



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Techno Engineering & Construction, Ltd.

File: B-243932

Date: July 23, 1991

Michael A. Georgopapadakos for the protester.
Paul M. Fisher, Esq., and Jeffrey A. Wayne, Esq., Department
of the Navy, for the agency.
Aldo A. Benejam, Esq., and Christine S. Meloay, Esq., Office
of the General Counsel, GAO, participated in the preparation
of the decision.

DIGEST

Where corporate surety's power of attorney form attached to bid bond failed to designate the individual who signed the bond on behalf of the surety as an attorney-in-fact authorized to bind the surety, the agency correctly determined the bond was defective and properly rejected bid as nonresponsive, since there was no evidence at the time of bid opening that surety would be bound.

DECISION

Techno Engineering & Construction, Ltd. (TEC) protests the rejection of its bid as nonresponsive under invitation for bids (IFB) No. N62471-90-B-1828, issued by the Department of the Navy for repairs and alterations to Building 9 at the Pearl Harbor Naval Shipyard in Hawaii. The Navy rejected TEC's bid because the surety's power of attorney form attached to the bid bond failed to designate the individual who signed the bond on behalf of the surety as an attorney-in-fact authorized to bind the surety.

We deny the protest.

The IFB required the submission of a bid bond or other suitable bid guarantee in the amount of 20 percent of the bid or \$3 million, whichever was less. Paragraph 9 of the IFB cautioned bidders that failure to furnish a bid guarantee in the proper form and amount might be cause for rejection of the bid.

TEC submitted the apparent low bid at bid opening on April 19, 1991. TEC's bid was accompanied by a bid bond naming First Insurance Company of Hawaii, Ltd. (FICH) as its corporate surety. The bond was signed on behalf of FICH by Herbert J. Chambers, who was identified on the bond as "attorney-in-fact." A completed FICH power of attorney form attached to the bond, however, listed only a Donald D. Dawson as the attorney-in-fact designated by FICH to bind the company; the power of attorney form failed to list Chambers. By letter dated April 29, the Navy rejected TEC's bid as nonresponsive because FICH's power of attorney form failed to designate Chambers as an attorney-in-fact authorized to bind FICH, rendering the bond defective.

The protester states that immediately upon receipt of the Navy's rejection notice, TEC explained in a May 1 letter to the contracting officer that both Chambers and Dawson were attorneys-in-fact designated by FICH to bind the company. Attached to its letter, TEC submitted a letter from Dawson & Chambers, Ltd., and a letter from FICH, both of which essentially confirmed that FICH had designated both Chambers and Dawson as attorneys-in-fact authorized to bind the firm. In addition, FICH's letter stated that the surety "has every intention of issuing a performance and payment bond on behalf of [TEC]," if the firm is awarded the contract.

A bid bond is a form of security submitted to assure the government that a successful bidder will not withdraw its bid within the period specified for acceptance and, if required, will execute a written contract and furnish performance and payment bonds. See Federal Acquisition Regulation (FAR) § 28.001. The purpose of a bid bond is to secure the liability to the government for excess procurement costs in the event the successful bidder defaults by failing to execute the necessary contractual documents or to furnish the required payment and performance bonds. See FAR § 52.228-1(c); Desert Dry Waterproofing Contractors, B-219996, Sept. 4, 1985, 85-2 CPD ¶ 268. A bid bond, even if in the proper amount, is defective and renders the bid nonresponsive if it is not clear that it will bind the surety. Baldi Bros. Constructors, B-224843, Oct. 9, 1986, 86-2 CPD ¶ 418. Determining whether the surety is clearly bound is essential because 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.

Here, the surety's power of attorney form attached to the bond listed only Dawson as the attorney-in-fact authorized to bind FICH, and did not list Chambers, the individual who signed the bond on behalf of the surety. The failure of FICH's power of attorney form to list Chambers thus created an uncertainty as

to whether Chambers was duly authorized to bind FICH, thereby rendering the bond defective and TEC's bid nonresponsive. Baldi Bros. Constructors, B-224843, supra; Langaker Marine, Inc., B-220556, Dec. 3, 1985, 85-2 CPD ¶ 623.

In its comments on the agency's report to our Office, TEC argues that the contracting officer knew or should have known that Chambers was authorized to bind FICH because Chambers was designated as an attorney-in-fact on two FICH power of attorney forms TEC recently submitted in connection with other Navy procurements conducted by the same office. The protester essentially contends that since the contracting officer had the letter from FICH specifically establishing Chambers's authority to bind FICH, and since the agency also had in its contracting files evidence clearly indicating that Chambers was an attorney-in-fact authorized to bind the surety in connection with other Navy procurements, its bid should not have been rejected as nonresponsive.

Whether Chambers had actual authority to bind the surety is not dispositive; rather, the issue is whether it appeared from the face of the bid documents that Chambers's signature on behalf of FICH was authorized and binding. There is no question that Dawson, not Chambers, was the only name listed on FICH's power of attorney form submitted with TEC's bid, and that TEC failed to submit with its bid prior to bid opening any evidence of Chambers's authority to bind the surety.

In order to establish Chambers's authority to bind FICH, evidence extrinsic to the bid documents and cooperation from the surety--the very party to be bound--was required in the form of a letter submitted well after bid opening. Since the responsiveness of a bid must be determined solely from the bid documents, it is of no consequence that FICH's letter, or other extrinsic evidence in the agency's contracting files, may have established that Chambers's signature as attorney-in-fact was authorized and binding on FICH. Nova Group, Inc., B-220626, Jan. 23, 1986, 86-1 CPD ¶ 80. The fact that such evidence was in existence at the time of bid opening does not alter our conclusion. Id. Accordingly, the agency correctly determined that the bond was defective based solely on the documents TEC submitted with its bid prior to bid opening, and properly rejected TEC's bid as nonresponsive.

The protest is denied.


for James F. Hinchman
General Counsel