

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

Decision

Matter of: Environmental Management Services, Inc.

File: B-245508

Date: September 18, 1991

Sam Zalman Gdanski, Esq., for the protester,
Henry J. Gorczycki, Office of the General Counsel, GAO,
participated in the preparation of the decision.

DIGEST

Where corporate surety's power of attorney form attached to the bid bond designated a different individual as attorney-in-fact than the individual who signed the bond on behalf of the surety, the agency correctly determined the bond was defective and properly rejected bid as nonresponsive.

DECISION

Environmental Management Services, Inc. (EMSI) protests the rejection of its bid under invitation for bids (IFB) No. N68711-91-B-1234, issued by the Department of the Navy for asbestos removal from Marine Corps Base, Camp Pendleton, California, and Naval Weapons Station Fallbrook Annex, Fallbrook, California. The Navy rejected EMSI's bid as nonresponsive because the surety's power of attorney form attached to the bid bond designated a different attorney-in-fact from the one signing the bid bond on behalf of the surety.

We dismiss the protest.

EMSI submitted a bid bond and power of attorney with its bid documents as required by the IFB. The bid bond was signed by Raymond E. Cobb, Jr. as attorney-in-fact for the surety. However, the power of attorney named C. Wayne McCartha as attorney-in-fact. EMSI's bid documents lacked any evidence that the surety authorized Raymond E. Cobb, Jr. to act on its behalf.

When required by an IFB, a bid bond is a material part of the bid and must be furnished with it. 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. 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.^{1/} 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. Fred Winegar, B-243557, Aug. 1, 1991, 91-2 CPD ¶ ____.

Absent the power of attorney authorizing Raymond E. Cobb, Jr. to act on behalf of the surety, the surety was not legally bound by the bid bond submitted with EMSI's bid. Therefore, the Navy correctly determined the bid bond as submitted was defective since there was no evidence at the bid opening that the surety would be bound in the event EMSI failed to execute the contract. Techno Eng'g & Constr., Ltd., B-243932, July 23, 1991, 91-2 CPD ¶ 87.

EMSI contends that evidence of the attorney-in-fact's authority to obligate the surety may be submitted after bid opening. EMSI argues that this situation is analogous to that in Noslot Pest Control, Inc., 68 Comp. Gen. 396 (1989), 89-1 CPD ¶ 396, which recognizes that the authority of a signatory to a document to bind his principal may be furnished after bid opening. However, Noslot Pest Control concerned a bidder's failure to sign the bid bond, not a surety's failure to do so. We found that the bidder's failure to sign the bond did not render the bid nonresponsive, since the bidder signed the bid and the bid bond contained the surety's authorized signature. As indicated above, the purpose of the bid bond is to bind the surety not the bidder. Consequently, that case, which revolved on evidence of the bidder's legal obligation under the bid when it failed to sign the bid bond, is not applicable to this case, where the surety's obligation is the pivotal issue.

EMSI also cites West Georgia Indus. Piping and Plumbing, Inc., B-227754, Sept. 22, 1987, 87-2 CPD ¶ 289. That case found that a bid bond is valid, even though it failed to include the surety's corporate seal, since the bid bond was otherwise properly executed by the properly authorized agent of the surety.

^{1/} The surety must give its express consent in the bond documents because suretyship law strongly suggests that a bond will be strictly construed in favor of the surety, and that surety liability will not be found by construction or implication. William V. Walsh Constr. Co., Inc., B-241257, Oct. 3, 1990, 90-2 CPD ¶ 270.

Since EMSI does not deny that its bid documents did not contain evidence of the authority of the individual who executed the bid bond, the bond was defective and EMSI's bid was properly rejected as nonresponsive.

The protest is dismissed.



James A. Spangenberg
Assistant General Counsel