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Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: A.W. and Associates, Inc.

File: B-239740

Date: September 25, 1990

William A. Bausch, Esq., Lyon, Golibersuch & Bausch, for the protester.
Herbert F. Kelley, Jr., Esq., Captain Sophia L. Rafatjah, and Fredrick M. Lewis, Esq., Department of the Army, for the agency.
Roger H. Ayer, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency properly determined a bid bond was defective and the bid therefore nonresponsive under a sealed bid procurement where the bond indicated that it was executed by the bonding agent 3 days before power of attorney authorized the bonding agent to sign the bond on behalf of the surety.

DECISION

A.W. and Associates, Inc. (AW) protests the rejection of its low bid and the award of a contract to another firm under invitation for bids (IFB) No. DAFK23-90-B-0036 issued by the Department of the Army for refurbishing a gymnasium floor at Fort Campbell, Kentucky.

AW submitted the low bid of the IFB, but there was a discrepancy between the dates of AW's bid bond, dated April 20, 1990, and its power of attorney, dated April 23, 1990.^{1/} The dates on the face of the documents indicated that the bonding agent may have executed AW's bid bond 3 days before the corporate surety granted the agent the power to do so. This caused the Army to question the validity of AW's bid bond and to reject AW's bid as nonresponsive. AW submitted a post bid opening letter from

^{1/} The surety's power of attorney authorized the named attorney-in-fact/bonding agent to sign the bid bond on the surety's behalf binding the surety to the bond's terms.

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the bonding agent stating its intention to honor the bond and explaining that the date on the bid bond was a typographical error.

When required by a solicitation, a bid bond is a material part of the bid which must be furnished with it. A.D. Roe Co., Inc., 54 Comp. Gen. 271 (1974), 74-2 CPD ¶ 194. The bid bond secures the surety's liability to the government thereby providing funds to cover the excess costs of awarding to the next eligible bidder in the event that the awardee fails to fulfill its obligations. See 14 Comp. Gen. 305, 308 (1934). Under the law of suretyship, no one incurs a liability to pay the debts or to perform the duties of another unless that person expressly agrees to be bound. Andersen Constr. Co.; Rapp Constructors, Inc., 63 Comp. Gen. 248 (1984), 84-1 CPD ¶ 279.

When a bidder supplies a defective bond, the bid itself is rendered defective and must be rejected as nonresponsive. 38 Comp. Gen. 532 (1959); Minority Enters., Inc., B-216667, Jan. 18, 1985, 85-1 CPD ¶ 57. A bid bond's sufficiency depends on whether the surety is clearly bound by its terms. Truesdale Constr. Co., Inc., B-213094, Nov. 18, 1983, 83-2 CPD ¶ 591. For example, a bid bond submitted with an invalid power of attorney may render the bid nonresponsive. See, e.g., Baldi Brothers Constructors, B-224843, Oct. 9, 1986, 86-2 CPD ¶ 418; Desert Dry Waterproofing Contractors, B-219996, Sept. 4, 1985, 85-2 CPD ¶ 268. The determinative question as to the acceptability of a bid bond is whether the bid documents establish that the bond is enforceable against the surety should the bidder fail to meet its obligations.

AW first alleges that the agency should have waived the discrepancy in the dates as a minor informality because the bid's timely submission and the propinquity of the dates on the two instruments (the bid bond and the power of attorney) show that the discrepancy in the dates is just a typographical error that occurred in the bond's preparation.

We disagree. Reading all of the bid documents together, we believe there was at best an uncertainty regarding the bonding agent's authority to sign a bond binding the surety before the surety granted the bonding agent a power of attorney; at worst, the documents indicate that the surety's agent acted without authority in executing the bond. Nothing in the bid documents refutes the dates on the two instruments or indicates that the bond was actually signed by the bonding agent following the surety's execution of the power of attorney. Since the responsiveness of a bid must be determined solely from the bid documents, the fact that

the bonding agent claims to have signed the document after receiving authority from the surety is of no consequence. See Baldi Brothers Constructors, B-224843, supra; Nova Group, Inc., B-220626, Jan. 23, 1986, 86-1 CPD ¶ 80. It is not proper to consider the reasons for a bid's nonresponsiveness, whether due to mistake or otherwise. A.D. Roe Co., Inc., 54 Comp. Gen. 271, supra.

AW next claims that even if the dates on the instruments are correct the discrepancy is merely a matter of form and of no consequence since the surety's April 23 power of attorney would operate as a ratification of the bonding agent's execution of the bond presuming he executed it on April 20. Under this theory, AW asserts that the bonding agent had actual authority to bind the surety on April 23, well before the April 30 bid opening, which eliminates any uncertainty as to the bond's validity at the time of bid opening. AW asserts that the power of attorney can be viewed as a ratification because it grants the bonding agent broad powers to bind the surety subject only to two limitations--that the agent cannot execute bonds in excess of \$100,000, and the bond must be executed before December 31, 1990.

Powers of attorney, although strictly construed, should be given construction which will give effect to intent of the parties. J.W. Bateson Co., Inc., B-189848, Dec. 16, 1977, 77-2 CPD ¶ 472. We think it was the surety's intent when it issued the power of attorney to have a third limitation on the power of attorney, that being that the agent cannot act for the surety until appointed by an officer of the surety. In this regard, the power of attorney states that only certain officers of the company may appoint attorneys-in-fact or agents "who shall have authority to issue bonds in the name of the Company." On April 23, one of the surety's named officers appointed the bonding agent who executed the bid bond at issue here.

At bid opening, the contracting officer was confronted with a bond which he knew, from the power of attorney, may have been executed before the bonding agent's receipt of authority from the surety. In this regard, Stearns, The Law of Suretyship § 2.13 (5th ed. 1951) instructs that:

"Since surety companies are generally considered to be similar to insurance companies, statutes relating to agents of surety companies are construed by the courts similarly to statutes relating to agents of insurance companies. Such statutes normally are construed to prohibit the insurance company from claiming that the agent had no authority or exceeded his authority, where the agent had authority to execute or deliver a bond

which the obligee accepted in good faith. But where the obligee can be charged with knowledge or notice of limitations on the agent's authority, the statute does not apply. [Emphasis supplied.] [Footnotes omitted.]

Here, the obligee in suretyship is the government, and at bid opening the government was clearly on notice of the possible limitation on the bonding agent's authority. Given the agency's notice of the discrepancy and its possible consequences, we think that at bid opening there was an open question whether the surety could escape liability by claiming the bonding agent had no authority to execute the bid bond.

Moreover, we do not agree that the surety ratified the bid bond. In order to bind a principal (here, the surety) in an agency relationship by ratification, "a knowledge of the material facts surrounding the ratified transaction must be brought home to [the principal]; he must have been in possession of all of the facts and must have acted in light of such knowledge." 3 Am. Jur. 2d, Agency § 189 (1986). There is no evidence in the bid document that the surety had any knowledge that the bonding agent executed an unauthorized bond.

Even if the surety had such knowledge, it could only cure the flaw by conveying its ratification of the bonding agent's action to the contracting officer before bid opening, which was not done here. In this regard, a ratification of the existence of an agency relationship for a transaction must be affirmed by the principal (here, the surety) before a third party (here, the government) has manifested its withdrawal from the transaction, either to the purported principal or to the agent, and before the offer or agreement has otherwise terminated or has been discharged. 3 Am. Jur. 2d, Agency § 185 (1986). In this case, since the surety did not ratify the bid bond prior to bid opening, the bid was, on its face nonresponsive and required to be rejected. Under agency terms, this required the government to withdraw from the transaction. The post bid opening explanations and commitments by the surety and bonding agent to honor the bid bond cannot be considered in determining bid responsiveness. A.D. Roe Co., Inc., 54 Comp. Gen. 271, supra.

AW cites our decisions B-168666, Jan. 26, 1970, and J.W. Bateson Co., Inc., B-189848, supra, in urging that it is improper to base responsiveness determinations on the dates inserted by the bidder on either Standard Form 24 (SF-24) bid bonds or on powers of attorney because (1) the SF-24 date box is only intended to identify the bond to the bid

and not to delimit the term of the bond, and (2) a bond is acceptable even if both the bid bond and the power of attorney are submitted undated since the missing dates do not diminish the surety's liability on the bond.

In B-168666, supra, although the bid bond was dated 2 days after bid opening, the bond was furnished with the bid at bid opening and must have been executed before bid opening despite its post bid opening date. We did find that the purpose of the box "Bid Date" on the SF-24 bid bond form was not to specify the duration of the surety's liability-- which could only commence with the government's decision to award the contract--but to identify the bid covered by the bond. The date on the bid bond did not raise any legitimate questions concerning the bond's enforceability. Here, the Army was presented with more than a misdated bond; it received a bond evidently signed before the bonding agent had the power to legally obligate the surety. The discrepancy in the date on AW's bond clearly could affect the government's right to enforce the bond.

J.W. Bateson Co., Inc., B-189848, supra, also is inapposite. That case concerned a situation where the bid bond was executed not by a bonding agent--whose authority derives from the surety through a power of attorney--but by an officer (an assistant secretary) of the surety, and delivered under the corporate seal. We found the lack of a date on the certificate of the surety's power of attorney a waivable informality since the government was adequately protected by a bond under seal executed by an officer of the surety which correctly identified the solicitation and the principal. Here, the contracting officer at bid opening was confronted with a bid bond that appeared to be executed by an individual before that individual became an agent of the surety, and which the surety, if it so elected, could have disavowed. We believe the Army properly concluded that this could leave the government without the protection of the bond.

The protest is denied.


for James F. Hinchman
General Counsel