



United States General Accounting Office
Washington, DC 20548

Decision

Matter of: Kemper Construction Company, Inc.

File: B-283286.2

Date: November 29, 1999

Stephen R. Remsberg, Esq., Lemle & Kelleher, for the protester.
Edward Goldstein, Esq., Army Corps of Engineers, for the agency.
Jennifer D. Westfall-McGrail, Esq., and Christine S. Melody, Esq., Office of the
General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Where bidder submitted a bid bond accompanied by a faxed copy of a power of attorney, and the bid documents did not establish that the surety would be bound by such a power of attorney, the bond was unacceptable and the bid nonresponsive.

DECISION

Kemper Construction Company, Inc. protests the rejection of its bid under invitation for bids (IFB) No. DACW29-99-B-0069, issued by the Army Corps of Engineers for construction of a shop and garage building at the Mississippi River Spillway, St. Charles Parish, Louisiana. The agency rejected Kemper's bid as nonresponsive because the power of attorney attached to its bid bond was a faxed copy. The protester contends that the copy was sufficient to bind the surety and thus should have been accepted.

We deny the protest.

The IFB, which was issued on June 15, 1999, required bidders to submit with their bids a bid bond in the amount of 20 percent of the bid price. Five bids were received by the bid opening time on July 15. Kemper was the apparent low bidder; Julius A. Payne Company, Inc. and Cooper Construction were second and third low, respectively; and DeLoach Corp. was fourth low. On July 16, DeLoach filed an agency-level protest, contending that the bids of Kemper, Payne, and Cooper should all be rejected as nonresponsive and that award should be made to DeLoach. The contracting officer agreed with DeLoach that Cooper's bid was nonresponsive, but denied the protest with regard to Kemper's and Payne's bids.

Upon learning that its agency-level protest had been denied, DeLoach protested to our Office. DeLoach argued, among other things, that the powers of attorney that accompanied Kemper's and Payne's bid bonds were not original documents. Upon investigation, the agency determined that both Kemper and Payne had in fact submitted faxed copies of powers of attorney with their bid bonds. Agency counsel further determined that because the powers of attorney were copies, the bids were nonresponsive. The agency notified all three bidders that the bids of Kemper and Payne had been determined nonresponsive and that award would be made to DeLoach, whereupon DeLoach withdrew its protest, and Kemper and Payne filed protests of their own.¹

Kemper's bond was signed by the attorney-in-fact for the National Fire Insurance Company of Hartford, and the surety company's seal was crimped over the attorney-in-fact's signature. The bond was accompanied by a faxed copy of a power of attorney appointing the individual as attorney-in-fact for the above-named surety company with "full power and authority . . . to sign, seal and execute for and on [its] behalf bonds undertakings and other obligatory instruments of similar nature . . . In Unlimited Amounts." A certificate at the bottom of the power of attorney provided that it was still in force; the date "July 15, 1999" had been handwritten onto the certificate. On the reverse side of the power of attorney, the following statement appeared:

This Power of Attorney is signed and sealed by facsimile under and by the authority of the following Resolution adopted by the Board of Directors of the Company at a meeting duly called and held on the 17th day of February, 1993.

RESOLVED: That the signature of the President, an Executive Vice President or any Senior or Group Vice President and the seal of the Corporation may be affixed by facsimile on any power of attorney granted pursuant to the Resolution adopted by this Board of Directors on February 17, 1993 and the signature of a Secretary or an Assistant Secretary and the seal of the Corporation may be affixed by facsimile to any certificate of any such power, and any power or certificate bearing such facsimile signature and seal shall be valid and binding on the Corporation. Any such power so executed and sealed and certified by certificate so executed and sealed, shall with respect to any bond or undertaking to which it is attached, continue to be valid and binding on the Corporation.

¹On October 7, we dismissed Payne's protest for failure to comment on the agency report. See Bid Protest Regulations, 4 C.F.R. § 21.3(i) (1999).

The protester contends that the power of attorney accompanying its bid bond, although a facsimile copy, was valid, and that its bid was thus responsive. Specifically, the protester argues that a facsimile power of attorney is acceptable where it is apparent from the bid bond documents that the surety intends to be bound by a facsimile version. Kemper maintains that it was apparent from language on the reverse side of the power of attorney authorizing the signing and sealing of a power of attorney by facsimile and from the presence of the surety's original crimped seal on the bid bond itself that the surety intended to be bound by the facsimile.

A bid bond is a form of 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. 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. The determinative question as to the acceptability of a bid bond is whether the bid documents, including the power of attorney appointing an attorney-in-fact with authority to bind the surety, establish unequivocally at the time of bid opening that the bond is enforceable against the surety should the bidder fail to meet its obligations. 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. Collins Cos., B-274765, Dec. 27, 1996, 96-2 CPD ¶ 243 at 2.

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, to be certain that there had not been alterations to which the surety had not consented, and that the government would therefore be secured. A faxed bid guarantee document, which is an electronically transmitted copy, is subject to the same uncertainty. Id.

Here, we think that the agency correctly determined that the bid bond documents submitted by Kemper did not definitely establish that its surety would be bound in the event Kemper failed to meet its obligations. Specifically, the power of attorney was not clearly valid, because it was a faxed copy. To the extent that the protester believes that the power of attorney was valid because the language printed on its reverse stated that the surety consented to be bound by a facsimile copy, we disagree. While the power of attorney provided that the signatures of designated corporate officers and the seal of the Corporation might be "affixed by facsimile" on a power of attorney or certificate, we believe that this phrase refers to signatures produced by mechanical means (for example, stamped or printed signatures), not to faxed (or photocopied) documents. Collins Cos., supra, at 3; Frank and Son Paving, Inc., B-272179, Sept. 5, 1996, 96-2 CPD ¶ 106 at 3. In other words, the phrase "affixed

by facsimile” refers to signatures created mechanically, not to documents (whether or not they include signatures) transmitted by a fax machine.²

Further, the presence of the surety’s original crimped seal on the bid bond was not sufficient to render the bond acceptable. While the raised corporate seal does constitute evidence of the authenticity of a bond, Daley Corp.-California Commercial Asphalt Corp., J.V., B-274203.2, Dec. 9, 1996, 96-2 CPD ¶ 217 at 4, it is not a substitute for an express indication that the surety intends to be bound by the bond even without the original signature of its authorized representative. Brothers Constr. Co., Inc., B-278042, Nov. 10, 1997, 97-2 CPD ¶ 135 at 2.

The protest is denied.

Comptroller General
of the United States

²In support of its position, the protester relies on Ray Ward Constr. Co., B-256374, June 14, 1994, 94-1 CPD ¶ 367, and Services Alliance Sys., Inc., B-255361, Feb. 22, 1994, 94-1 CPD ¶ 137. To the extent these cases suggest that the phrase “affixed by facsimile” refers to signatures transmitted by fax machine, they will no longer be followed.