



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

Decision

Matter of: Integrity Works
File: B-258818
Date: February 21, 1995

Stuart N. Josefsberg, Esq., for the protester.
Lester Edelman, Esq., Department of the Army, for the agency.
Daniel I. Gordon, Esq., and Paul E. Jordan, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency improperly rejected bid due to an allegedly invalid bid bond where the power of attorney certification, which confirmed the authority of the person signing the bid bond on behalf of the surety, was dated 1 day before the bid bond was executed; because the bid documents provided no reasonable basis to doubt the continued validity of the power of attorney, the bid bond was not defective.

DECISION

Integrity Works protests the rejection of its bid as nonresponsive for lack of a valid bid bond under invitation for bids (IFB) No. DACA83-94-B-0064, issued by the Honolulu District of the Army Corps of Engineers. The protester contends that the agency lacked a reasonable basis for its determination that Integrity's bid bond was defective.

We sustain the protest.

The IFB was issued on August 22, 1994, soliciting bids for repair of bleachers at Fort Shafter, Hawaii. The IFB required submission of a bid guarantee, which could be made in the form of a bid bond, in the amount of 20 percent of the bid.

At bid opening on September 21, Integrity's bid was low. However, the agency determined that the bid failed to provide a valid bid guarantee. This determination was based on the bid's including a bid bond dated September 19, while the power of attorney, which confirmed the authority of the person executing the bond on behalf of the surety, was dated September 18. Specifically, the power of attorney, which

had originally been executed on January 20, 1994, bore a certification dated September 18 stating that it was a true and correct copy of the original power of attorney "which is still in full force and effect." The power of attorney did not include any expiration date. Because the validity of the power of attorney had been confirmed on September 18, 1 day prior to the execution of the bid bond, the contracting officer concluded that "it was not clear from the face of the bid" whether the person executing the bid bond was authorized to bind the surety on September 19. On that basis, the agency rejected Integrity's bid and made award to the next low bidder, Tower Construction, Inc. The protester contends that the agency lacked a legitimate basis to question the continuing validity of the power of attorney.

A bid guarantee is a form of security that assures the government that a bidder will not withdraw its bid within the period specified for acceptance and, if required, will execute a written contract and furnish required performance and payment bonds. Federal Acquisition Regulation (FAR) § 28.001. The bid guarantee 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 these obligations. A.W. and Assocs., Inc., 69 Comp. Gen. 737 (1990), 90-2 CPD ¶ 254.

When required by a solicitation, a bid guarantee is a material part of the bid and a valid guarantee 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 bid bond is submitted as a bid guarantee and the 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 must generally be rejected as nonresponsive.¹ Quantum Constr., Inc., B-255049, Dec. 1, 1993, 93-2 CPD ¶ 304. 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 Constructors, 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. Quantum Constr., Inc., supra.

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 executing bonds. FAR § 28.001.

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, 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. Constructors, 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 a photocopy of the power of attorney, rather than the original, with its bid, 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., 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. Also, 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.

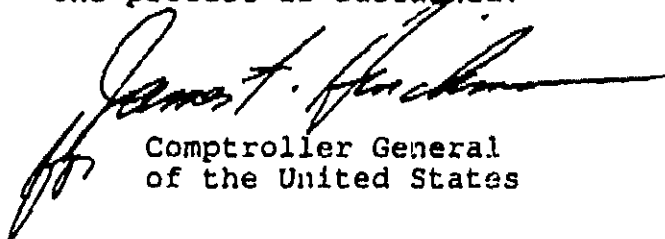
In this protest, the continuing validity of the power of attorney was confirmed on the day immediately before the bid bond was executed. There was thus no significant passage of time that could lead to concern about the continued validity of the power of attorney. Cf. Quantum Constr., Inc., supra (18-month gap between date of power of attorney and date of bid bond raised concern that the power of attorney might have been revoked). Nothing on the face of the bid documents, nor anything otherwise disclosed in the record, would suggest any basis for the contracting officer's concern about the ongoing validity of the power of attorney. On the contrary, the bid documents clearly established the authority of the attorney-in-fact to bind the surety, thus protecting the government's interest.

The contracting officer appears to believe that only a power of attorney bearing the same date as the bid bond is acceptable. The agency provides no authority for this position. If the contracting officer's view is based on a perceived need to eliminate all doubt, insisting that the power of attorney and bid bond bear the same date would be

inadequate, since some doubt could, theoretically, arise even where the two documents are executed on the same day.² In fact, the issue is whether the bid documents provide any reasonable basis to doubt the validity of the power of attorney. Where they do, the bid must be rejected. E&R, Inc., supra. In this case, the fact that the continuing validity of Integrity's power of attorney was confirmed 1 day before execution of the bid bond only served as corroboration, and did not constitute a reasonable basis to question the validity of the power of attorney or of the bid bond.

Accordingly, we conclude that the protester's bid should not have been rejected, and we sustain the protest. We recommend that the contract awarded to Tower Construction be terminated for the convenience of the government and award made to Integrity Works, if otherwise eligible. We also find that Integrity is entitled to reimbursement of its protest costs. 4 C.F.R. § 21.6(d) (1994). In accordance with 4 C.F.R. § 21.6(f), Integrity's certified claim for such costs, detailing the time expended and costs incurred, must be submitted directly to the agency within 60 days after receipt of this decision.

The protest is sustained.



Janet F. Hatcher
Comptroller General
of the United States

²Because a power of attorney is always revocable, one signed in the morning could, in theory, have been revoked prior to the signing of a bid bond in the afternoon of the same day. Conversely, where a bid bond is signed in the morning and the power of attorney is executed in the afternoon, doubt could arise about the authority of the attorney-in-fact to sign the bid bond in the morning.