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**Comptroller General
of the United States**

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

Decision

Matter of: Johnson Machine Works, Inc.

File: B-297115

Date: October 20, 2005

Steven L. Briggerman, Esq., Grace Bateman, Esq., John T. Bergin, Esq., and Jamison L. Weinbaum, Esq., Seyfarth Shaw LLP, for the protester.

David J. Buono, Esq., Dunn Carney Allen Higgins & Tongue LLP, for Oregon Iron Works, Inc., an intervenor.

William A. Lubick, Esq., Army Corps of Engineers, for the agency.

Louis A. Chiarella, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Where corporate surety's power of attorney form attached to bid bond failed to designate the individual who signed the bond on behalf of the surety as an attorney-in-fact authorized to bind the surety, contracting agency properly determined the bond was defective and the bid nonresponsive because it is not clear whether the surety would be bound. Evidence of the authority of surety's agent to sign bid bond on behalf of the surety must be furnished with a bid prior to bid opening, and failure to furnish it renders the bid nonresponsive.

DECISION

Johnson Machine Works, Inc. (JMW) protests the rejection of its low bid under invitation for bids (IFB) No. W911WN-05-B-0004, issued by the Army Corps of Engineers, Department of the Army, for work on the Emsworth Locks and Dams, located on the Ohio River in western Pennsylvania. The Corps rejected JMW's bid because the surety's power of attorney attached to the bid bond failed to designate the individual who signed the bond on behalf of the surety as an attorney-in-fact authorized to bind the surety.

We deny the protest.

The IFB, issued on July 22, 2005, sought the fabrication and delivery of two vertical lift gates as part of the rehabilitation project of the Emsworth Locks and Dams, to be performed within 180 calendar days after receipt of the Notice to Proceed. The IFB

required each bidder to submit with its bid a bid guarantee (e.g., a bid bond supported by good and sufficient surety or sureties, postal money order, certified check, or cashier's check) in the amount of 20 percent of the bid price or \$3 million, whichever was less. IFB § I-4. With regard to a bidder's submission of a bid bond as its bid guarantee, the solicitation stated that a valid power of attorney for an individual acting as agent for the surety shall accompany the bid bond, and that the failure to furnish a bid bond or a valid power of attorney, as specified, with the bid may result in rejection of the bid for noncompliance. IFB § L-5.

Three bids, including the low bid of JMW, were received by the August 22 bid opening. The Corps rejected JMW's bid as nonresponsive, however, having determined that the bid guarantee was improper. Specifically, JMW's bid was accompanied by a bid bond that listed JMW as principal and Employers Mutual Casualty Company (EMC) as corporate surety. In the space provided for the surety, the bid bond contained the signature of David L. Hixenbaugh, who was identified as "attorney-in-fact" on behalf of the surety.¹ Agency Report (AR), Tab 4, JMW Bid, at 16. Included with JMW's bid bond was a power of attorney, signed by the surety's president, authorizing specific individuals (Sue A. Allen and Bruce D. Kingsbury) to bind the surety; the power of attorney, however, did not name Mr. Hixenbaugh as being authorized to bind the surety.² *Id.* at 18. The contracting officer determined that the liability of the surety on JMW's bid bond was uncertain, because there was no evidence to show that Mr. Hixenbaugh was an attorney-in-fact or was otherwise authorized to sign the bond on behalf of the surety. AR at 3. This protest followed.

JMW argues that the agency should not have rejected its bid because the bid bond was valid and effective. In support thereof, JMW contends that the bid documents clearly established that Mr. Hixenbaugh was authorized to sign the bond and bind the surety. The Corps argues that the protester's failure to provide documentary evidence at the time of bid opening that Mr. Hixenbaugh was authorized to bind the surety represented a defect that could not be cured after bids were opened, and that the bid had to be rejected as nonresponsive.

¹ 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. Federal Acquisition Regulation (FAR) § 28.001. 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 The power of attorney included a certification signed by Mr. Hixenbaugh, as EMC vice president, attesting to the authority of the surety's president to appoint attorneys-in-fact and declaring that the power of attorney appointments of the named individuals were true, correct, and still in full force and effect. *Id.* at 18.

A bid bond 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 written contract and furnish required performance and payment bonds. See FAR § 28.001. The purpose of a bid bond is to secure the liability of a surety to the government for excess procurement costs in the event the successful bidder defaults by failing to execute the necessary contractual documents or to furnish the required payment and performance bonds. See FAR § 52.228-1(d), (e); Mars Elec. Inc., B-245192, Aug. 23, 1991, 91-2 CPD ¶ 195 at 2. The sufficiency of a bid bond depends on whether the surety is clearly bound by its terms; when the liability of the surety is not clear, the bond is defective. E&R, Inc., B-255868, Mar. 29, 1994, 94-1 CPD ¶ 218 at 3. The reason for this is that under the law of suretyship no one can be obligated to pay the debts or to perform the duties of another unless that person has expressly agreed to be bound. Andersen Constr. Co.; Rapp Constructors, Inc., B-213955, B-213955.2, Mar. 9, 1984, 84-1 CPD ¶ 279 at 4.

When required by a solicitation, a bid bond or other bid guarantee is a material part of the bid, noncompliance with which renders the bid nonresponsive and generally requires rejection of the bid. FAR § 28.101-4(a); Nova Group, Inc., B-220626, Jan. 23, 1986, 86-1 CPD ¶ 80 at 2. This is because permitting correction of a bid guarantee after bid opening would open the door to manipulation of the competitive bidding system by permitting a bidder to decide after other bids have been exposed whether to attempt to have its bid accepted or rejected. Trans South Indus., Inc., B-224950, Dec. 19, 1986, 86-2 CPD ¶ 692 at 2.

A bid bond submitted with an invalid power of attorney certificate renders the bid nonresponsive.³ See, e.g., Big River Constr. Co., B-250961, Oct. 26, 1992, 92-2 CPD ¶ 283 at 2; Techno Eng'g & Constr., Ltd., B-243932, July 23, 1991, 91-2 CPD ¶ 87 at 2-3. This is so because a power of attorney authorizes an agent to act for the surety and only a valid power of attorney would indicate that the surety expressly agreed to be bound to pay the bond signed by the attorney-in-fact. E&R, Inc., *supra*,

³ Subsequent to the date of bid opening here, a new provision, § 28.101-3, was added to the FAR, effective September 30, 2005, establishing 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, and making questions concerning the authenticity and enforceability of a power of attorney at the time of bid opening a matter of bidder responsibility (to be handled after bid opening) rather than bid responsiveness. See 70 Fed. Reg. 57,459 (Sept. 30, 2005). We note that the new regulatory provision does not specifically address the circumstance where, as here, the power of attorney submitted to evidence the attorney-in-fact's authority to bind the surety fails to name the attorney-in-fact. In any event, we see no basis to apply a provision that was not in effect at the time the solicitation here was issued. See FAR § 1.108(d)(1) (FAR changes apply to solicitations issued on or after the effective date of the change).

at 4. A power of attorney is to be strictly construed. The surety's power of attorney must establish unequivocally that the individual who signed the surety's bond was authorized to bind the surety, and we will not convert ambiguous aspects of powers of attorney into mere matters of form which can be explained away and waived. Id.

Here, the surety's power of attorney attached to the bond listed only Ms. Allen and Mr. Kingsbury as attorneys-in-fact authorized to bind EMC, and did not also list Mr. Hixenbaugh, the individual who signed the bond as attorney-in-fact on behalf of the surety. The failure of EMC's power of attorney to list Mr. Hixenbaugh thus created an uncertainty as to whether Mr. Hixenbaugh was duly authorized to bind EMC, thereby rendering the bond defective and JMW's bid nonresponsive under the regulations then in effect. See Techno Eng'g & Constr., Ltd., supra.

JMW does not dispute that its bid bond identified Mr. Hixenbaugh as attorney-in-fact on behalf of the surety, while the accompanying power of attorney failed to list Mr. Hixenbaugh as an attorney-in-fact for EMC.⁴ Nonetheless, JMW argues that it submitted a valid bid bond with its bid, the rejection of which by the agency was improper. In support thereof JMW contends that the bid documents establish that Mr. Hixenbaugh was a vice president of EMC, that as a vice president of the surety Mr. Hixenbaugh had the legal authority to bind EMC on bid bonds (as well as the authority to appoint attorneys-in-fact on behalf of the surety), and that his signature on the bid bond did in fact bind EMC as surety. Protest at 5-6.

Whether Mr. Hixenbaugh had actual authority to bind the surety is not dispositive; rather, the issue is whether it appeared from the face of the bid documents that Mr. Hixenbaugh's signature on behalf of the surety was authorized and binding. See Techno Eng'g & Constr., Ltd., supra, at 3. Our review of the power of attorney indicates only that Mr. Hixenbaugh is a vice president of EMC, and that EMC vice presidents have the authority to appoint and remove attorneys-in-fact on behalf of the surety. The power of attorney does not, however, as the protester represents, demonstrate that Mr. Hixenbaugh's position as vice president, or his authority to appoint attorneys-in-fact, carried with it the authority to bind the surety, and JMW has been unable to point to any aspect of the power of attorney which evidences this critical detail.⁵

⁴ JMW contends that the surety inadvertently failed to include the power of attorney appointing Mr. Hixenbaugh as attorney-in-fact on behalf of EMC with the bid bond. Protest at 3. In an apparently contradictory statement, JMW also contends that Mr. Hixenbaugh mistakenly identified himself and erroneously executed the bid bond as attorney-in-fact rather than as a vice president of EMC. Protest at 4, exh. 4, Affidavit of David L. Hixenbaugh, at 1.

⁵ The fact that Mr. Hixenbaugh signed the bond as attorney-in-fact, and not as EMC vice president, further undermines the protester's assertion that Mr. Hixenbaugh's
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In its comments on the agency's report on the protest, the protester also argues that Mr. Hixenbaugh, as an officer of the surety, could execute the bid bond and bind the company without presenting any independent evidence of his or her authority to do so. Relying upon Hawaiian Dredging Constr. Co., Inc. v. United States, 59 Fed. Cl. 305 (2004), JMW contends that, under the instructions which accompanied the required bid bond form, when the person executing the bond on behalf of the surety is an officer of the surety, the individual is not required to provide any further evidence of his or her authority to bind the company.⁶ Comments at 4-5. Thus, JMW argues, as Mr. Hixenbaugh was known to be an officer of the surety from the bid documents provided, he was not required to furnish evidence of his authority to sign the bond in a representative capacity. We disagree.

The bid bond instructions state, in relevant part:

Insert the full legal name and business address of the Principal in the space designated "Principal" on the face of the form. An authorized person shall sign the bond. Any person signing in a representative capacity (e.g., an attorney-in-fact) must furnish evidence of authority if that representative is not a member of the firm, partnership, or joint venture, or an officer of the corporation involved.

IFB § K, Standard Form 24, Bid Bond, at 2; FAR § 53.301-24.

We think that JMW's reliance on this bid bond instruction is misplaced. First, we think that the bond instruction here is intended to apply to the person signing the bond for the principal, and not the person executing the bond on behalf of the surety. To find otherwise as JMW suggests--that any member or officer of the surety need not furnish evidence of his or her authority to execute bonds and bind the surety--would eviscerate a central tenet of suretyship law, that there be an express

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position as vice president automatically provided him with the authority to bind the surety.

⁶ In Hawaiian Dredging Constr. Co., Inc. v. United States, the Court of Federal Claims held that the agency unreasonably rejected a contractor's bids on the ground that the power of attorney appointing the attorney-in-fact who executed the bonds on behalf of the surety lacked original signatures, when the bid documents themselves unequivocally established the surety's intent to be bound by mechanically-applied (i.e., facsimile) signatures. The Court found that while both applicable procurement regulations and the bid bond instructions required the person executing the bond on behalf of a corporate surety to furnish evidence of his or her authority to do so, neither required an original signature on the document that served as evidence of such authority (e.g., the power of attorney).

agreement of the surety to be bound. See Andersen Constr. Co.; Rapp Constructors, Inc., supra. In this regard, the court in Hawaiian Dredging cited the bid bond instruction in the context of affirming the same principle that we apply here, that an individual signing a document on behalf of a corporate surety must furnish evidence of his authority. Hawaiian Dredging Constr. Co., Inc. v. United States, supra, at 310. The language from the instruction on which JMW relies—requiring evidence of authority if the representative is “not a member of the firm, partnership, or joint venture, or an officer of the corporation involved”—simply was not at issue in the case. Moreover, JMW ignores the fact that the IFB here expressly informed bidders that “[a] valid power of attorney for an individual acting as agent for the surety shall accompany the bond,” and that “[f]ailure to furnish a bid bond or a valid power of attorney, as specified, with the bid may result in rejection of the bid for noncompliance.” IFB § L-5. In sum, we find JMW’s argument that any officer of a surety can execute bonds and bind the surety without presenting any independent evidence of his or her authority to do so, including the signature of Mr. Hixenbaugh on the bond here, to be without merit.

Lastly, the protester argues that the Corps should accept extrinsic evidence that Mr. Hixenbaugh was in fact authorized to sign the bid bond and bind EMC. We have previously, and repeatedly, rejected this argument. The responsiveness of a bid must be determined solely from the bid documents; thus, the fact that extrinsic evidence may establish that the individual who executed the bond on behalf of the surety was authorized to do so is of no consequence, notwithstanding the fact that evidence was in existence at the time of bid opening. See E&R, Inc., supra, at 5; Techno Eng’g & Constr., Ltd., supra, at 3; Baldi Bros. Constructors, B-224843, Oct. 9, 1986, 86-2 CPD ¶ 418 at 3. Quite simply, a bid which is nonresponsive due to the lack of an adequate bid guarantee cannot be made responsive by furnishing the guarantee in proper form after bid opening. Nova Group, Inc., supra, at 3; AVS, Inc., B-218205, Mar. 14, 1985, 85-1 CPD ¶ 328 at 2. Accordingly, we find that the agency correctly determined that JMW’s bond was defective based solely on the documents that JMW submitted with its bid prior to bid opening, and properly rejected JMW’s bid as nonresponsive.

The protest is denied.

Anthony H. Gamboa
General Counsel