



Decision

Matter of: TJ's Marine Construction LLC

File: B-402227

Date: January 7, 2010

Tobin J. Tetterton for the protester.
M. Brooke Lamson, Esq., U.S. Army Corps of Engineers, for the agency.
Pedro E. Briones, Esq., and Guy R. Pietrovito, Esq., Office of the General Counsel,
GAO, participated in the preparation of the decision.

DIGEST

Where an invitation for bids required the submission of a bid guarantee, agency properly rejected protester's bid as nonresponsive where protester's bid bond contained a copy of the surety agent's signature.

DECISION

TJ's Marine Construction LLC of Belhaven, North Carolina, protests the rejection of its bid by the U.S. Army Corps of Engineers (USACE) under invitation for bids (IFB) No. W912HN-09-B-0020 for the replacement of breakwaters at Belhaven Harbor in North Carolina. USACE rejected TJ's Marine's bid because the protester's bid bond contained a copy of the surety agent's signature.

We deny the protest.

The IFB required bidders to submit a bid guarantee, or bid bond, in the amount of 20 percent of the bid price or \$3,000,000, whichever was less. IFB at 19. Bidders were informed that an original and two copies of sealed bids were required, and the solicitation did not authorize submission of bids either electronically or by facsimile. Id. at 1, 12; Legal Memorandum at 2.

TJ's Marine, which submitted the apparent second low bid,¹ provided a bid bond that

¹ The apparent low bid was rejected as nonresponsive for reasons that are not relevant to this protest. See Contracting Officer's Statement at 2.

contained the original signature of the principal and a copy of the surety agent's signature. Agency Report (AR), Tab E, Protester's Bid Bond. The protester's bid bond also contained an illegible and barely visible outline of a seal in the space designated for the corporate seal on the form. The agency rejected the protester's bid as nonresponsive. Contracting Officer's Statement at 3. This protest followed.²

TJ's Marine contends that it submitted a valid and enforceable bid bond, explaining that its bond was an original print-out of the bond emailed to it by the surety agent. Protest at 3; Comments at 2. The protester argues that, because the bid bond was a document formed during an interstate transaction involving electronic commerce as defined under the Electronic Signatures in Global and National Commerce (E-SIGN) Act, it thus became an original when the protester signed the document. Comments at 2-3, citing 15 U.S.C. § 7006. The protester also argues that the "solicitation nowhere prohibits a copy, telefax, or otherwise of the bid guarantee." Protest at 3. Moreover, the protester argues that the Federal Rules of Evidence (FRE) provide that a duplicate is admissible to the same extent as an original and that a paper rendering of an electronic record is an original. Protest at 4, citing FRE Rules 1003, 1004; Comments at 3, citing FRE Rule 1001.

The protester also notes that photocopies of powers of attorney are permitted under the Federal Acquisition Regulation (FAR) § 28.101-3(b) and that the FAR permits the agency to contact the surety after bid opening to correct any technical errors in the power of attorney. Comments at 7; see FAR § 28.101-3(d)(2). In this regard, TJ's Marine argues that "the power of attorney and the bid bond work together as integrated and mutually essential components of a whole," that is, the bond certificate's substantive coverage, or amount, and the power of attorney together make the bid guarantee responsive. Id. at 3-4.

The agency responds that the enforceability of the protester's bid bond was questionable and that it had no assurance that the copied bid bond document submitted by the protester was in fact the document signed by the surety.³ Legal Memorandum at 1, 6. USACE notes that the protester acknowledged to the agency that the bond was a copy and that the original bond was not available at bid opening. Id. at 3. The agency argues that the FAR provision permitting the submission of copies of powers of attorney does not apply to the bid bond itself and disagrees with

² In response to the agency's request, we invoked the express option provisions of our Bid Protest Regulations. See 4 C.F.R. § 21.10 (2009).

³ In responding to the protest, the agency does not contend that the illegible copy of the surety's corporate seal provides a basis for rejecting the protester's bid. We have found that the failure to affix corporate seals to a bid bond does not render the bid nonresponsive and such seals may be furnished after bid opening. See Siska Constr. Co., Inc.--Recon., B-218208, B-218208.2, Mar. 21, 1985, 85-1 CPD ¶ 331 at 4.

the protester's arguments regarding electronic commerce because the IFB did not permit electronic submissions and the protester submitted the bid bond as a paper copy, not electronically.⁴ See id. at 7, 11. Citing the IFB's incorporation of FAR § 52.228-1(a), which provides that "[f]ailure to furnish a bid guarantee in the proper form and amount, by the time set for opening of bids, may be cause for rejection of the bid," and FAR § 52.214-5(d), which provides that "[f]acsimile bids . . . will not be considered unless authorized by the solicitation," the agency argues that the contracting officer correctly determined that the bid was nonresponsive.

The sufficiency of a bid bond relates to whether the government will receive full and complete protection in the event that the bidder fails to execute the required contract documents and deliver the required performance and payment bonds. BW JVI, LLC, B-401841, Dec. 4, 2009, 2009 CPD ¶ __ at 3. 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 or uncertainty exists at the time of bid opening that the bidder has furnished a legally binding bond, the bid itself is rendered defective and must be rejected as nonresponsive. See Blakelee Inc., B-239794, July 23, 1990, 90-2 CPD ¶ 65 at 4; A & A Roofing Co., Inc., B-219645, Oct. 25, 1985, 85-2 CPD ¶ 463 at 1-2.

The determinative question in judging the sufficiency of a bid guarantee such as a bid bond is whether it could be enforced if the bidder subsequently fails to execute required contract documents and to provide performance and payment bonds. Southern California Eng'g Co., Inc., B-232390, Oct. 25, 1988, 88-2 CPD ¶ 391 at 1. For the bid guarantee to be viewed as enforceable, the surety must appear to be clearly bound based on the information in the possession of the contracting officer at the time of bid opening. Frank & Son Paving, Inc., B-272179, Sept. 5, 1996, 96-2 CPD ¶ 106 at 1. Copies of bid guarantee documents, whether transmitted electronically or hand-delivered, generally do not satisfy the requirement for a bid guarantee since there is no way, other than by referring to the original documents after bid opening, for the contracting agency to be certain that there had not been alterations to which the surety had not consented and could use as a basis to disclaim liability. Excel Bldg. & Dev. Corp., B-401955, Dec. 23, 2009, 2009 CPD ¶ __ at 3. See Jay-Brant Gen. Contractors, B-274986, Jan. 10, 1997, 97-1 CPD ¶ 17 at 3; G&A Gen. Contractors, B-236181, Oct. 4, 1989, 89-2 CPD ¶ 308 at 1.

⁴ Section 28.101-3 of the FAR provides that a copy of an original power of attorney, including a photocopy or facsimile copy, when submitted in support of a bid bond, is sufficient evidence of the authority to bind the surety. See Johnson Mach. Works, Inc., B-297115, Oct. 20, 2005, 2005 ¶ CPD 188 at 3 n. 3; see also Hawaiian Dredging Constr. Co., Inc. v. United States, 59 Fed. Cl. 305, 314, n. 7 (2004), citing FAR § 52.228-1 (original signature required on bid bond, not power of attorney).

Here, we find that the USACE properly rejected TJ's Marine's bid. The bid bond submitted with the protester's bid did not contain the surety's agent's original signature. Without referring, after bid opening, to the document containing the surety agent's original signature, the USACE cannot ascertain whether or not there had been alterations to which the surety had not consented and could use as a basis to disclaim liability. Accordingly, TJ's Marine's bid guarantee cannot be viewed as enforceable based on the information in the possession of the contracting officer at the time of bid opening.

We do not agree with the protester that the E-SIGN Act requires the USACE to accept the copy of the surety agent's signature on TJ's Marine's bid bond. The E-SIGN Act provides that a governmental agency need not accept electronic signatures with respect to a contract. See Excel Bldg. & Dev. Corp., supra, at 4, citing 15 U.S.C. § 7001(b)(2), FAR § 4.502. TJ's Marine's arguments concerning the FRE are also without merit. The FRE govern the admission of evidence in federal courts. They do not, however, answer the issue here as to whether an agency can ascertain at bid opening whether or not a copied document has been altered from the original. See id. at 4 n. 3.

We also disagree with the protester's suggestion that extrinsic evidence may be submitted after bid opening to establish the enforceability of a bid bond that contained only a copy of the surety agent's signature. Extrinsic evidence may be submitted after bid opening to resolve any minor discrepancies between the principals named on the bid and bid bond, BW JVI, LLC, supra, at 3-4, or to resolve questions regarding the authority of an agent to bind the bidder or surety, Siska Constr. Co., Inc.-Recon., supra, at 4. The issue here, however, does not involve discrepancies between named principals or the authority of agents. Rather, as discussed above, the question in this case is whether the contracting agency could be certain at the time of bid opening that there had not been alterations to the copied bid bond to which the surety had not consented and could use as a basis to disclaim liability. In such cases, the bond's deficiency may not be cured by requesting submission of the original bond documents after bid opening because this would essentially provide the bidder with the option of accepting or rejecting the award by either correcting or not correcting the bond deficiency, which is inconsistent with the sealed bidding system. Bird Constr., B-240002; B-240002.2, Sept. 19, 1990, 90-2 CPD ¶ 234 at 2.

The protest is denied.

Lynn H. Gibson
Acting General Counsel