



Comptroller General
of the United States
Washington, D.C. 20548

834306

Decision

Matter of: Fiore Construction Company

File: B-256429

Date: June 23, 1994

Phillip E. Johnson, Federal Contract Specialists, Inc., for the protester.
Newton L. Klements, Esq., Department of the Army, for the agency.
Jennifer D. Westfall-McGrail, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Power of attorney accompanying bid bond clearly established that attorney-in-fact was authorized to bind the surety where it contained certification by surety's assistant secretary that appointment of attorney-in-fact was in full force and effect on the date of bid opening.

DECISION

Fiore Construction Company protests the proposed award of a contract to C-Q Construction Corporation under invitation for bids (IFB) No. DACA33-93-B-0078, issued by the U.S. Army Corps of Engineers for demolition of structures and removal of debris at the Charlestown Navy Yard in Charlestown, Massachusetts. Fiore contends that C-Q's bid was nonresponsive due to an alleged defect in the power of attorney accompanying its bid bond.

We deny the protest.

The IFB required each bidder to provide a bid bond in an amount equal to 20 percent of its bid price or \$2 million, whichever was lesser. C-Q, the low bidder, furnished a bond in the correct amount designating Fidelity and Deposit Company of Maryland as its surety. The bond was signed by C-Q's president, as principal, and by the surety's attorney-in-fact, Diane M. Kelly; in addition, it bore the corporate seals of both companies. An accompanying power of attorney

stated that on February 10, 1992, Fidelity, by one of its vice presidents and with the concurrence of one of its assistant secretaries, had appointed Diane M. Kelly as an attorney-in-fact to execute bonds on its behalf as surety.

Fiore contends that the power of attorney was defective because the signature of the vice president who had appointed Diane M. Kelly as attorney-in-fact was a facsimile (i.e., mechanically reproduced) signature. In this regard, the protester argues that the power of attorney explicitly provided that the facsimile or mechanically reproduced signature of any assistant secretary of the company, wherever appearing upon a certified copy of any power of attorney issued by the company, would be valid and binding upon the company with the same force and effect as though manually affixed, but that it did not recognize the validity of a facsimile signature of a vice president. The protester also alleges that Fidelity filled in Diane M. Kelly's name, her appointment date, and the date on which her appointment was certified as continuing to be in full force and effect after the cognizant company officials had signed the power of attorney, thereby casting doubt upon the enforceability of the surety's commitment.

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. Anderson Constr. Co.; Rapp Constructors, Inc., 63 Comp. Gen. 248 (1984), 84-1 CPD ¶ 279.

Here, we think that Fidelity's power of attorney unequivocally established that Diane M. Kelly was authorized to bind the surety, and that C-Q's bid was therefore responsive. At the bottom of the copy of the power of attorney furnished with C-Q's bid bond, an assistant secretary of Fidelity had certified that the original power

of attorney appointing Diane M. Kelly was in full force and effect on the date of bid opening. This certification was sufficient to establish that the power of attorney was current and valid. Ray Ward Constr. Co., supra.

Furthermore, although the power of attorney did not expressly state that the facsimile signature of a vice president would bind the company, Fidelity had previously submitted to the U.S. Army Bonds Team a copy of a resolution adopted by its Board of Directors on May 10, 1990, which provided that the facsimile or mechanically reproduced signature of any vice president, secretary, or assistant secretary of the company, wherever appearing upon a certified copy of any power of attorney issued by the company, would be valid and binding upon the company with the same force and effect as though manually affixed. Where a surety has authorized the execution of documents by facsimile signature and has furnished evidence of such authorization to the agency, there can be no doubt as to the enforceability of the surety's obligation. See FAR § 14.405(c)(2), which authorizes mechanically reproduced signatures on bids where the firm has formally adopted or authorized, before the date set for opening of bids, the execution of documents by typewritten, printed, or stamped signature and submits evidence of such authorization.

With regard to the protester's second argument, we do not think that the evidence that it submitted supports its contention that Fiore photocopied a signed power of attorney and then filled in the names of the individuals being appointed as attorneys-in-fact, their appointment date, and the date of certification. Fiore bases this allegation on a comparison of two different powers of attorney issued by Fidelity: one, executed on February 10, 1992, appointing Diane M. Kelly and seven other individuals from Boston,

¹Although the signature of the assistant secretary who made the certification was also a facsimile signature, its validity is not in dispute, since, as previously noted, the certification expressly recognized the validity of facsimile signatures of the company's assistant secretaries. The authenticity of the document is confirmed by the fact that an original corporate seal was affixed to it. See Ray Ward Constr. Co., B-256374, June 14, 1994, 94-1 CPD ¶ ____.

²Fidelity had furnished a copy of the resolution to the Contract Appeals Division of the U.S. Army Bonds Team after receiving a letter from that office instructing that if it intended to use facsimile seals and signatures and its powers of attorney did not expressly state these were acceptable, it must furnish documentary evidence authorizing facsimile seals and signatures from its Board of Directors.

Massachusetts as attorneys-in-fact, and the other, executed on January 20, 1992, appointing three individuals from Seattle, Washington. The protester claims that the signatures on these two documents "line up exactly," demonstrating that both forms were photocopied from the same original and that the other information was added later.

We have compared the two powers of attorney furnished by the protester and disagree with its contention that the signatures "line up exactly." The signatures are identical--as one would expect, given that they are mechanically reproduced signatures--but their placement on the form is not precisely the same. Thus, we find no evidence that the names of the attorneys-in-fact were added after the power of attorney had been signed.

The protest is denied.

/s/ Ronald Berger
for Robert P. Murphy
Acting General Counsel