



Comptroller General  
of the United States

8032312

Washington, D.C. 20548

## Decision

**Matter of:** Southwest Maintenance Service

**File:** B-258178

**Date:** December 15, 1994

Robert M. Cambridge, Esq., for the protester, Leonard G. Crowley, Esq., Diane D. Hayden, Esq., and Paul M. Fisher, Esq., Department of the Navy, for the agency. Scott H. Riback, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

### DIGEST

Protest that agency improperly rejected bid as nonresponsive because individual executing certificate of procurement integrity did not have authority to bind firm is denied where agency obtained dispositive information from protester regarding nature of individual's authority shortly after bid opening which showed that the individual, in fact, did not have authority to bind firm.

### DECISION

Southwest Maintenance Service protests the rejection of its bid as nonresponsive under invitation for bids (IFB) No. N68711-94-B-1534, issued by the Department of the Navy for custodial services at the Naval Warfare Center in White Sands, New Mexico. Southwest maintains that the agency improperly found that the individual executing the firm's certificate of procurement integrity did not have authority to bind the firm, and thus improperly rejected the firm's bid as nonresponsive.

We deny the protest.

The IFB contained the standard certificate of procurement integrity clause found at Federal Acquisition Regulation (FAR) § 52.203-8. That clause implements the Office of Federal Procurement Policy Act, 41 U.S.C. § 423(e) (1988 and Supp. II 1990), which precludes federal agencies from awarding a contract to a firm unless the officer or employee responsible for preparing the offer or bid certifies in writing that neither he nor those employees who participated in preparing the bid has any information concerning violations or possible violations of the act.

In response to the IPB, the Navy received 13 bids. The low bid was rejected as nonresponsive because the bidder had failed to properly execute its certificate of procurement integrity. Southwest was second low, and the agency examined its bid to determine whether it was responsive. The contracting officer noted that the bid had been signed by Southwest's owner, Ms. Mary Ray, but that the certificate of procurement integrity had been executed by another individual, Mr. John Mueller. Because of this, the contracting officer requested that Southwest provide the agency with proof that John Mueller was an officer or employee of Southwest. In response to this request, Southwest provided the Navy with a copy of the firm's partnership agreement which had been entered into on March 15, 1994. The partnership agreement provided that the signatures of a majority of the partners were required to bind the partnership in making contracts, and that John Mueller held only a 49-percent interest in the firm.

After reviewing the partnership agreement, the contracting officer wrote to Southwest, stating that it was the agency's understanding that the signatures of a majority of the partners were required to bind the firm; that either the signature of Mary Ray alone or the signatures of both partners were required to bind the partnership; and that John Mueller could not individually bind the firm. The contracting officer's letter requested that Southwest respond with information showing whether or not this understanding was correct. In response, Mary Ray sent a letter to the agency stating that "... we concur in your interpretation regarding signature authority. Currently, we have no plans for John Mueller to be authorized individually [to] bind [Southwest]." Based on this information, as well as the terms of the partnership agreement, the agency concluded that Southwest's bid was nonresponsive because its certificate of procurement integrity had not been executed by an individual authorized to bind Southwest. Upon learning of the agency's decision, Southwest filed this protest.

Southwest (a California partnership) maintains that, because the firm is a general partnership and John Mueller is a general partner, he could properly bind the firm, under California law. Although California law does not permit a partner to bind the partnership where the third party for whom the act is done has knowledge of a restriction on the partner's authority, Southwest maintains that since the

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<sup>1</sup>California Corporation Code § 15009(4) (Deering 1979). We also note, however, that California case law suggests that, regardless of the state of the third party's knowledge, a  
(continued...)

agency had no knowledge of any restriction on John Mueller's authority at the moment of bid opening, and since responsiveness is determined at the moment of bid opening, John Mueller's execution of the certificate was effective.

Southwest's argument is based on the incorrect premise that responsiveness is determined at the moment of bid opening. In fact, while a determination of responsiveness must be based solely on information included with the bid at the time of bid opening, there is no requirement that the determination be made only at the instant bids are opened, or not at all. Rather, an agency properly may investigate a matter bearing on a bid's responsiveness after bid opening has occurred and then, based on this investigation, make the actual responsiveness determination. Indeed, this typically is the course taken by agencies where the authority of an individual to bind his or her firm is at issue. See W.G. Yates & Sons, Constr. Co., B-248719, Aug. 11, 1992, 92-2 CPD ¶ 97. Thus, the fact that the agency was not aware of any restriction on John Mueller's authority to bind Southwest at the time of bid opening did not preclude the agency from investigating this question, determining that John Mueller in fact lacked authority to bind Southwest, and then rejecting Southwest's bid as nonresponsive on the basis that the firm's certificate was ineffective.

Southwest has submitted other evidence purporting to establish that John Mueller in fact had authority to bind the firm at bid opening; a firm may properly submit evidence after bid opening to show that the individual signing a bid or certificate of procurement integrity had authority to bind the firm at the time of bid opening. Id. The evidence in this case, however, does not establish that the agency's determination was incorrect.

In its letter of protest, Southwest furnished for the first time a power of attorney executed by Mary Ray in favor of John Mueller which is dated prior to bid opening. The protester maintains that, regardless of the other information provided to the agency, this power of attorney establishes that at bid opening, John Mueller had the authority conferred on Mary Ray by the terms of the partnership agreement.

Southwest has not explained why it did not provide this power of attorney to the agency during the course of its inquiry. The contracting officer's letter to Southwest

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<sup>1</sup>(...continued)

partner may not act in contravention of a restriction on his authority to bind the partnership. See People v. Van Skander, 66 P.2d 1228 (1937).

after her review of the partnership agreement was quite specific, requesting that the firm "provide additional evidence that Mr. Mueller had authority to individually bind [Southwest]." Rather than provide the power of attorney that the protester now maintains afforded John Mueller authority to individually bind the firm, Southwest stated that it agreed with the agency's understanding of the restriction on John Mueller's authority, and that currently there were "no plans for John Mueller to be authorized individually [to] bind [Southwest]."

Under these circumstances, we question the probative value of the power of attorney when compared to Southwest's earlier representation to the agency; this is especially so in light of the particulars of the power of attorney. The power of attorney was executed in February 1992, by Mary Ray individually rather than as a partner of Southwest; this is evident from the fact that Southwest's partnership agreement was not executed until March 1994, more than 2 years later. The record thus shows that the power of attorney was executed prior to the time when the partnership was formed, and this brings into question whether, at the time of its execution, the parties intended the power of attorney to affect the nature of their subsequent partnership relationship.

Southwest also submitted affidavits executed by each of the two partners with its comments on the agency report. These affidavits essentially represent that, at the time Southwest was preparing its bid, Mary Ray and John Mueller orally agreed that his signature on the certificate of procurement integrity would be effective to bind the firm. These affidavits also represent that Mary Ray's earlier statement (in response to the contracting officer's inquiry) that John Mueller did not have authority to individually bind the partnership was made in response to the contracting officer's general question regarding his authority; the parties represent that, had the contracting officer specifically asked whether John Mueller had authority to sign the certificate, they would have explained that he had been extended that authority orally during the firm's bid preparation.

Given the existence of several pieces of evidence--each of which the protester has presented with a different explanation of the basis for John Mueller's authority under the partnership--we are left to balance the evidence in considering which should be accorded determinative weight here. As with the power of attorney, Southwest has not explained why it did not furnish these statements to the agency at the time of its inquiry or, for that matter, with its initial letter of protest. This lack of an explanation gives rise to the appearance that the affidavits set forth

no more than a self-serving scenario engendered after the fact to render Southwest eligible for award. In contrast, Mary Ray's earlier representation--in response to a direct question from the agency--that John Mueller did not have authority to individually bind the partnership, was made when she apparently was unaware of the implications of her representation. We conclude that this earlier representation provides the more reliable evidence of the scope of John Mueller's authority at the time of bid opening.

The protest is denied.

\s\ Paul Lieberman  
for Robert P. Murphy  
General Counsel