



United States Government Accountability Office
Washington, DC 20548

Comptroller General
of the United States

Decision

Matter of: Excel Building & Development Corporation

File: B-401955

Date: December 23, 2009

John M. Lawhorn, Esq., Frantz, McConnell & Seymour, LLP, for the protester.

Bryan Ledford, for Bristol Group, Inc., an intervenor.

Antonio T. Robinson, Esq., Department of Agriculture, 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

Excel Building & Development Corporation of Johnson City, Tennessee, protests the rejection of its bid by the U.S. Forest Service, Department of Agriculture, under invitation for bids (IFB) No. AG-4756-S-09-0042 for the construction of a campground bathhouse in the Cherokee National Forest. The Forest Service rejected Excel's bid because the protester did not submit an original bid bond as required by the IFB.

We deny the protest.

The IFB required bidders to submit an original bid guarantee, or bid bond, in the amount of 20 percent of the bid price. IFB at 18. Bidders were informed that "hardcopy" bids were required and that faxed or emailed bids would not be accepted. *Id.* at 3.

Excel, which submitted the apparent low bid, provided a bid bond that contained the original signature of the principal and a copy of the surety agent's signature and seal. The contract specialist contacted the surety, who informed her that the original bond would have an original seal affixed to it. The contract specialist also contacted the surety's agent, who signed the bond, and he explained that he had emailed a copy of the bond to Excel and that the original, which he sent by FedEx, was received by the

protester after bid opening. Agency Report (AR), Tab 8, Contracting Specialist's Memorandum, at 1. The agency rejected the protester's bid as nonresponsive and awarded the contract to the second low bidder. Contracting Officer's Statement at 2. This protest followed.

Excel argues that it in fact submitted an original bid bond, explaining that its submitted bid bond was an original print of the bond emailed to it by the surety's agent. Protest at 1. The protester argues that "once the contents of the email were printed and signed by Excel . . . an original bid bond was created." See Protester's Comments at 2. The protester also contends that the signatures and seals on the bond are clear and legible and that the bond is binding regardless of whether the signatures are in their original ink, and adds that the power of attorney accompanying the bond expressly states that "[t]he corporate seal is not necessary for the validity of any bonds . . . [and t]he signature of any such officer and the corporate seal may be printed by facsimile."¹ Protester's Response to Agency's Dismissal Request at 1-2, citing Excel's Bid Bond at 3. According to the protester, signing, sealing, emailing, and then physically mailing the bond is standard industry practice. See Protester's Comments at 1, 3. Moreover, the protester argues that the Uniform Electronics Transactions Act (UETA) and the Electronic Signatures in Global and National Commerce (E-SIGN) Act have legitimized the use of email as a binding method of conducting business, and the Federal Rules of Evidence (FRE) recognizes a print-out of an email to be an original document. Id. at 2-3, citing FRE Rule 1001(3).

The agency responds that the protester did not submit an original bid bond, which raised questions as to whether the bid document was altered. AR at 1. In this regard, the Forest Service questions why the surety would send the original bond document by FedEx if, as the protester argues, the emailed version was the original.² The agency adds that it is not concerned with whether the power of attorney is binding because photocopies or facsimile copies of powers of attorney are permitted under the Federal Acquisition Regulation (FAR). See FAR § 28.101-3 (2009). 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," the agency argues that it properly rejected the protester's bid in accordance with that provision and FAR § 14.404-2(j) (bid shall be

¹ Excel has provided a letter from its surety agent, which states that the agent did in fact sign and seal the bond and delivered it to the protester via email. Protest at 2.

² The agency notes that Excel's CEO contacted the contracting specialist the day after bid opening and offered to deliver the original bid bond to her. See Contracting Specialist's Memorandum at 2. The contracting specialist also states that Excel's Vice President of Operations commented at bid opening that the firm had difficulty in receiving the bond from its bonding company in a timely manner.

rejected where bidder fails to furnish bid guarantee in accordance with requirements of IFB).

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. 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.

Moreover, a bond deficiency may not be cured by submitting 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 a 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. For this reason, a surety's post-bid opening letter to the contracting officer cannot establish the liability of the surety and responsiveness of the protester's bid. A nonresponsive bid cannot be made responsive after bid opening through an explanation of what the bidder or surety intended. Design for Health, Inc., B-239730, Sept. 14, 1990, 90-2 CPD ¶ 213 at 3.

Here, we find that the Forest Service properly rejected Excel's bid. The bid bond submitted with the protester's bid did not contain the surety's agent's original signature and seal. Without referring, after bid opening, to the document containing the surety agent's original signature, the Forest Service 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, Excel'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 Excel that the E-SIGN Act requires the Forest Service to accept the copy of the surety agent's signature on Excel's bid bond as an original signature.³ Rather, the E-SIGN Act provides that a governmental agency need not accept electronic signatures with respect to a contract. See 15 U.S.C. § 7001(b)(2). In this regard, the FAR provides that agencies may accept electronic signatures and records in connection with government contracts, see FAR § 4.502(d), but also recognizes that in allowing the use of electronic commerce, agencies may have to supplement electronic transactions "by using other media to meet the requirements of any contract action governed by the FAR (*e.g.*, transmit hard copy of drawings)." ⁴ See FAR § 4.502(a).

The protest is denied.

Lynn H. Gibson
Acting General Counsel

³ Excel's arguments concerning the Uniform Electronics Transactions Act and Federal Rules of Evidence are also without merit. The UETA is not a federal law but a model state act proposed by the National Conference of Commissioners on Uniform State Laws. See www.nccusl.org (last visited Dec. 22, 2009). 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. Moreover, FRE Rule 1002 generally requires an original writing to prove the content of that writing. See also FRE Rule 1003, which provides that "[a] duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original."

⁴ The Office of Management and Budget (OMB) has issued guidance to federal agencies explaining that the Act does not force contracting parties, whether the government or the private sector, to use or accept electronic signatures and records. See *Guidance on Implementing the Electronic Signatures in Global and National Commerce Act*, Memorandum for the Heads of Departments and Agencies, M-00-15, OMB, Sept. 25, 2000, available at www.whitehouse.gov/omb/memoranda_m00-15/ (last visited Dec. 22, 2009).