



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Henry Building & Engineering, Inc.
File: B-239709
Date: September 17, 1990

R.W. Miller, Esq., Karen Iverson, Esq., and Mark R. Hinkston, Esq., Lathrop, Norquist & Miller, for the protester.
Martha Crandall Coleman, Esq., Strasburger & Price, for Grinnell Fire Protection Systems Co., an interested party.
Lee W. Crook, III, Esq., General Services Administration, for the agency.
Jennifer Westfall-McGrail, Esq., and Andrew T. Pogany, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

The validity of a bid bond that does not include the signature of the authorized representative of the surety is sufficiently questionable to warrant rejection of the bid as nonresponsive.

DECISION

Henry Building & Engineering, Inc. protests the rejection of its bid under invitation for bids (IFB) No. GS-07P-90-HUC-0014, issued by the General Services Administration for fire safety upgrade at the Fritz G. Lanham Federal Building, Fort Worth, Texas. The agency rejected Henry's bid as nonresponsive because the representative of its corporate surety had failed to sign its bid bond.

We deny the protest.

The IFB required each bidder to provide a bid guarantee in an amount equal to 20 percent of its bid price. Henry, the low bidder, furnished a bid bond in the correct amount naming Seaboard Surety Company of Dallas, Texas, as its surety. Seaboard's corporate seal was affixed to the bond, and a general power of attorney from the surety authorizing several individuals, including a Theresa Misner, to execute surety bonds in its name was attached. The name "Theresa Misner," as attorney-in-fact, was typed on the bond, but

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neither Ms. Misner nor any other representative of the surety had signed it. The agency rejected Henry's bid as nonresponsive because the bond lacked the surety's signature and awarded a contract to the next low bidder, Grinnell Fire Protection Systems Company.

A bid bond is a material part of the bid; thus, a defective bond renders a bid nonresponsive. In determining whether a bond is defective, the central issue is whether the bidding documents establish that the bond could be enforced if the bidder did not execute the contract. Truesdale Constr. Co., Inc., B-213094, Nov. 18, 1983, 83-2 CPD ¶ 591.

The protester contends that its bid bond would have been enforceable despite the fact that none of the surety's representatives had signed it. The protester cites two of our previous decisions, B-144106, Jan. 17, 1961, and B-177407, Feb. 26, 1973, as support for its position. In these cases, we concluded that a bid bond which bore the surety's corporate seal, but lacked the signature of the surety's representative, would nonetheless be enforceable against the surety and was therefore acceptable. In reaching this conclusion, we relied on authority to the effect that it is not essential to the validity of a bond that the obligor subscribe his name if the bond is sealed and delivered.

We modified our stance regarding the enforceability of a bond not signed by the surety in several subsequent opinions, however. In Truesdale Constr. Co., Inc., B-213094, supra, we recognized, citing B-177407, supra, that although there is authority for the proposition that a bond sealed and delivered to the obligee is sufficient without the signature of the obligor, there is also authority for the view that the signature of the surety's representative is necessary for an enforceable bond.

We reasoned that due to the conflicting legal authority, it was not clear whether the surety would be unequivocally bound in the absence of the signature of its attorney-in-fact. We therefore concluded that it was reasonable for the contracting officer to have questioned the validity of the bond and thus to have rejected the bid as nonresponsive. We reaffirmed our view that a bid bond lacking the signature of the surety's attorney-in-fact was materially defective in Crimson Enters., Inc., B-220204 et al., Oct. 1, 1985, 85-2 CPD ¶ 363, and Golden Reforestation, Inc., B-230169, Feb. 25, 1988, 88-1 CPD ¶ 196.

Here, the bond was not signed by a representative of the surety. While Seaboard's corporate seal was affixed to the bond, a corporate seal generally is not the same as a signature nor is it equivalent to a signature. It merely attests or authenticates the signature. See Italo-Petroleum Corp. of Am. v. Hannigan, 40 Del. 534, 14 A.2d. 401 (1940); Fletcher Cyc. Corp., § 2471.10 (1978). Concerning the general power of attorney, since the bond was unexecuted, the general power of attorney, standing alone, did not clearly bind the surety. Because suretyship law strongly suggests that a bond will be strictly construed in favor of the surety, and that liability will not be found by construction or implication, see Fitzgerald & Co., Inc.-- Recon., B-223594.2, Nov. 3, 1986, 86-2 CPD ¶ 510, we conclude that the contracting officer properly found Henry's bid bond materially defective and properly rejected its bid as nonresponsive since sufficient doubt existed as to the enforceability of the bid bond.^{1/}

The protester, a small business, in its comments on the agency report, argues for the first time that it should have been awarded a contract since it is federal policy to give small businesses the maximum practicable opportunity to participate in performing government contracts while the awardee, Grinnell Fire Protection Systems Co., is a large business.

First, the fact that the protester is a small business does not excuse the nonresponsiveness of its bid. Second, the procurement was not set aside for small business and therefore award could not properly be limited to small business concerns. To the extent that the protester is objecting to the agency's failure to set this procurement aside for small business competition, its protest is

^{1/} The protester further argues that the contracting officer should have waived the failure of Seaboard's representative to sign the bid bond as a minor informality since it is clear that Seaboard intended to be bound by the document. The short answer is that the defective bid bond rendered the bid nonresponsive which may not be waived after bid opening. See Seaboard Elecs. Co., B-237352, Jan. 26, 1990, 90-1 CPD ¶ 115.

untimely. A protest based upon an alleged impropriety in a solicitation which is apparent prior to bid opening must be filed prior to opening. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1990); Professional Aviation Maintenance and Management Servs., Inc., B-232078, Oct. 13, 1988, 88-2 CPD ¶ 350.

The protest is denied.



for
James F. Hinchman
General Counsel