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**Comptroller General
of the United States**

**United States Government Accountability Office
Washington, DC 20548**

Decision

Matter of: Hamilton Pacific Chamberlain, LLC

File: B-409795

Date: August 11, 2014

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David B. Dempsey, Esq., and James C. Fontana, Esq., Dempsey Fontana, PLLC,
for the intervenor.
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Counsel, GAO, participated in the preparation of the decision.

DIGEST

Where an invitation for bids required the submission of a bid guarantee, the awardee's failure to submit an original bid guarantee at bid opening could not be waived as a minor informality and rendered the bid nonresponsive.

DECISION

Hamilton Pacific Chamberlain, LLC (HPC) of Waldorf, Maryland, protests the award of a contract to Utility Systems Solutions, Inc. (US2), of Dallas, Texas, under Invitation for Bids (IFB) No. VA-245-14-B-0046, issued by the Department of Veterans Affairs (VA) as a service-disabled, veteran-owned small business (SDVOSB) set-aside for steam trap replacement and installation of a new steam trap monitoring system at the VA Medical Center, Baltimore, Maryland. HPC contends that US2's bid was nonresponsive because US2 provided only a copy of its required bid guarantee with the bid.

We sustain the protest.

BACKGROUND

The IFB required each bidder to submit an original and a copy of its sealed bid. IFB at 1. Bidders were also required to submit a bid guarantee, or bid bond:

A bid guarantee is required in an amount not less than 20 percent of the bid price but shall not exceed \$3,000,000. Failure to furnish

the required bid guarantee in the proper form and amount, by the time set for opening of bids, will require rejection of the bid in all cases except those listed in FAR 28.101-4, and may be cause for rejection even then.

IFB at 7. The IFB also included standard Federal Acquisition Regulation (FAR) clause 52.228-1, which informed bidders that the failure to furnish a bid guarantee in the proper form and amount may result in rejection of the bid. IFB at 13.

VA received nine bids at bid opening. US2 submitted the second lowest bid of \$336,717, and HPC submitted the third lowest bid of \$369,429. Agency Report (AR), Tab 7, Bid Abstract. VA rejected the lowest bid because the bidder was not listed in the VA's Vendor Information Pages database as a verified and eligible SDVOSB firm. AR, Tab 11, VA Letter to Low Bidder.

US2 submitted both an original and a copy of its bid, as required by the IFB. Contracting Officer's (CO) Statement at 1. US2's original bid did not include a bid guarantee. Id.; AR, Tab 8, US2 Bid (Original). US2, however, included a copy of its bid guarantee with an attached power of attorney with the copy of its bid.¹ CO's Statement at 1; AR, Tab 9, US2 Bid (Copy).

The contracting officer reviewed only the original bids at bid opening, and determined that US2's bid should be rejected because US2 had not provided the required bid guarantee.² US2 protested the rejection of its bid to the agency, and, as part of its protest, provided the original version of its bid guarantee, which US2 stated was inadvertently omitted from its original bid. CO's Statement at 2. VA upheld US2's protest, concluding that US2's failure to provide an original bid guarantee should be considered a minor informality or irregularity that US2 cured after bid opening. Id.

Following notice that VA intended to rescind the rejection of US2's bid, HPC protested to our Office. Id.

¹ 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.

² Following the rejection of US2's bid, the contracting officer discovered that US2 had included a copy of its bid guarantee with the copy of its bid. CO's Statement at 2.

DISCUSSION

HPC contends that US2's submission of a photocopied bid guarantee without original signatures rendered US2's bid nonresponsive, and is not a "minor informality or irregularity" that may be waived or cured after bid opening. Protest at 2.

The VA responds that, although US2 submitted only a copy of its bid guarantee, the accompanying power of attorney shows that US2's surety, SureTec Insurance Company, agreed to be bound by a facsimile or photocopy version of the power of attorney, as well as "any bond or undertaking to which it is attached".³ AR at 3. VA argues accordingly that a copy of US2's bid guarantee sufficiently demonstrated SureTec's intent to be bound and that therefore US2's bid was responsive. *Id.* at 4, citing Ray Ward Constr. Co., B-256374, June 14, 1994, 94-1 CPD ¶ 367. VA also notes that the bid guarantee was submitted in the correct amount and was signed by US2's President, as the principal, and by the surety's attorney-in-fact; and it bore copies of the corporate seals of both companies. The VA further notes that US2's original bid consisted of a signed Standard Form 1442, on which US2 acknowledged all solicitation amendments, and that US2 did not take any exceptions to the solicitation's material terms and conditions.

The VA elected to conduct this procurement using sealed bidding. Under the sealed bidding framework, bids are publicly opened, FAR § 14.101(c), and upon opening "must comply in all material respects with the invitation for bids". FAR § 14.301(a). The issue of the bid's compliance with the material terms of the invitation, *i.e.*, the bid's responsiveness, must be clear at bid opening. GAO has long recognized that permitting a bidder to correct an issue of responsiveness after bid opening would open the door to manipulation of the competitive bidding system to permit a bidder to decide after bids have been exposed whether to attempt to have its bid accepted or rejected. *See Johnson Mach. Works*, B-297115, Oct. 20, 2005, 2005 CPD ¶ 188 at 3 (involving questionable bid guarantee); *see also Trans South Indus., Inc.*, B-224950, Dec. 19, 1986, 86-2 CPD ¶ 692 at 2.

³ The VA also argues that the contracting officer was permitted to treat US2's failure to submit the original version of its bid guarantee with its bid as a minor informality or irregularity pursuant to VA Acquisition Regulation, 48 C.F.R. § 814.404-2(a)(1), which allows the contracting officer to make a determination that an incomplete bid would nevertheless create a valid and binding contract to perform all material terms and conditions of the solicitation. *See* AR at 5. As discussed *infra*, however, the failure to provide a binding bid guarantee at bid opening means that US2 did not submit a bid that would satisfy all material solicitation requirements.

When required by a solicitation, a bid guarantee is a material condition of the IFB with which there must be compliance at the time of bid opening.⁴ A.D. Roe Co., Inc., B-181692, Oct. 8, 1974, 74-2 CPD ¶ 194 at 3. Noncompliance with a solicitation requirement for a bid guarantee generally renders the bid nonresponsive and requires rejection of the bid.⁵ FAR § 28.101-4(a); Shaka, Inc., B-405552, Nov. 14, 2011, 2011 CPD ¶ 252 at 3. The sufficiency of a bid guarantee depends on whether the surety is clearly bound by its terms; when the liability of the surety is not clear, the bond is defective. Hostetter, Keach & Cassada Constr., LLC, B-403329, Oct. 15, 2010, 2010 CPD ¶ 246 at 3. 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.

As an initial matter, we do not agree with VA that the power of attorney submitted with the bid guarantee indicated the surety's agreement to be bound by the "facsimile" signature of its attorney-in-fact on a bid bond.⁶ Rather, the power of attorney stated in pertinent part:

Be it Resolved, that the signature of any authorized officer and seal of the Company heretofore or hereafter affixed to any power of

⁴ A bid guarantee is a form of security that ensures that a bidder will not withdraw its bid within the period specified for acceptance, and, if required, will execute a contract and furnish required performance and payment bonds. FAR § 28.001. Where the guarantee is in the form of a bid bond, it secures the liability of the surety to the government, thereby providing funds to cover the excess costs of awarding to the next eligible bidder in the event that the bidder awarded the contract fails to fulfill these obligations. Harris Excavating, B-284820, June 12, 2000, 2000 CPD ¶ 103 at 3; see also FAR clause 52.228-1(d),(e).

⁵ Prior to 1959, the failure of a bidder to submit a bid bond when required by the IFB could be waived by a contracting officer, if the failure was due to inadvertence or other excusable cause not related to the bidder's financial ability to secure the bond. Since that date, we have consistently held that the failure to submit an enforceable bid bond at bid opening, when required by the IFB, is a material failure that renders the bid nonresponsive. See 38 Comp. Gen 532 (1959) (waiving a bid bond requirement after bid opening compromises the integrity of the competitive bid system by (1) making it possible for a bidder to decide after opening whether or not to try to have its bid rejected, (2) causing undue delay in effecting procurements, and (3) creating, by the necessary subjective determinations by different contracting officers, inconsistencies in the treatment of bidders).

⁶ An "attorney-in-fact" means an agent, independent agent, underwriter, or any other company or individual holding a power of attorney granted by a surety. FAR § 28.001.

attorney or any certificate relating thereto by facsimile, and any power of attorney or certificate bearing facsimile signature or facsimile seal shall be valid and binding upon the Company with respect to any bond or undertaking to which it is attached.

AR, Tab 9, US2 Bid (Copy), SureTec Limited Power of Attorney. We read this resolution to indicate the surety's agreement that it would be bound by facsimile signatures and seals with respect to the appointment of an attorney-in-fact to sign bid bonds on the surety's behalf.⁷ Despite the VA's contention to the contrary, however, the power of attorney does not address, or otherwise commit, the surety to be bound by the facsimile signature of its attorney-in-fact on a bid bond. As a result, we do not view this situation as covered by the exception in Ray Ward Constr. Co., supra, at 3-4 (a facsimile of power of attorney could be accepted at bid opening where the power of attorney clearly established the intent of the surety to be bound by the facsimile signature of a corporate officer on the power of attorney that included an original corporate seal).

Since the power of attorney does not commit the surety to be bound by a photocopied signature on a bid bond, the question here is whether a photocopy of the omitted original bid bond could satisfy the solicitation's requirement that Hamilton provide a bid guarantee in the form of a firm commitment. As the VA recognizes, we have long held that 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. See Excel Bldg. & Dev. Corp., B-401955, Dec. 23, 2009, 2009 CPD ¶ 262 at 3; Regional Dev. Corp.--Recon.; Ware's Van & Storage Co., Inc.--Recon., B-251299.2; B-251431.2, Mar. 16, 1993, 93-1 CPD ¶ 238; Executone Information Sys., Inc., B-246155, Oct. 21, 1991, 91-2 CPD ¶ 353. In the absence of compelling argument, which is absent here, we will follow our long-standing precedent.

In this case, the record does not establish that US2 submitted an enforceable bid guarantee, as required by the IFB. Without referring, after bid opening, to the document containing the surety agent's original signature, the VA could not ascertain whether or not there had been alterations to which the surety had not consented and could use as a basis to disclaim liability. In these circumstances, the submission of a copy of the bid guarantee was not a correctable minor informality,

⁷ In this respect, SureTec's power of attorney is consistent with section 28.101-3(b) of the FAR, which provides that a copy of an original power of attorney is sufficient evidence of an attorney-in-fact's authority to bind the surety. See Johnson Mach. Works, Inc., B-297115, Oct. 20, 2005, 2005 CPD ¶ 188 at 3 n.3.

as the VA suggests, and could not be cured by the submission of the original bond 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 concept of procuring using sealed bids. TJ's Marine Constr. LLC, B-402227, Jan. 7, 2010, 2010 CPD ¶ 19 at 4.

The government procurement community has, for many years, wrestled with the issue of photocopies of bid bonds and the power of attorney documents that accompany them. See All Seasons Const. Inc. v. United States, 55 Fed. Cl. 75 (2003) (denying bid protest on basis that rejected bid contained photocopied power of attorney); Hawaiian Dredging Const. Co. v. United States, 59 Fed. Cl. 305 (2004) (unreasonable to reject bid just because bid bond was accompanied by a power of attorney with mechanically applied signature; because the bidder submitted board resolutions which bound the surety to powers of attorney with facsimile signatures and other documents that were facially valid, the documents as a whole established the surety's intention to be bound). In response to the court's decision in Hawaiian Dredging, the FAR Council amended the regulation to establish 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. In addition, the new rule provides that the authenticity and enforceability of the power of attorney will be treated as a matter of responsibility. See FAR § 28.101-3(b), (d)(2); see also Powers of Attorney for Bid Bonds, 70 Fed. Reg. 57459 (Sept. 30, 2005). The FAR Council in amending the rules governing powers of attorney made no changes to the regulations governing bid bonds. In this case, where there is a well-established rule in the realm of sealed bids, we leave it to the FAR Council to consider, as it did in 2005, whether to adopt a different rule. Having clearly articulated rules in the arena of sealed bidding increases transparency and integrity in the process.

RECOMMENDATION

We recommend that the VA reject US2's bid as nonresponsive, and identify the next lowest-priced, responsive bidder, and make award to that firm, if otherwise proper. We also recommend that HPC be reimbursed the costs of filing and pursuing its protest, including reasonable attorneys' fees. Bid Protest Regulations, 4 C.F.R. § 21.8(d)(1) (2014). The protester should submit its certified claim for such costs, detailing the time expended and the costs incurred, directly to the contracting agency within 60 days after receipt of this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

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General Counsel