mere statements by the surety or other individuals, without further details, would not be sufficient. National Sureties & Investment (NSI), the surety broker, responded within the allotted time with a variety of documents concerning each surety.

For the first surety, NSI submitted a March 1989, unaudited financial statement, prepared by a CPA, based upon the surety's representations. The CPA did not render an opinion regarding the financial statement, attest to having reviewed the surety's assets and liabilities, and, apart from a note that cash equivalents were "highly liquid," did not furnish an opinion on the liquidity of assets.

The financial statement showed assets including cash and cash equivalents, a personal residence, automobiles, personal effects, collectibles, and an individual retirement account (IRA) totaling \$1,340,000, along with investments in three closely held companies, limited and general partnerships, contract rights, and a medical equipment lease, totaling \$4,929,100. Liabilities of \$1,875,773 included a mortgage, notes, a lease payable, and estimated income tax based on the difference between the estimated current values of assets and their tax bases. According to the statement, the first surety's net worth was \$4,393,327, while the SF 28 showed a net worth of \$5,008,040. As evidence of ownership and value, NSI furnished a copy of the deed to the personal residence; receipts for the automobiles; an insurance policy listing 17 oriental rugs and other personal property along with their insured values; 1979 and 1982 appraisals of 6 oriental rugs; a 1984 appraisal of 5 antiques; undated art gallery statements of the value of certain serigraphs and paintings; 1987 and 1988 income tax returns; a bank statement listing the value of assets in a trust for the surety's children; and the surety's divorce decree.

For the second surety, NSI also submitted a March 1989 unaudited financial statement, prepared by a CPA, based upon the surety's representations. As with the first surety, the CPA did not render an opinion regarding the financial statement, attest to having reviewed the surety's assets and liabilities, and, apart from the same note regarding the liquidity of cash equivalents, did not furnish an opinion on the liquidity of assets. The CPA also noted that the statement included the surety's wife's undivided interest in jointly held property and certain of her separate assets whose current values were not "practicably determinable."

The financial statement showed assets including cash and cash equivalents, a personal residence (jointly owned with his wife), an automobile, personal effects, collectibles, a time-share unit, life insurance, deferred compensation plans and IRAs, and a demand note, totaling \$981,371, along with various investments (marketable securities, U.S. savings bonds, the same 3 closely held companies, many of the same limited and general partnerships, contract rights and medical equipment lease, as the first surety) totaling \$4,704,600. Liabilities totaling \$1,650,173 included notes, mortgages, a lease payable, and the estimated tax on the difference in current asset values and their tax bases. The second surety's net worth was thus \$4,035,798, although his SF 28 showed a net worth of \$4,775,040. As evidence of ownership and value, NSI submitted the surety's and his wife's joint tax return; a receipt for a \$100,000 certificate of deposit which matured in October 1988; various statements for his and his wife's IRAs; bank and credit union statements detailing balances in accounts held by the surety, his wife, and held by both jointly; copies of savings bonds; insurance policies; the personal residence deed; an automobile price sticker; a copy of 1,000 jointly held shares in a savings and loan; an insurance declaration detailing oriental rugs and other personal property and their insured values; a note receivable; and a letter from the surety stating that his antiques were valued based on his personal estimate and explaining the discrepancy in the claimed and insured values of his oriental rugs.

Each surety's investments represented the bulk of their net worths. The majority of these investments were equal interests in various interrelated, closely held companies, general and limited partnerships, contract rights, and the equipment lease. Together, the sureties owned 100 percent of a health care facility developer which in turn held management agreements with several surgical centers (limited and general partnerships) in which the sureties owned interests. The sureties also owned 100 percent of a company which provided billing services to medical facilities

controlled by the sureties, their associates or affiliated companies. Further, the sureties owned 100 percent of contract rights to provide certain computer assisted medical services to the surgical centers they controlled and 100 percent of a medical equipment lease for equipment in one of the centers.

As evidence of the value of these interests, NSI submitted the medical equipment lease, copies of signed management agreements with three of the surgical centers and an unsigned agreement for a fourth center. These agreements explained the fees due to the developer, named the general partners, and established the price of limited partnership units which were to be offered to "physicians or related entities." These prices were denominated "current market prices" in the sureties' financial statements, and the values of the general partnership interests were based on these prices. The value of the developer was based upon the total management fees expected over the 5-year term of the management agreements, which fees were based upon financial forecasts of the surgical centers set forth in the agreements. The agreements also provided a caveat that the accompanying forecast was an illustration of financial results based upon the general partner's assumptions, which were not necessarily the most likely. The financial statements explained that the value of the contract rights was based upon "revenues to be generated over the contract lives." The financial statements further explained that the equipment lease was a wraparound lease with another lease payable to the owner of the equipment. A copy of the lease, stating the monthly rent was also submitted. NSI also furnished an updated list of the sureties' bond obligations showing each to be a surety on an \$800,000 bid bond, where the bid date had been extended indefinitely, and payment and performance bonds totaling \$1,047,856.50 on another contract awarded to H&H.

The agency reviewed these documents and concluded that they did not provide credible evidence that either surety possessed a sufficient net worth to cover the penal sum of the bid bond. This determination was based upon the lack of available verification of the claims of ownership and values asserted, especially with regard to the sureties' investments, several of which were classified as tax shelters and showed substantial passive and non-passive losses according to the sureties' tax returns. Further, virtually all values were the representations of the sureties themselves and the CPA had not expressed the requested opinion as to the validity of the representations or as to the liquidity of the assets. The determination also was based upon the fact that the bank, which had signed the SF 28 certificates of

sufficiency,^{1/} formally rescinded its officer's signatures. The bank explained that its officer had not personally investigated the sureties' financial information reported on the face of the SF 28. It further explained that the bank had initially refused to provide the signatures but believed its position had been misunderstood and that the signatures were obtained by mistake.

H&H contends that the information submitted supports the claimed net worth of its sureties. It also contends that even if the entire net worth is not supported, there is sufficient net worth to cover the difference in its bid and the awardee's bid, allowing the contracting officer to waive any deficiency under the Federal Acquisition Regulation (FAR). Thus, H&H concludes that it is entitled to award of the contract. We disagree.

The contracting officer's obligation to investigate individual sureties is set out at FAR § 28.202-2, which requires the contracting officer to "determine the acceptability of individuals proposed as sureties." The regulation states that "[t]he information provided [in SF 28] is helpful in determining the net worth of proposed individual sureties." In making this determination, the contracting officer therefore is not limited to the consideration of information contained in SF 28 and may go beyond that information where necessary in making his decision. Aceves Constr. and Maintenance, Inc., B-233027, Jan. 4, 1989, 89-1 CPD ¶ 7. Moreover, the contracting officer is vested with a wide degree of discretion and business judgment in making this determination. Therefore, we will defer to this judgment unless the protester shows that the decision was without a reasonable basis. See Eastern Metal Prods. & Fabricators, Inc., B-220549.2 et al., Jan 8, 1986, 86-1 CPD ¶ 18. In our view, the record here reflects a reasonable basis for the Navy's determination that the sureties were unacceptable.

Based upon the agency's and our own review of the record, we agree with the Navy that there was insufficient credible evidence to support the claimed net worths of the sureties. In particular, we note that the second surety's financial statement showed substantial assets (personal residence and accounts in financial institutions) held jointly with his

^{1/} The certificate reads: "I Hereby Certify, That the surety named herein is personally known to me; that in my judgment, said surety is responsible, and qualified to act as such; and that to the best of my knowledge, the facts stated by said surety in the foregoing affidavit are true."

wife, as well as property owned solely by his wife, without any indication of the value of the surety's interests. Though he claimed personal property and collectibles (antiques and oriental rugs) valued at \$320,000, he only submitted evidence of the insured value of oriental rugs, jewelry, and silverware totaling \$80,303. The value of his antiques and other, unidentified personal property was based on his own representation.

With regard to the first surety we note that although he claimed personal property and collectibles (art, wines, antiques, and oriental rugs) valued at \$770,000, his evidence of value covered only \$296,170 according to various receipts, appraisals, and his insurance policy, with the balance based on his own representations. He offered no evidence of the \$65,000 in cash and cash equivalents claimed and omitted a \$20,000 liability under his divorce decree.

As for the sureties' claimed values of their companies and partnerships, we note that the partnership shares are available to a limited population--physicians and related entities--calling into question the liquidity of these assets. Moreover, the value of these assets appears greatly inflated. For example, each surety claims his 50 percent interests in the health care facility developer, and the billing company are valued at \$2,940,000 and \$250,000 respectively. Yet, their financial statements show that the developer has a net equity of only \$132,372 and that its recent expenses exceeded revenue by \$139,478. Similarly, the billing company shows a deficit in stockholder equity of \$70,853. With regard to the limited and general partnerships each surety showed losses in excess of \$50,000 on his tax return. Moreover, each surety's financial statement showed that the claimed values of the closely held companies, partnerships, and contract rights exceeded their tax bases by at least \$4.5 million. While we may agree with the protester that tax return and tax base information does not provide the most accurate assessment of an asset's value, this information is sufficient to call into question an asset's claimed value. When the sureties' investment values and other unsupported asset values are discounted, it is plain that neither surety possesses sufficient net worth to equal or exceed the penal sum of the bond. This is especially true in view of the more than \$1 million in outstanding bond obligations of the sureties.

As such, we think the agency reasonably determined that the information submitted by the sureties called into doubt the accuracy of the sureties' representations, thereby diminishing the likelihood that their financial guarantee would be

enforceable. See Ware Window Co., et al., B-233367 et al., Feb. 6, 1989, 89-1 CPD ¶ 122.

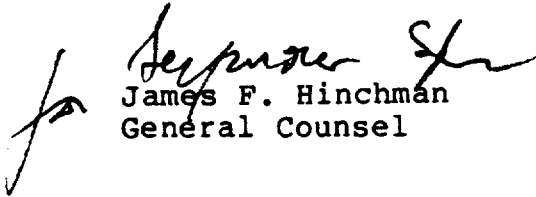
H&H also contends that the Navy violated FAR § 28.101-4(b) (FAC 84-32). That regulation requires that noncompliance with a solicitation requirement for a bid guarantee be waived when the amount of the bid guarantee submitted is less than required, but is equal to or greater than the difference between the bid price and the next acceptable bid. H&H argues that the difference between its bid and Massey's bid is only \$52,000 and its sureties must have proven sufficient net worth to exceed that amount. However, it is our view that once the accuracy of the sureties' representations reasonably has been called into question, then notwithstanding the alleged adequacy of other assets, the agency is justified in rejecting the sureties. This reflects the nature of the surety's obligation as a financial guarantee and the importance an agency is entitled to place on the accuracy, thoroughness, and verity of surety financial information. See Farinha Enters., Inc., B-235474, Sept. 6, 1989, 89-2 CPD ¶ ____. In any event, in view of H&H's general lack of support of the value, ownership, and liquidity of its sureties' various assets, coupled with the sureties' outstanding bond obligations, we find that H&H has not met its burden of proof to establish that its sureties have sufficient net assets to equal or exceed the difference in bids.

H&H also contends that the bank only rescinded its signatures under a threat of legal action by the Navy and states that both sureties have long term business relationships with the bank. H&H has submitted no independent evidence of these contentions and the bank's letter to the Navy does not mention any threat of legal action. However, regardless of the sureties' relationship with the bank and whether the officer who signed the certificates was required to possess personal knowledge of the sureties' assets, the fact that the bank disclaims such knowledge gave the Navy sufficient cause to discount the certificate as evidence verifying their assets. Construct Sun, Inc., B-234068, May 8, 1989, 89-1 CPD ¶ 431. In any event, the lack of evidence of ownership and value, as set forth above, adequately supports the Navy's finding of nonresponsibility.

In a separate submission, the first surety complains that there was insufficient time to obtain an audited financial statement and that his CPA was "thoroughly familiar" with his net worth and that of one of the surgical centers in which he owns an interest. An agency is not required to delay award indefinitely while a bidder attempts to cure a problem of responsibility and it may set a reasonable

deadline for receipt of information concerning the bidder's responsibility. Aceves Constr. and Maintenance, Inc., B-233027, supra. Here, the bidder had more than 5 business days from the time of the agency's request for further information and we believe this to be a reasonable time for submitting the requested information. Even assuming that there was insufficient time to have an audited financial statement prepared, we note that H&H has not provided such a statement even now, more than 3 months later. Further, the agency considered the financial statements, as well as the other documents which were submitted, and reasonably concluded that they did not support the sureties' claimed net worths. Moreover, we note that although the first surety's CPA was "thoroughly familiar" with his net worth, no such written opinion was furnished by the surety.

Accordingly, the protest is denied.

James F. Hinchman
General Counsel