



Decision

Matter of: Intercontinental Construction Contracting, Inc.

File: B-414843

Date: September 25, 2017

Hal J. Perloff, Esq., Husch Blackwell LLP, for the protester.
James H. Roberts III, Esq., Van Scoyoc Roberts PLLC, for Benaka, Inc., the intervenor.
Deena G. Braunstein, Esq., Department of the Army, for the agency.
Nora K. Adkins, Esq., and Amy B. Pereira, Esq., Office of the General Counsel, GAO,
participated in the preparation of the decision.

DIGEST

Agency properly rejected a bid as non-responsive where the individual signing the bid bond as attorney-in-fact failed to include with the bid bond evidence of his authority to bind the surety.

DECISION

Intercontinental Construction Contracting, Inc. (ICCI), a small business located in Passaic, New Jersey, protests the rejection of its bid under invitation for bids (IFB) No. W912QR-17-B-0006, which was issued by the Department of the Army, U.S. Army Corps of Engineers for work on the Army Reserve Center in Bullville, New York. The protester argues that the agency improperly rejected its bid as non-responsive.

We deny the protest.

The IFB was issued on March 24, 2017, as a small business set-aside. IFB at 1. The solicitation sought bids for the construction, addition, and alteration of an existing 150-member Army Reserve Center in Bullville, New York. Id. The IFB contemplated the award of a fixed-price contract, and required bidders to submit a bid guarantee with their bids in the amount of twenty percent of the bid price or three million dollars, whichever was less. Id. at 3-4, 18. The solicitation stated that failure to furnish a bid guarantee in the proper form or amount, by the time set for opening of bids, may be cause for rejection of the bid. Id. at 18.

The agency conducted a public bid opening on May 3, and four bids were received. Contracting Officer's Statement at 2; Agency Report (AR), Tab 7, Tabulation of Bids,

at 1. ICCI was the apparent low bidder. AR, Tab 7, Tabulation of Bids, at 1. The agency reviewed ICCI's bid package and found that ICCI's bid was accompanied by a bid bond that listed ICCI as principle and Selective Insurance Company of America (SICA) as surety. AR, Tab 9, ICCI Bid Bond, at 1. In the space provided for the surety, ICCI's bid bond contained the signature of M.C.¹, who was identified as the "attorney-in-fact"² on behalf of the surety. Id. Included with ICCI's bid bond was a power of attorney³, signed by the surety's Senior Vice President of Strategic Business Units, Commercial Lines, authorizing a specific individual (C.K.) to bind the surety. Id. at 3. The power of attorney did not name M.C. as being authorized to bind the surety. Id. As a result, the agency concluded that ICCI failed to provide evidence that the person signing its bid bond on behalf of the surety was authorized to do so, and the contracting officer rejected ICCI's bid. AR, Tab 10, Agency Notice of Non-Responsive Bid, at 1.

The protester learned that its bid had been rejected on May 3. Id. ICCI filed an agency-level protest on May 12. AR, Tab 13, Agency-Level Protest. On June 15, the agency notified ICCI that its agency-level protest was denied. AR, Tab 14, Agency Protest Decision. On June 23, ICCI filed the current protest.

ICCI argues that the agency unreasonably rejected its bid as nonresponsive. In support of its allegation, the protester cites FAR § 28.101-3, and asserts that this provision requires a contracting officer to handle any questions of authenticity and enforceability of the power of attorney as matters of responsibility, not responsiveness. In this regard, ICCI alleges that the surety's minor technical error--entering the wrong individual's name on the power of attorney--deals with the enforceability of the power of attorney. The Corps argues that it properly rejected ICCI's bid because the protester failed to provide evidence at the time of bid opening that the individual signing the bid bond as attorney-in-fact was authorized to sign the bond on behalf of the surety.

The purpose of a bid bond is to assure that a bidder will not withdraw its bid within the time specified for acceptance; it secures the liability of a surety to the government in the event the bidder fails to fulfill its obligations. Hamilton Pacific Chamberlain, LLC, B-410955, Mar. 30, 2015, 2015 CPD ¶ 114 at 2.

The FAR provision at issue here, FAR § 28.101-3, authority of an attorney-in-fact for a bid bond provides:

¹ Throughout this decision, we identify individuals by their initials rather than their full names.

² An attorney-in-fact is an agent, independent agent, underwriter, or any other company or individual holding a power of attorney granted by a surety. Federal Acquisition Regulation (FAR) § 28.001.

³ A power of attorney is the authority given one person or corporation to act for and obligate another, as specified in the instrument creating the power. FAR § 2.101.

(a) Any person signing a bid bond as an attorney-in-fact shall include with the bid bond evidence of authority to bind the surety.

* * *

(d) The contracting officer shall –

(1) Treat the failure to provide a signed and dated power of attorney at the time of bid opening as a matter of responsiveness; and

(2) Treat questions regarding the authenticity and enforceability of the power of attorney at the time of bid opening as a matter of responsibility. These questions are handled after bid opening.

FAR § 28.101-3.

Here, we find no reason to question the agency's rejection of ICCI's bid for failure to provide evidence of the attorney-in-fact's authority to bind the surety. The bid bond listed M.C. as the attorney-in-fact. The surety's power of attorney attached to ICCI's bid bond named C.K. as the attorney-in-fact authorized to bind SICA, not M.C. On this record, we find no basis to conclude that ICCI's failure to name the individual signing as attorney-in-fact in its power of attorney concerns a matter of enforceability of the power of attorney.⁴ FAR § 28.101-3(d)(2). Rather, the relevant inquiry is whether the attorney-in-fact submitted evidence of its authority to bind the surety. FAR § 28.101-3(a).

We find no evidence of M.C.'s authority to bind the surety, since the power of attorney did not name M.C. Indeed, the omission of M.C.'s name from the power of attorney is tantamount to a failure to provide a signed and dated power of attorney with the bid bond. FAR § 28.101-3(d)(1). Thus, the agency properly rejected ICCI's bid as non-responsive.

The protest is denied.

Susan A. Poling
General Counsel

⁴ We note that the power of attorney grants authority to C.K. and appears to be enforceable.