



Comptroller General
of the United States

1017233

Washington, D.C. 20548

Decision

Matter of: E&R, Inc.
File: B-255868
Date: March 29, 1994

Phillip E. Johnson, Federal Contract Specialists, Inc., for the protester.
Ted Jordan for East Bay Electric Co., an interested party.
Billie Spencer, Esq., and Diane Hayden, Esq., Department of the Navy, for the agency.
Guy R. Pietrovito, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. A consultant may represent an interested party in a protest before the General Accounting Office, where the consultant has been authorized to act for the interested party.
2. The awardee's bid was nonresponsive and could not properly be accepted by the procuring agency where the awardee's bid guarantee was executed 2 months after the date which the power of attorney identified as the expiration of the authority of the attorney-in-fact to bind the surety; the authority of the attorney-in-fact to bind the surety must be established from the face of the bid documents at bid opening.

DECISION

E&R, Inc. protests the award of a contract to East Bay Electric, Inc. under invitation for bids (IFB) No. N62470-93-B-2366, issued by the Naval Facilities Engineering Command, Department of the Navy, for construction services at the Marine Corps Air Station, Cherry Point, North Carolina. E&R contends that East Bay's bid should have been rejected as nonresponsive because East Bay's bid guarantee was not supported by a valid power of attorney.

We sustain the protest.

The IFB, issued July 13, 1993, sought runway power improvement services to be performed within 360 calendar days after award. The solicitation required the submission of performance and payment bonds, as well as bid guarantees.

The bid guarantee was required to "be accompanied by a verifax or other facsimile copy of the agent's authority to sign bonds for the surety company." Bidders were cautioned that the failure to furnish a proper bid guarantee could result in the rejection of the bid.

Seven bids were received at the September 13 bid opening. East Bay submitted the low bid of \$307,962, while E&R's \$315,375 bid was second low. East Bay submitted the required bid guarantee, signed by Kathy McGee as attorney-in-fact on behalf of the corporate surety and dated September 13. Included with the awardee's bid guarantee was a power of attorney, signed by the surety's president, authorizing Ms. McGee to bind the corporate surety; the power of attorney stated, however, that it was "invalid for any instrument dated after July 1, 1993."

E&R, through its authorized representative, Federal Contract Specialists, Inc., challenged the validity of East Bay's bid guarantee in a protest filed with the agency.¹ The Navy dismissed the protest because Federal Contract Specialists had not provided evidence to indicate authority to act on E&R's behalf and was not itself an interested party eligible to protest the award to East Bay. The Navy did not inform Federal Contract Specialists, prior to dismissing E&R's protest, that the agency questioned the consultant's authority to act for E&R in that bidder's protest. E&R then timely filed its protest with our Office.

As an initial matter, the Navy argues that Federal Contract Specialists is not an interested party to challenge East Bay's bid guarantee and bid bond, because Federal Contract Specialists did not provide proof of its authority to file a protest on E&R's behalf and Federal Contract Specialists was not itself a bidder under the IFB. In its protest filings to the Navy and our Office, Federal Contract Specialists represented that it was acting on E&R's behalf and submitted to our Office a letter signed by the vice president of E&R (the same person that signed E&R's bid under the IFB) stating that Federal Contract Specialists had been authorized to file the protests on E&R's behalf. A consultant, such as Federal Contract Specialists, may represent an interested party in a protest filed with our Office where, as here, the consultant has been authorized to act for that interested party. See Windet Hotel Corp., B-220987, Feb. 6, 1986, 86-1 CPD ¶ 138; Systems and Facilities Corp., B-220580.2, Feb. 4, 1986, 86-1 CPD ¶ 125.

¹Federal Contract Specialists, among other things, assists and represents firms and individuals in bidding or proposing for government contracts, in filing contract claims and in challenging contract awards.

Therefore, Federal Contract Specialists' protest on behalf of E&R will be considered by our Office.

E&R contends that East Bay's bid is nonresponsive to the IFB's requirement for a bid guarantee. Specifically, E&R complains that since the power of attorney submitted with East Bay's bid and bid guarantee states that it was invalid for instruments executed after July 1, 1993, the bid papers do not demonstrate that the attorney-in-fact had authority to sign for the surety on September 13, 1993, the date of the bid bond.

The Navy responds that at the time of bid opening the contracting officer knew that Ms. McGee had actual authority to act as attorney-in-fact for the surety because the contracting officer had received a valid bid guarantee and power of attorney from Ms. McGee and the same surety on another unrelated procurement prior to bid opening under the IFB. The agency also asserts that the expiration date stated on the face of the power of attorney in this procurement was obviously erroneous, inasmuch as the surety's corporate secretary attested that the power of attorney was "in full force and effect" on September 13--2 months after the document was by its express terms invalid; the agency argues that this obviously erroneous date could be waived by the contracting officer. Finally, the agency argues that there is no requirement that bid guarantees be supported by a power of attorney and therefore the submission of an invalid power of attorney is not a matter of bid responsiveness.

A bid guarantee is a form of security that assures that a bidder will not withdraw its bid within the period specified for acceptance and, if required, will execute a written contract and furnish required performance and payment bonds. Federal Acquisition Regulation (FAR) § 28.001. The bid guarantee 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 bidder awarded the contract fails to fulfill these obligations. A.W. and Assocs., Inc., 69 Comp. Gen. 737 (1990), 90-2 CPD ¶ 254; Hydro-Dredge Corp., B-214408, Apr. 9, 1984, 84-1 CPD ¶ 400. The sufficiency of a bid guarantee depends on whether the surety is clearly bound by its terms; when the liability of the surety is not clear, the bond is defective. Techno Eng'g & Constr., Inc., B-243932, July 23, 1991, 91-2 CPD ¶ 87. Under the law of suretyship, no one incurs a liability to pay the debts or perform the duties of another unless that person has expressly agreed to do so. Andersen Constr. Co.; Rapp Constructors, Inc., 63 Comp. Gen. 248 (1984), 84-1 CPD ¶ 279.

When required by a solicitation, a bid guarantee is a material part of the bid and must be furnished with it. A.D. Roe Co., Inc., 54 Comp. Gen. 271 (1974), 74-2 CPD ¶ 194; 38 Comp. Gen. 532 (1959). Noncompliance with a solicitation requirement for a bid guarantee generally renders the bid nonresponsive and requires the rejection of the bid. FAR § 28.101-4(a); A.W. and Assocs., Inc., *supra*.

A bid guarantee submitted with an invalid power of attorney renders the bid nonresponsive.² See, e.g., Fred Winegar, B-243557, Aug. 1, 1991, 91-2 CPD ¶ 111; Baldi Bros. Constructors, B-224843, Oct. 9, 1986, 86-2 CPD ¶ 418; Nova Group, Inc., B-220626, Jan. 23, 1986, 86-1 CPD ¶ 80. This is so because a power of attorney authorizes an agent to act for the surety and only a valid power of attorney would indicate that the surety expressly agreed to be bound to pay the bond signed by the attorney-in-fact. This express agreement to be bound is required under the law of suretyship. See Andersen Constr. Co.; Rapp Constructors, Inc., *supra*. A power of attorney is to be strictly construed. See J.W. Bateson Co., Inc., B-189848, Dec. 16, 1977, 77-2 CPD ¶ 472. The surety's power of attorney must establish unequivocally that the attorney-in-fact who signed the surety's bond was authorized to bind the surety. Quantum Constr., Inc., B-255049, Dec. 1, 1993, 93-2 CPD ¶ 304; Standard Roofing USA, Inc., B-245776, Jan. 30, 1992, 92-1 CPD ¶ 127. We will not convert ambiguous aspects of powers of attorney into mere matters of form which can be explained away and waived. A.W. and Assocs., Inc., *supra*.

Here, the power of attorney submitted with East Bay's bid guarantee failed to unequivocally establish that the attorney-in-fact who signed the bond was authorized to bind the surety, given the fact that on the date of execution of the bid bond the power of attorney indicated that the authority of the attorney-in-fact to bind the surety had expired.

While the surety's corporate secretary attested that the power of attorney was in "full force and effect" on the date that the bid bond was signed on the surety's behalf, the corporate secretary could not, by the express terms of the power of attorney, extend the authority of the named attorneys-in-fact to bind the surety; the power of attorney states that only the surety's president has the authority to appoint or remove attorneys-in-fact. Thus, Ms. McGee's authority to bind the surety on instruments executed after July 1, 1993, could not be extended by the corporate

²A power of attorney is a written authorization used to evidence an agent's authority to a third person. 3 Am. Jur. 2d Agency § 23 (1964).

secretary, and by the terms of this instrument expired on July 1, prior to the signing of the bid guarantee at issue here. See A.W. and Assocs., Inc., supra.

The Navy asserts that the surety has now confirmed that Ms. McGee had actual authority to bind the surety. The responsiveness of a bid must be determined solely from the bid documents; thus, the fact that extrinsic evidence may establish that the attorney-in-fact's signature was authorized is of no consequence, notwithstanding the fact that the evidence was in existence at the time of bid opening. See Baldi Bros. Constructors, supra; Nova Group, Inc., supra; Hydro-Dredge Corp., supra. As noted above, the bid documents here do not establish Ms. McGee's authority to act for the surety.

The Navy also argues that it knew on the date of bid opening from a power of attorney submitted with the bid guarantee in an unrelated procurement that Ms. McGee had actual authority to bind the surety. As noted above, this extrinsic evidence could not be considered as establishing the responsiveness of East Bay's bid. In any event, the earlier submitted power of attorney, while indicating that Ms. McGee's authority to act for the surety in these matters would not expire until 1995, does not establish that Ms. McGee had the authority to bind the surety on September 13, 1993, the date of the bid bond's execution. The powers of attorney submitted with the awardee's bid guarantee under this IFB and under the unrelated earlier procurement are revocable instruments and reserve to the surety the power to terminate at will the authority of named attorneys-in-fact to act on the surety's behalf.³ Since the authority of Ms. McGee could have been revoked after the date of the unrelated and earlier submitted power of attorney, the earlier power of attorney does not establish the authority of Ms. McGee to bind the surety to the bid bond submitted under this IFB. See Fred Winegar, supra; Baldi Bros. Constructors, supra.

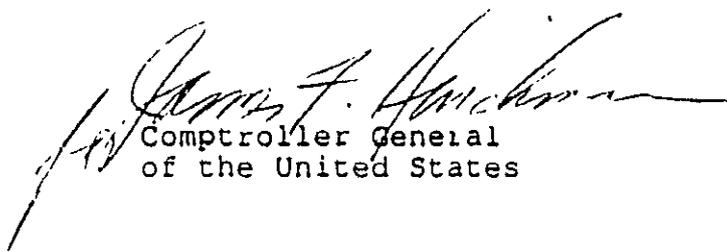
Finally, the Navy asserts that the "obviously erroneous" expiration date can be waived under FAR § 28.101-4(c)(8), which provides that a contracting officer may waive the noncompliance of "[a]n otherwise acceptable bid bond [that] is erroneously dated or bears no date at all." We disagree. This regulation expressly provides for the waiver of erroneous or omitted dates that do not affect the

³It is for this reason that a valid power of attorney must be provided for each bid guarantee, establishing the continued authority of the named attorney-in-fact to bind the surety. Absent this express evidence of authority, the government cannot be certain that it has received the required security.

acceptability of the bid bond. Here, the assertedly erroneous date concerns the expiration of the attorney-in-fact's authority and goes to the heart of the validity and acceptability of the bid bond. Since the bid bond is not "otherwise acceptable" apart from the expiration of the attorney-in-fact's authority, this regulation provides no basis for the waiver of the stated expiration period. See Nova Group, Inc., supra.

In sum, since East Bay's bid guarantee was supported by an invalid power of attorney, its bid was nonresponsive and could not properly be accepted by the Navy. Because performance of the 1-year contract has continued for nearly 6 months, it is impracticable to recommend termination of the contract for the convenience of the government. Accordingly, we find that E&R is entitled to its costs of bid preparation and of filing and pursuing the protest. 4 C.F.R. § 21.6(d) (1993). E&R must file its certified claim for its costs directly with the agency within 60 working days after receipt of this decision. 4 C.F.R. § 21.6(f) (1).

The protest is sustained.


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