



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Frank and Son Paving, Inc.

File: B-272179

Date: September 5, 1996

William L. Bruckner, Esq., Bruckner & Walker, for the protester.
George N. Brezna, Esq., and Diane D. Hayden, Esq., Department of the Navy, for the agency.

Christine Davis, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Bid including only a photocopy of the required bid bond is nonresponsive.

DECISION

Frank and Son Paving, Inc. protests the rejection of its bid under invitation for bids (IFB) No. N68711-93-B-2285, issued by the Department of the Navy, Naval Facilities Engineering Command, for the repair and resurfacing of specified streets and parking lots on the Marine Corps Logistics Base, Barstow, California. The Navy rejected Frank and Son's bid as nonresponsive because the bidder submitted a photocopy of the required bid bond with its bid. The protester argues that the rejection of its bid for this reason was improper.

We deny the protest.

The IFB required bidders to submit with their bids a bid bond in the amount of 20 percent of the bid price. The IFB authorized facsimile copies of any power of attorney attached to the bond.

The Navy received 14 bids at bid opening on April 3, 1996. Frank and Son submitted the apparent low bid of \$275,004. Along with its bid, Frank and Son submitted photocopies of the required bid bond and power of attorney.¹ The power of attorney appointed Michael E. Cundiff as attorney-in-fact for the surety, American Motorists Insurance Company, and Mr. Cundiff's signature appeared on the

¹Frank and Son states that it received facsimile copies of the bid bond and power of attorney from its surety, which it photocopied and submitted with its bid.

photocopied bid bond. The surety's corporate seal was not visible on the photocopied documents.

The power of attorney contained a resolution adopted by the surety, which provided:

"That the signature of the Chairman of the Board, the President, any Vice President, or their appointees designated in writing and filed with the Secretary, and the signature of the Secretary, the seal of the Company, and certifications by the Secretary, may be affixed by facsimile on any power of attorney or bond . . . and any such power so executed, sealed, and certified with respect to any bond or undertaking to which it is attached, shall continue to be valid and binding upon the Company."

On May 17, the Navy rejected the protester's bid as nonresponsive because the photocopied bid bond "did not bear an original signature for the surety nor did it bear a corporate seal for the surety." This protest followed.

The determinative question in judging the sufficiency of a bid guarantee 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. 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. The King Co. Inc., B-228489, Oct. 30, 1987, 87-2 CPD ¶ 423; Imperial Maintenance, Inc., B-224257, Jan. 8, 1987, 87-1 CPD ¶ 34. In general, photocopied bid bonds and facsimile bid bonds (i.e., electronically transmitted copies) do not satisfy the requirement for a bid guarantee because there is no way, other than by referring to the original documents after bid opening, for the contracting agency to detect unauthorized alterations, which the surety could use as a basis to disclaim liability. Bird Constr., B-240002; B-240002.2, Sept. 19, 1990, 90-2 CPD ¶ 234.

Frank and Son asserts that, in this case, its surety clearly intended to be bound by a photocopied bid bond. The protester claims that the power of attorney expressly provided that bid bonds bearing facsimile signatures--and, by implication, photocopied signatures--were sufficient to bind the surety.

The power of attorney in question provided that "signature[s] . . . designated in writing and filed with the [surety's] Secretary . . . may be affixed by facsimile on any power of attorney or bond." Although there is some implication to the contrary in Ray Ward Constr. Co., B-256374, June 14, 1994, 94-1 CPD ¶ 367 and Services Alliance Sys., Inc., B-255361, Feb. 22, 1994, 94-1 CPD ¶ 137, we do not view the phrase "affixed by facsimile" as referring to facsimile or photocopied documents,

but rather to signatures produced by mechanical means, for example, stamped, printed, or typewritten signatures. See Morrison Constr. Servs., B-266233; B-266234, Jan. 26, 1996, 96-1 CPD ¶ 26; Global Eng'g, B-250558, Jan. 11, 1993, 93-1 CPD ¶ 31. In other words, the phrase "affixed by facsimile" refers to signatures created by facsimile, not to signatures transmitted by facsimile.

The same interpretation applies to the instant power of attorney. The power of attorney provided for original signatures to be "designated in writing and filed" with the surety's secretary and to be "affixed" or mechanically reproduced by the surety on an original bid bond document. The language does not reasonably suggest that the surety consented to be bound by bid bonds which, after leaving the surety's hands, had been photocopied or transmitted by facsimile.

The protester argues that this case is distinguishable from Morrison Constr. Servs., supra, and Global Eng'g, supra, because, in those cases, the bid documents authorizing signatures "affixed by facsimile" were stated to be valid only if the documents' serial number appeared in red, which effectively invalidated facsimile or photocopied documents. Because no similar condition appeared in the power of attorney submitted with its bid, Frank and Son argues that the phrase "affixed by facsimile" should be construed to extend to facsimile or photocopied bid bonds.

We disagree. As stated above, the instant power of attorney clearly authorized only the mechanical reproduction of signatures on file with the surety's secretary. Because the power of attorney did not expressly extend the surety's liability to facsimile or photocopied bid bonds, uncertainty existed as to the enforceability of the bond submitted with Frank and Son's bid. As a result of this uncertainty, the protester's bid was nonresponsive and was properly rejected.

The protester finally argues that the IFB, by authorizing the use of facsimile powers of attorney, implied to bidders that facsimile or photocopied bid bonds were also acceptable. This argument has no merit. Not only does the provision in question only mention powers of attorney, but facsimile bid bonds are generally not permissible in any case because of the potential for unauthorized alterations. Bird Constr., supra.

The protest is denied.

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