Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Morrison Construction Services

File: B-266233; B-266234

Date: January 26, 1996

John Chapman for the protester.
Gerald J. Brentnall, Jr., Esq., Rowley, Grace, Brentnall & Kraft, for Farinha, Inc., an interested party.
Calvin F. Boles IV, Esq., and Cynthia S. Guill, Esq., Department of the Navy, for the agency.
Susan K. McAuliffe, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Where bidder has submitted only photocopies of required bid guarantee documents as of the time of bid opening, the bid guarantees are of questionable enforceability and the bids were properly rejected as nonresponsive; since responsiveness cannot be established after bid opening, the defect in the bid guarantees cannot be cured by the submission of the original bid guarantee documents after bid opening.

DECISION

Morrison Construction Services protests the agency's rejection of its apparent low bids, and the award of contracts to Farinha, Inc., under invitations for bids (IFB) Nos. N62766-95-B-0402 and N62766-95-B-0403, issued by the Department of the Navy for the replacement of air conditioning and heat recovery units at a family housing area in Guam. Morrison challenges the agency's determination that the bid guarantees submitted with the protester's bids were defective because they were photocopies of required bid guarantee documents.

We deny the protests.

Each IFB required the submission of a bid guarantee in the amount of 20 percent of the bid price. The IFBs' instructions provided that all bids and bonds were to be submitted in "original format" and stated that bids must be manually signed. Other than providing for the timely transmission by facsimile of acknowledgment of amendments, the IFBs did not expressly authorize facsimile bids or modifications. Six bids were received by bid opening on August 17, 1995. Morrison's apparent low

bids were rejected, by letter of September 14, for including only photocopies of the required bid bond documents. Awards were made to Farinha, the next low bidder, under the IFBs. These protests followed.

Morrison explains that it mailed its bids, including the original bid bonds and power of attorney certificates, by certified mail on Friday, August 11 (5 days before the scheduled bid opening). On Monday, August 14, upon learning that 5 days may not be sufficient time for receipt at the Guam bid openings, it sent a copy of the bids to its agent in Guam; that agent submitted the photocopied bids with notes from Morrison explaining, as stated above, why the photocopies of its bids were being submitted. Morrison's original bid documents were received by the agency on August 25, 8 days after bid opening. Morrison contends that the bond documents are sufficient since they show that the surety was bound at the time of bid opening, that any perceived deficiency due to the photocopy nature of the bond documents should be waived as a minor informality, and that the agency could confirm after award that there were no alterations to the photocopied bond documents since the original bond documents were sent to the agency prior to bid opening.

A bid bond is a form of bid guarantee designed to protect the government's interest in the event of default; that is, if a bidder fails to honor its bid in any respect, the bid bond secures a surety's liability for all reprocurement costs. Ray Ward Constr. Co., B-256374, June 14, 1994, 94-1 CPD ¶ 367. 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, the bid itself is rendered defective and must be rejected as nonresponsive. Blakelee, Inc., B-239794, July 23, 1990, 90-2 CPD ¶ 65. The determinative question as to the acceptability of a bid bond is whether the bid documents at the time of bid opening establish that the bond is enforceable against the surety should the bidder fail to meet its obligations. If the agency cannot determine definitely from the documents submitted with the bid that the surety would be bound, the bid is nonresponsive and must be rejected. Global Eng'g, B-250558, Jan. 11, 1993, 93-1 CPD ¶ 31. Photocopies of bid guarantee documents generally do not satisfy the requirement for a bid guarantee since there is no way, other than by referring to the originals after bid opening, for the contracting agency to be certain that there had not been alterations to which the surety had not consented, and that the government would therefore be secured. The King Co., Inc., B-228489, Oct. 30, 1987, 87-2 CPD ¶ 423.

Morrison contends that it submitted a proper bid guarantee in its bid under each IFB. Morrison first argues that the photocopied power of attorney submitted with each bid includes language showing that facsimile documents (i.e., facsimile copies of the bond and power of attorney) would bind the surety; the protester contends that its photocopied documents should at least be treated as facsimile documents. Our Office resolved a similar issue in our decision in Global Eng'g, supra, where the photocopy of the power of attorney submitted with the bid clearly stated that the

power of attorney is valid only if numbered in red and the copy was printed in black ink only. Here, the photocopy of the power of attorney submitted with Morrison's bids at bid opening provided a warning that "this power of attorney is invalid without the red border." The photocopy of the power of attorney in Morrison's bids, including the border, was printed in black ink only. As we recognized in our decision in Global Eng'g, supra, this fact alone would appear to make the power of attorney submitted prior to bid opening invalid on its face. See The King Co., Inc., supra. Moreover, the language cited by Morrison does not provide that the submission of documents transmitted by facsimile, as the protester contends, would bind the surety. The exact language on the power of attorney (referring to the signatures of certain officers "affixed by facsimile to any Power of Attorney" binding the company "to any bond or undertaking to which it is validly attached") does not refer to facsimile or photocopy documents but, rather, refers to a signature on the power of attorney produced by mechanical means, such as a typewritten, printed, or stamped signature. See Federal Acquisition Regulation (FAR) § 14.405(c)(2); Global Eng'g, supra. Without the required red border, or some other indication of originality and authenticity (for example, an original corporate seal, as was the case in Ray Ward Constr. Co., supra), the contracting officer reasonably could determine at bid opening that the attorney-in-fact did not have the authority to bind the surety. The King Co., Inc., supra.

Additionally, the terms of the power of attorney, stated above in part, do not mention the acceptability of facsimile signatures on the bond, as in this case, or provide that the surety would be bound where the bond had other than an original signature of the attorney-in-fact. Without some semblance of originality of the required bid guarantee documents, we believe the agency at bid opening also could reasonably determine that the documents were not "validly" attached, as required in the conditions of the power of attorney. Consequently, as we found in Global Eng'g, the possibility of alterations to the bond documents after the surety signed them, and the possibility that the surety could disclaim liability on the bond, existed at the time of bid opening. Since the surety's liability was unclear at the time of bid opening, the agency acted properly in rejecting the bid. Id.

Morrison contends that the agency must consider its original bid documents, which were in the mail to the agency before bid opening (and were received 8 days after bid opening), either as an acceptable late bid, or as sufficient proof of the accuracy of the photocopied bid guarantee documents submitted at bid opening to allow a waiver of the bidding defect as a minor informality. We disagree. First, the late receipt of the protester's original bid documents does not fit within the solicitation and FAR exception relating to overseas procurements, FAR § 52.214-32,

which applies to a procurement in Guam, see Kentucky Bridge & Dam, Inc., 70 Comp. Gen. 97 (1990), 90-2 CPD ¶ 405, since regardless of how the package was sent, there has been no showing of mishandling by the government (i.e., the contracting agency) causing the late receipt. See Winston Corp., B-243394, Apr. 8, 1991, 91-1 CPD ¶ 360.[1]

Second, it would have been improper for the agency to have considered the late bid documents for the purposes of confirming the accuracy of the photocopied ones and thereby to cure the defect in the bid guarantee. As stated above, a required bid bond is a material IFB condition so that a defective bond renders the bid nonresponsive. The sealed-bid system requires that responsiveness be determined solely on the information available at bid opening. See Global Eng'g, supra.

The protests are denied.

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[1]The IFBs' terms, applicable procurement regulations, and decisions issued by our Office provide that the only exception permitted for considering late bids on overseas procurements, whether sent by first class, registered, or certified mail, is where it is determined by the government that the late receipt of the bid was due solely to mishandling by the government after receipt at the government installation. FAR § 52.214-32(a); Kentucky Bridge & Dam, Inc., supra. The bid package must be delivered to the contracting agency installation before the mishandling can occur; that is, mishandling by the government under these rules does not include mishandling by the Postal Service. Id.