



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Shackelford Mechanical, Inc.

File: B-261948

Date: November 1, 1995

William R. Purdy, Esq., Ott & Purdy, for the protester.

Marilyn W. Johnson, Esq., and Cynthia S. Guill, Esq., Department of the Navy, for the agency.

Jacqueline Maeder, Esq., and Paul Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency properly determined that a bid bond was defective, and the bid therefore nonresponsive, where the surety's power of attorney authorizing the named attorney-in-fact to sign the bid bond on the surety's behalf contained an undated certification that the power of attorney had not been revoked, raising the question of whether the power of attorney had been revoked prior to the execution of the bid bond.

DECISION

Shackelford Mechanical, Inc. protests the rejection of its bid as nonresponsive, and the award of a contract to C.R. Hipp, Inc., under invitation for bids (IFB) No. N62467-94-B-0886, issued by the Department of the Navy for the extension of a natural gas piping system at Charleston Air Force Base, Charleston, South Carolina.

We deny the protest.

The Navy received four bids at bid opening on June 13, 1995. Shackelford submitted the apparent low bid of \$1,465,947, and Hipp's bid was second low at \$1,642,419. Along with its bid, Shackelford submitted the required bid bond on standard form 24. The bond was dated May 23, 1995, and signed by D.M. Ferris as attorney-in-fact for the surety, St. Paul Fire and Marine Insurance Company. The bond was accompanied by a power of attorney from the surety listing D.M. Ferris as an attorney-in-fact.¹ The power of attorney was signed by the secretary of the surety and notarized on October 25, 1994; however, the certification provision in the

¹In the context of bid bonds, a power of attorney is the authority given one person, the attorney-in-fact, to act on behalf of a surety company in signing bonds. Federal Acquisition Regulation (FAR) § 28.001.

power of attorney--by which the secretary of the surety was to certify that the power of attorney remained in full force and effect and had not been revoked--was not properly completed. An assistant secretary of the surety had signed his name on the signature line, and a seal was affixed to the certification, but the certification was undated. Because the certification was undated, the Navy was concerned that the power of attorney may have been revoked prior to the execution of the bid bond, in which case Shackelford's bid bond would not be binding on the surety. Consequently, the Navy informed Shackelford on June 26 that its bid was being rejected as nonresponsive.

Shackelford filed an agency-level protest on June 27, arguing that the agency improperly rejected its bid as nonresponsive because an undated certification on a power of attorney accompanying a bid bond is a waivable minor informality. The Navy denied this protest on June 29 and awarded the contract to Hipp on the same day. Shackelford then filed this protest in our Office, arguing that the certification is not conditioned upon any particular date but is an "open-ended representation, signed by a corporate officer of the surety, that the power of attorney is good." Shackelford contends that, even though it is undated, the certification is complete on its face because it states that the power of attorney has not been revoked and is in full force and effect, and that it shall be binding on the surety if it bears a facsimile signature or facsimile company seal.²

A bid bond is a written instrument executed by a bidder or contractor and a third party--the surety--to assure fulfillment of the contractor's obligations to the

²Shackelford also argues that the bid bond must be found valid and binding under applicable Mississippi Law. However, the validity and construction of contracts of the United States and their consequences on the rights and obligations of the parties present questions of federal law not controlled by the law of any state. The GR Group, Inc., B-242570, Apr. 29, 1991, 91-1 CPD ¶ 418; Nationwide Roofing and Sheet Metal, Inc., 64 Comp. Gen. 474 (1985), 85-1 CPD ¶ 454. We will look to state law for guidance only in the absence of controlling federal law. Pete Vicari Gen. Contractor, Inc., 69 Comp. Gen. 191 (1990), 90-1 CPD ¶ 92. Here, the FAR and prior decisions of our Office provide adequate legal basis for our resolution of Shackelford's protest. In addition, public policy supports the dominance of federal law in this regard. Agencies generally must be able to ascertain the adequacy of a bid bond solely from the documents submitted at bid opening. See A&A Roofing Co., Inc., B-219645, Oct. 25, 1985, 85-2 CPD ¶ 463. As a result, uniform federal regulations exist to ascertain the sufficiency of bid bonds; ignoring these uniform regulations to require that agencies instead attempt to determine whether bidders have furnished adequate bid guarantees under the laws of an individual state would detract from the agencies' ability to promptly and definitively determine the adequacy of bid bonds. See The GR Group, Inc., *supra*.

government. FAR § 28.001. 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. A.W. and Assocs., Inc., 69 Comp. Gen. 737 (1990), 90-2 CPD ¶ 254.

When required by a solicitation, a bid bond is a material part of the bid and a valid bond must be furnished with the bid in order for it to be responsive. A.D. Roe Co., Inc., 54 Comp. Gen. 271 (1974), 74-2 CPD ¶ 194. Specifically, where a required bid bond is accompanied by a power of attorney that on its face does not establish unequivocally that the person signing was authorized to bind the surety, the bid generally must be rejected as nonresponsive. Integrity Works, B-258818, Feb. 21, 1995, 95-1 CPD ¶ 98. This is so because only a valid power of attorney would establish that the surety expressly agreed to be bound to pay the bond. This express agreement to be bound is required under the law of suretyship. See Andersen Constr. Co.; Rapp Constr., Inc., 63 Comp. Gen. 248 (1984), 84-1 CPD ¶ 279. A power of attorney is to be strictly construed, and we will not convert ambiguous aspects of powers of attorney into mere matters of form which can be explained away and waived. Integrity Works, *supra*.

Accordingly, a bid must be rejected as nonresponsive where there is ambiguity about the authority of the person signing the bond on behalf of the surety. For example, a bid may not be accepted where the power of attorney, by its terms, lapsed prior to the date the bid bond was executed, E&R, Inc., B-255868, Mar. 29, 1994, 94-1 CPD ¶ 218, where the certification provision in the power of attorney by which the secretary of the surety was to certify that the power of attorney remained in full force and effect had not been signed, Fred Winegar, B-243557, Aug. 1, 1991, 91-2 CPD ¶ 111, or where the power of attorney named a person different from the individual who actually signed the bid bond, Environmental Management Servs., Inc., B-245508, Sept. 18, 1991, 91-2 CPD ¶ 261; Baldi Bros. Constr., B-224843, Oct. 9, 1986, 86-2 CPD ¶ 418. For the same reason, where a power of attorney stated that only the original was valid but the bidder submitted with its bid a photocopy of the power of attorney, rather than the original, the agency properly rejected the bid, since the contracting officer could not determine from the bid documents whether the person signing the bond had authority to bind the surety. The King Co. Inc., B-228489, Oct. 30, 1987, 87-2 CPD ¶ 423.

The authority of the person executing a bid bond on behalf of the surety, and consequently the validity of the bid bond, are most clearly free of ambiguity where the power of attorney is signed immediately prior to the execution of the bid bond. Reversing the order casts into doubt the signer's authority at the time the bond is executed. See, e.g., A.W. and Assocs., Inc., *supra*. When the power of attorney is dated well in advance of the bid bond, doubt may arise about whether the power of attorney had expired or been revoked by the time the person signed the bid bond. See, e.g., Quantum Constr., Inc., B-255049, Dec. 1, 1993, 93-2 CPD ¶ 304.

Here, the certification section of the power of attorney submitted by Shackelford was undated and, thus, the continuing validity of the power of attorney was not confirmed. Because the power of attorney was executed October 25, 1994, and the bond was not executed until 7 months later, on May 23, 1995, the significant passage of time raised concern that the power of attorney could have been revoked. Quantum Constr., Inc., supra. Under these circumstances, the contracting officer could not be certain that the power of attorney remained in full force and effect; since the missing date meant that the power of attorney did not establish unequivocally that the agent was authorized to bind the surety, rejection of the bid was proper.³ Id.

Shackelford's argument that the certification is valid because of the statements on the power of attorney regarding the binding nature of a facsimile signature or facsimile company seal misconstrues the purpose of this language. The fact that the certification is signed and sealed has no binding effect here, where the authority of the signatory is called into question. A corporate seal merely attests or authenticates the signature, Fred Winegar, supra, and allowing for facsimiles merely permits the bidder to submit a facsimile of the power of attorney, rather than the original, with its bid. Here, at the time of bid opening, it was not clear from the face of the bid that the bond signatory was authorized to bind the surety.

The protest is denied.

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³The protester cites our decision in J.W. Bateson Co., Inc., B-189848, Dec. 16, 1977, 77-2 CPD ¶ 472, for the proposition that the lack of a date on the certification is a waivable informality. Shackelford's reliance is misplaced. As stated in Bateson, the appropriate test to determine the validity of a bid bond is whether the government obtains the same protection in all material respects under the bond actually submitted with an informality as it would under a bond complying with the exact requirements relating to bid bonds. The government is not comparably and adequately protected when the bid includes a stale and undated power of attorney certification since this raises a serious question as to whether the power of attorney had been revoked prior to bid opening. Quantum Constr., Inc., supra.