

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

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FILE: B-211514**DATE:** August 9, 1983**MATTER OF:** Fitts Construction Co., Inc.,**DIGEST:**

Agency's rejection of low bid as nonresponsive because individual sureties submitted on a bid bond pledged the same assets was improper where affidavit submitted disclosed a net worth which was more than adequate to cover the requirement that each surety have a net worth at least equal to the penal amount of the bond and where bid bond was legally sufficient to establish the joint and several liability of the sureties. Furthermore, Defense Acquisition Regulation § 10.201.2 does not require that the two sureties have two separate pools of assets.

Fitts Construction Co., Inc. (Fitts), protests the rejection of its bids by the Naval Facilities and Engineering Command under invitations for bids (IFB) Nos. N62477-82-B-8012 and N62477-82-B-0027. Fitts' bids were rejected as nonresponsive because the individual sureties submitted by Fitts as bid security pledged the same assets. The Navy takes the position that the failure to have separate pools of assets for each surety detracts from the joint and several liability of the sureties and, therefore, relates to bid responsiveness rather than responsibility. Further, the Navy argues that Defense Acquisition Regulation (DAR) § 10.201.2 (1976 ed.) anticipates that the two sureties submitted as bid security have two separate pools of assets.

We sustain the protest.

The two contracts were for miscellaneous repairs and improvements to two Navy buildings. Fitts was the low bidder in response to both IFB's. Each IFB required that a bid guarantee, in the amount of 20 percent of the largest amount for which award can be made under the bid, be

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submitted with each IFB. Fitts complied with this requirement, submitting a bid bond for each IFB listing two individual sureties. The penal amount of the bond for IFB No. N62477-82-B-8012 was \$8,567 and for IFB No. N62477-82-0027 was \$18,000, 20 percent of the bid amounts. The individual sureties listed by Fitts are husband and wife. They completed and submitted separate affidavits of net worth (standard form 28), but each affidavit listed identical assets and indicated an identical net worth of \$802,775.

We disagree with the Navy's view that the issue raised in the present case relates to bid responsiveness. The test to be applied in determining the responsiveness of a bid is whether the bid as submitted is an offer to perform without exception, the exact thing called for in the invitation, and upon acceptance will bind the contractor to perform in accordance with all the invitation's material terms and conditions. 49 Comp. Gen. 553, 556 (1970). This determination of responsiveness must be made from the bid documents at the time of bid opening. Peter Gordon Company, Inc., B-196370, July 18, 1980, 80-2 CPD 45. We have held that a solicitation provision calling for a bid guarantee is a material requirement which cannot be waived. 38 Comp. Gen. 532 (1959). We have also recognized that a bid is nonresponsive where either the required bond is not submitted, de Weaver and Associates, B-200541, January 6, 1981, 81-1 CPD 6, or the submitted bond contains a deficiency which detracts from the joint and several liability of the sureties on the bond. See Structural Finishing, Inc., B-201614, April 21, 1981, 81-1 CPD 303, and Southland Construction Co., B-196297, March 14, 1980, 80-1 CPD 199 (bid nonresponsive where bond was altered without any evidence of approval by the surety); Cassidy Cleaning, Inc., B-191279, April 27, 1978, 78-1 CPD 331 (blank bid bond submitted).

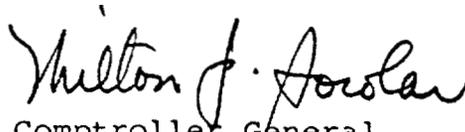
The bid bond furnished by Fitts was duly executed by two individual sureties whose affidavits indicated that they both had net worths at least equal to the penal amount of the bond and was not otherwise defective on its face. Neither surety in this case was in a position to disavow the obligation under the bond since both expressly agreed to indemnify the Government in a specified amount. The bond thus met the solicitation's bonding requirement and was legally sufficient to establish the joint and several liability of the sureties in the event of default on the bid by Fitts. Accordingly, we find that the Navy's determination that the

bid submitted by Fitts was nonresponsive was improper since the question of the acceptability of individual sureties is one of bidder responsibility. Dan's Janitorial Service, Inc., B-205823; B-205843; B-206469, September 9, 1982, 82-2 CPD 217.

Furthermore, we find no support for the argument asserted by the Navy that the DAR requires that there be two separate pools of assets for each surety. In B-172750, September 27, 1971, we considered a situation in which a husband and wife served as individual sureties and where only one Affidavit of Individual Surety was submitted. We found that since the affidavit contained the signatures of both the husband and the wife, an intent was manifested that the affidavit be an affidavit from two sureties. Also, we found that the applicable procurement regulations concerning the net worth of each surety were satisfied since the affidavit disclosed a net worth more than adequate to cover the requirement that each surety have a net worth at least equal to the penal amount of the bond.

In the present case, the penal amount of the bonds for the two IFB's totaled \$26,657. The net worth disclosed by the affidavits was \$802,775, which is clearly adequate to cover each surety's obligation to have a net worth at least equal to the penal amount of the bond. Accordingly, there was no basis for concluding that the sureties were not acceptable. Dan's Janitorial Service, Inc., *supra*.

However, since performance is approximately 50 per cent complete on both projects, we are not recommending that either contract be terminated. In these circumstances, corrective action would not be in the Government's best interests.

for 
Comptroller General
of the United States