The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: G&C Enterprises, Inc.

File: B-233537

Date: February 15, 1989

DIGEST

A bid is properly rejected as nonresponsive where the bid bond furnished with the bid listed one surety company on the face of the bond, but the corporate seal and the attached power-of-attorney for the signer of the bond is from another surety, since it is unclear from the bid documents, including the bond, whether either surety is bound.

DECISION

G&C Enterprises, Inc. protests the rejection of its low bid as nonresponsive under invitation for bids No. (IFB) DACA51-88-B-0059, issued by the Army Corps of Engineers, for the construction of cooling systems at the Pulse Power Center in Fort Monmouth, New Jersey. G&C disputes the Corps' determination that G&C's bid bond was defective, rendering its bid nonresponsive.

We deny the protest.

The IFB required each bidder to submit with its bid a bid guarantee, and advised that failure to furnish a guarantee in the proper form and amount by the time set for bid opening might cause the rejection of the bid. Bids were opened on September 14, 1988. G&C submitted the apparent low bid and Hercules Construction submitted the second low bid. G&C's bid was accompanied by a guarantee in the form of a bid bond naming Fidelity and Deposit Company of Maryland as the surety. The bond was signed by a Mr. Post, who was identified as attorney-in-fact. The power of attorney attached to the bond also named Mr. Post, but as an attorney-in-fact for Fireman's Insurance Company of Newark, New Jersey, not for Fidelity. Additionally, the corporate seal affixed to the bid bond was that of Fireman's.

The Corps determined that this apparent inconsistency rendered the bond uncertain because, while it may have been clear that the attorney-in-fact was authorized to bind Fireman's, his authority to bind Fidelity was questionable and it was unclear which surety the attorney-in-fact intended to bind. The agency concluded that since either company could deny liability on the bond if enforcement were attempted, the bond obligation was not sufficiently established, and the bid was nonresponsive.

G&C concedes the bond was irregular in that the power of attorney was inadvertently submitted on a Fireman's form instead of a Fidelity form and that Fireman's corporate seal was inadvertently affixed to the bond. However, the firm contends that the contracting officer knew that Mr. Post was authorized to bind Fidelity because in connection with numerous modifications of a recent G&C contract at the Center, Mr. Post was designated as an attorney-in-fact on a Fidelity power of attorney form, including one submitted approximately 2 months before the bid opening on the procurement here. On this basis, G&C contends that the contracting officer should have determined the firm's bid to be responsive.

In support of its contention, G&C cites our decision Danish Arctic Contractors, B-225807, June 12, 1987, 87-1 CPD ¶ 590, in which we held that reasonably available evidence in existence prior to bid opening may be used to establish the identity of an agent of the surety. According to the protester, the previously existing attorney-in-fact forms contained in the contracting officer's files established the authority of Mr. Post to bind Fidelity, thus establishing Fidelity's liability on the bond. G&C maintains that the power of attorney here established Mr. Post's additional authority to execute bonds on behalf of Fireman's, but did not diminish the certainty of Fidelity's liability on the bond.

The agency argues that Danish Arctic is inapposite here, and that the circumstances here actually are the same as those in O.V. Campbell and Sons Industries, Inc., B-216699, Dec. 27, 1984, 85-1 CPD ¶ 1, where we denied the protest and held that a bid was nonresponsive where the bid bond furnished with the bid listed one surety company on the face of the bond, but the corporate seal and attached power of attorney for the signer of the bond was from another surety, since it was unclear from the bid documents, including the bond, whether either surety was bound.

The sufficiency of a bid bond depends on whether the surety is clearly bound by its terms at the time of bid opening;

when the liability is not clear, the bond is defective. The reason for this is that under the law of suretyship, no one can be obligated to pay the debts or to perform the duties of another unless that person expressly agrees to be bound. O.V. Campbell and Sons Industries Inc., B-216699, supra.

The determinative issue in this case is not, as G&C's argument suggests, whether the attorney-in-fact named on the bid bond was authorized to bind the surety (although this point has come into contention due to the bid bond discrepancies); rather, the issue is whether it was clear from the bond which of two named sureties the attorney-in-fact intended to bind.

We agree with the Corps that our decision in O. V. Campbell clearly is applicable in resolving this question. Here, as in that case, there is conflicting evidence on the face of the bond as to which surety was to be bound: Fidelity was the named surety, but the attached power of attorney gave the attorney-in-fact authority only to bind Fireman's, and the Fireman's corporate seal was affixed to the bond. Under these circumstances, even if it could have been established from agency records (i.e., as in Danish Arctic) that the attorney-in-fact also had authority to bind Fidelity, there would remain a legitimate question, given these other inconsistencies, as to whether Fidelity or Fireman's would be liable on the bond. The bid therefore properly was rejected as nonresponsive.

We note, furthermore, that even if Corps records had been reviewed and did indicate that the attorney-in-fact had authority to bind Fidelity, absent further evidence that this authority still existed as of the bid opening date, the agency would have no basis for assuming that this was the case, and thus properly could reject the bid. G&C incorrectly reads our decision in Danish Arctic as extending to this situation. There, we held only that the agency must review its recent records to determine whether the surety agent listed in a bond with one first name was the same individual who signed the accompanying certification using a different first name. Unlike the situation in the case at hand, once this was resolved it was clear that the single named surety had been bound as of bid opening.1/

1/ The protester also cites Hancon Associates--Request for Reconsideration, B-209446.2, Apr. 29, 1983, 83-1 CPD ¶ 460 in support of its position. However, the facts in Hancon are distinguishable. In Hancon while the names of two different surety companies appeared on the bond, since the

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Hercules requests reimbursement of its attorneys' fees in connection with its participation in the protest as an interested party. Under our Bid Protest Regulations, however, only successful protesting parties are entitled to recover such costs. 4 C.F.R. § 21.6(d)(1988).

The protest is denied.

James F. Hinchman
General Counsel

1/(...continued)
power-of-attorney and corporate seal supported only one company, it was clear that the intention was that only one surety company would be bound.