



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Fred Winegar
File: B-243557
Date: August 1, 1991

Fred Winegar for the protester.
Allen W. Smith, Esq., Department of Agriculture, for the agency.
Tania Calhoun and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency properly determined a bid bond was defective and the bid therefore nonresponsive under a sealed bid procurement where the surety's power of attorney authorizing the named attorney-in-fact to sign the bid bond on the surety's behalf was not certified by the surety as not having been revoked.

DECISION

Fred Winegar protests the rejection of his bid as nonresponsive, and the award of a contract to Harney County Gypsum Company under invitation for bids (IFB) No. R6-4-91-11 issued by the Department of Agriculture, Forest Service, for construction of fish habitat structures along the John Day River, Oregon.

We deny the protest.

Mr. Winegar submitted the second low bid of \$75,000 by bid opening on March 12, 1991. (The apparent low bidder was permitted to withdraw its bid due to a mistake in bid.) Harney County submitted the third low bid of \$89,600.

Along with his bid, Mr. Winegar submitted the required bid bond on the Standard Form 24. The bond was dated March 12, 1991, and signed by Mary-Anne Skinner as attorney-in-fact for the surety, American Bonding Company. The bond was accompanied by a power of attorney from the surety listing

Mary-Anne Skinner (among others) as an attorney-in-fact.^{1/} The power of attorney was signed by the president of the surety and notarized on August 21, 1986; however, 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the secretary of the surety was to certify that the power of attorney remained in full force and effect and had not been revoked--was not completed. The date of March 12, 1991, was typed in and a seal was affixed to the certification, but the signature line was blank. This caused the Forest Service to question whether Mr. Winegar's bid bond bound the surety. Consequently, it rejected Mr. Winegar's bid as nonresponsive.

When required by a solicitation, a bid bond is a material part of the bid which must be furnished with it. A.D. Roe Co., Inc., 54 Comp. Gen. 271 (1974), 74-2 CPD ¶ 194. 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. See 14 Comp. Gen. 305, 308 (1934). 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.

When a bidder supplies a defective bond, the bid itself is rendered defective and must be rejected as nonresponsive. 38 Comp. Gen. 532 (1959); Minority Enters., Inc., B-216667, Jan. 18, 1985, 85-1 CPD ¶ 57. A bid bond's sufficiency depends on whether the surety is clearly bound by its terms. Truesdale Constr. Co., Inc., B-213094, Nov. 18, 1983, 83-2 CPD ¶ 591. The determinative question as to the acceptability of a bid bond is whether the bid documents establish that the bond is enforceable against the surety should the bidder fail to meet its obligations. A.W. and Assocs., Inc., B-239740, Sept. 25, 1990, 69 Comp. Gen. ____, 90-2 CPD ¶ 254.

A bid bond submitted with an invalid power of attorney may render the bid nonresponsive.^{2/} See, e.g., Baldi Brothers Constructors, B-224843, Oct. 9, 1986, 86-2 CPD ¶ 418; Desert Dry Waterproofing Contractors, B-219996, Sept. 4, 1985, 85-2 CPD ¶ 268. This is so because a power of attorney authorizes the agent to act for the principal and only a valid power of

^{1/} A power of attorney is evidence that the named attorney-in-fact is authorized to sign the bid bond on the surety's behalf, binding the surety to the bond's terms.

^{2/} A power of attorney is a written authorization used to evidence an agent's authority to a third person. 3 Am. Jur. 2d § 23.

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., 63 Comp. Gen. 248, supra.

The power of attorney submitted by Mr. Winegar lacked the signature for certification, which raised the question of whether the power of attorney had been revoked between the date of its execution, August 21, 1986, and the bid opening date of March 12, 1991. That is, as of the time of bid opening, it was not clear, from the face of the bid, that Ms. Skinner was authorized to bind the surety. Given the agency's notice of the lack of the signed certification and its possible consequences, there was an open question at bid opening whether the surety could escape liability by claiming the bonding agent's authority to execute the bond had been revoked prior to March 12, 1991. See A.W. and Assocs., Inc., B-239740, supra. The fact that the certification is dated and sealed is not dispositive, since a corporate seal generally is not the same as a signature, nor is it equivalent to a signature; it merely attests or authenticates the signature. William V. Walsh Constr. Co., Inc., B-241257, Oct. 3, 1990, 90-2 CPD ¶ 270.

Mr. Winegar argues that the attorney-in-fact could not have sealed the document without the authority to do so because the seal would have been confiscated had the authority been revoked. Mr. Winegar also argues that Standard Form 24 does not require a power of attorney because if the signatory has the seal of the surety, the authority to sign is also present and the surety will be legally bound.

Evidence of the authority of a surety's agent to sign a bid bond on behalf of the surety, e.g., a power of attorney, must be furnished with the bid prior to bid opening, and failure to furnish this information renders a bid nonresponsive. See JC Constr. Co., B-229486, Dec. 29, 1987, 87-2 CPD ¶ 640. As stated above, a corporate seal is not acceptable in lieu of a signature to bind a surety. Since the bid documents here left the issue of the agent's authority to bind the surety open to question due to the possibility of a revocation, the bid bond was properly found unacceptable and the bid nonresponsive.

The protest is denied.


for James F. Hinchman
General Counsel