



Comptroller General  
of the United States

853226

Washington, D.C. 20548

## Decision

**Matter of:** Ray Ward Construction Company

**File:** B-256374

**Date:** June 14, 1994

Phillip E. Johnson, Federal Contract Specialists, Inc., for the protester.  
Leigh Ann Holt, Esq., General Services Administration, for the agency.  
Behn Miller, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

### DIGEST

Where power of attorney certificate attached to bid bond specifically provided that surety agreed to be bound by facsimile signatures of its officers and the certificate was embossed with the surety's original corporate seal, contracting agency reasonably determined that awardee's submitted bid bond was acceptable and therefore responsive to solicitation's bid guarantee requirement.

### DECISION

Ray Ward Construction Company protests the award of a contract to Schoonmaker Electro-Mechanical, Inc., under invitation for bids (IFB) No. GS-08P-93-JXC-0133, issued by the General Services Administration (GSA) for the construction of 10 telecommunication closets at the Internal Revenue Service's building located in Ogden, Utah. Ray Ward contends that Schoonmaker's bid should have been rejected as nonresponsive because the power of attorney accompanying the bid was defective. 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 its terms. Here, Ray Ward argues that Schoonmaker's power of attorney is defective because it is executed with facsimile--as opposed to original--signatures, and because the notary public's seal is merely a photocopy from a power of attorney submitted for another procurement.

We deny the protest.

The IFB was issued on November 12, 1993; at the December 21 bid opening, 10 bids were received. Schoonmaker was the apparent low bidder; Ray Ward was the second-low bidder.

Ray Ward filed a timely request under the Freedom of Information Act for copies of the three low bidders' bid bonds, among other items. By letter dated January 7, 1994, GSA provided the requested documents. On January 19, Ray Ward filed a protest with GSA challenging any award to Schoonmaker on the ground that the firm had submitted a defective power of attorney with its bid bond. By decision dated January 27, GSA denied Ray Ward's agency-level protest; on February 4, Ray Ward filed this protest with our Office.

Bid bonds are a form of bid guarantee designed to protect the government's interest in the event of default; that is, if a bidder fails to honor its bid in any respect, the bid bond secures a surety's liability for all procurement costs. See N.G. Simonowich, 70 Comp. Gen. 28 (1990), 90-2 CPD ¶ 298. As such, a required bid bond is a material condition of an IFB with which there must be compliance at the time of bid opening; when a bidder submits a defective bid bond, the bid itself is rendered defective and must be rejected as nonresponsive. Blakelee, Inc., B-239794, July 23, 1990, 90-2 CPD ¶ 65; Minority Enters., B-216667, Jan. 18, 1985, 85-1 CPD ¶ 57. 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., 69 Comp. Gen. 737 (1990), 90-2 CPD ¶ 254. If the agency cannot determine definitely from the documents submitted with the bid that the surety would be bound, the bid is nonresponsive and must be rejected. Global Eng'g, B-250558, Jan. 11, 1993, 93-1 CPD ¶ 31. To that end, a bid bond submitted with an invalid power of attorney may render the bid nonresponsive; this is so because a power of attorney authorizes the agent to act for the principal and only a valid power of attorney would indicate that the surety expressly agreed to be bound to pay the bond signed by the attorney-in-fact. See Fred Winegar, B-243557, Aug. 1, 1991, 91-2 CPD ¶ 111.

A bid bond deficiency may not be cured by submitting the original document after bid opening because this would provide the bidder with the option of accepting or rejecting the award by either correcting or not correcting the bond

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<sup>1</sup>This express agreement to be bound is required under the law of suretyship. See Anderson Constr. Co.; Rapp Constructors, Inc., 63 Comp. Gen. 248 (1984), 84-1 CPD ¶ 279.

deficiency, which is inconsistent with the sealed bidding system. Bird Constr., B-240002; B-240002.2, Sept. 19, 1990, 90-2 CPD ¶ 234. Consequently, photocopies of bid guarantee documents generally do not satisfy the requirement for a bid guarantee since there is no way, other than by referring to the originals after bid opening, for the contracting agency to be certain that there had not been alterations to which the surety had not consented, and that the government would therefore be secured. See The King Co., Inc., B-228489, Oct. 30, 1987, 87-2 CPD ¶ 423.

Facsimile versions of required bid bond items--such as a facsimile signature--are electronically transmitted copies and thus are subject to the same uncertainty as photocopies transmitted by mail; since a facsimile version is not the original, there is usually no way to be certain that unauthorized alterations have not been made without referring to the original documents after bid opening. See Bird Constr., supra. However, where there is evidence submitted with the bid which unequivocally demonstrates the surety's intent to be bound by a facsimile or photocopy version, the agency may reasonably determine the bid bond to be acceptable. See Services Alliance Sys., Inc., B-255361, Feb. 22, 1994, 94-1 CPD ¶ 137.

In this case, the power of attorney submitted by the awardee with its bid bond is comprised of three parts. The first part authorizes the named individuals to act as attorneys-in-fact for the surety; it is signed by an assistant secretary and vice president of the surety. The second part is a notary public certification of the corporate officers' signatures on the first part. The third part, captioned "Certificate," is signed by another assistant secretary of the surety who certifies that "the original Power of Attorney of which the foregoing is a full, true and correct copy, is in full force and effect. . . ."

Ray Ward argues that the power of attorney is defective because none of the signatures is an original and because the notary public's seal is photocopied on the form.

Unlike prior decisions by this Office where a bid bond was required to be rejected due to the lack of evidence--at the time of bid opening--that the surety intended to be bound by other than an original signature, see Regional Dev. Corp.--Recon; Ware's Van & Storage Co., Inc.--Recon., B-251299.2; B-251431.2, Mar. 16, 1993, 93-1 CPD ¶ 238 (photocopies of original bid bond insufficient to bind the surety); Standard Roofing USA, Inc., B-245776, Jan. 30, 1992, 92-1 CPD ¶ 127 (rubber stamp signature renders power of attorney and accompanying bid bond fatally deficient), here there is clear evidence that Schoonmaker's surety intended to be bound by the facsimile signature of its assistant secretary

on the certificate. Specifically, the certificate provides, in relevant part, that:

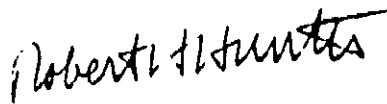
"[t]his [c]ertificate may be signed by facsimile under and by authority of the following resolution of the Board of Directors of the [surety] at a meeting duly called and held on the 16th day of July, 1969.

"RESOLVED: 'That the facsimile or mechanically reproduced signature of any Assistant Secretary of the Company, whether made before or hereafter, wherever appearing upon a certified copy of any power of attorney issued by the Company, shall be valid and binding upon the company with the same force and effect as though manually affixed.'"

We think that this language shows that the surety fully intended to be bound by the facsimile signatures of its assistant secretary. The authenticity of the document is confirmed by the fact that an original corporate seal was affixed to it. Accordingly, we think the contracting officer could reasonably conclude that Schoonmaker submitted a valid power of attorney with its bid bond. See Services Alliance Sys., Inc., supra.

The fact that the other three signatures and the notary public's seal on the power of attorney were not originals does not change our conclusion. The key to establishing the surety's intent to be bound is the certification by the assistant secretary that the power of attorney is in full force and effect. Since, as discussed above, the document indicates that the surety has by corporate resolution authorized the use of facsimile signatures to certify to the validity of the power of attorney, the facsimile signature by the surety's assistant secretary on the certification establishes that the power of attorney is current and valid.

The protest is denied.

  
for Robert P. Murphy  
Acting General Counsel