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Comptroller General
of the United States

United States General Accounting Office
Washington, DC 20548

Decision

Matter of: Schrepfer Industries, Inc.

File: B-286825

Date: February 12, 2001

Andrew W. Loewi, Esq., and Shelby L. Katz, Esq., Brownstein Hyatt & Farber, for the protester.

Thomas J. Ingram, IV, Esq., U.S. Army Corps of Engineers, for the agency.

Jennifer D. Westfall-McGrail, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency properly determined bid bond accompanied by photocopied power of attorney unacceptable because photocopied power of attorney does not establish unequivocally at the time of bid opening that the bond would be enforceable against the surety in the event that the bidder fails to meet its obligations.

DECISION

Schrepfer Industries, Inc. protests the rejection of its low bid under invitation for bids (IFB) No. DACW45-00-B-0020, issued by the Army Corps of Engineers for the replacement of an irrigation conduit at Chatfield Lake in Littleton, Colorado. The Corps rejected Schrepfer's bid as nonresponsive because the power of attorney attached to its bid bond was a photocopy. Schrepfer contends that the copy was sufficient to bind its surety and thus should have been accepted.

We deny the protest.

The IFB, which was issued on August 1, 2000, required each bidder to submit a bid guarantee with its bid. Six bids were received and opened on the September 8 opening date. Schrepfer's bid was low; the bids of BRB Contractors, Inc. and BT Construction, Inc. were second and third low, respectively.

Upon review of Schrepfer's bid package, the contracting officer discovered that the power of attorney that the protester had submitted with its bid bond was a photocopy. Relying on our decision in Kemper Constr. Co., Inc., B-283286.2, Nov. 29, 1999, 99-2 CPD ¶ 98, the contracting officer determined that the photocopied power of attorney was unacceptable because it did not definitely establish the surety's intent to be bound; accordingly, she rejected Schrepfer's bid as nonresponsive. The contracting officer then reviewed the bid of BRB Contractors, the second low bidder, and discovered that BRB, like Schrepfer, had submitted a photocopied power of attorney with its bid bond; thus, she also rejected BRB's bid. The third low bidder, BT Construction, was found to have submitted an original power of attorney with its bid bond; hence, its bid was determined responsive. Due to this protest, award has not yet been made.

Schrepfer contends that its bid bond and supporting power of attorney should have been accepted.

A bid bond is a form of 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 reprourement costs. 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. The determinative question as to the acceptability of a bid bond is whether the bid documents, including the power of attorney appointing an attorney-in-fact with authority to bind the surety, establish unequivocally at the time of bid opening 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. 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, to be certain that there have not been alterations to which the surety has not consented, and that the government would therefore be secured. Kemper Constr. Co., Inc., supra, at 3.

The protester argues, citing our decision in Daley Corp.--California Commercial Asphalt Corp., J.V., B-274203.2, Dec. 9, 1996, 96-2 CPD ¶ 217, that a photocopied power of attorney is acceptable where it is accompanied by a certification stating that it is a true copy and is still in full force and effect. Schrepfer maintains that its power of attorney was accompanied by such a certification.

In Daley, we found a reproduced power of attorney to be acceptable where it was accompanied by an updated certification, signed by the surety's secretary, stating that the reproduction was a full, true, and correct copy and that the power of attorney was still in full force and effect. The facts in Daley are distinguishable from the facts here, however, in that here, the power of attorney was not accompanied by an updated certification signed by an authorized representative of the surety. Instead, the power of attorney was accompanied by a photocopied certification. In

other words, the evidence that we relied on in finding the reproduced power of attorney to be acceptable in Daley, i.e., an original certification by a current officer of the surety authenticating the power of attorney and attesting to its continuing validity, was not present here.

To the extent that the protester further argues that the presence of a raised corporate seal on the bid bond itself was sufficient to render the bond acceptable, while a raised corporate seal does constitute evidence of the authenticity of a bond, Daley Corp.–California Commercial Asphalt Corp., J.V., supra, at 4, it is not a substitute for a properly signed power of attorney. Kemper Constr. Co., Inc., supra, at 4.

Because Schrepfer's power of attorney was a photocopy, which was not accompanied by an original authenticating certification, there is no way, other than through reference to the original power of attorney, for the agency to determine whether it has been altered; thus, the bid documents submitted by Schrepfer did not establish unequivocally at the time of bid opening that the bond would be enforceable against the surety in the event that the bidder failed to meet its obligations. Accordingly, we find that the agency properly determined the bond unacceptable and rejected Schrepfer's bid as nonresponsive.

The protest is denied.

Anthony H. Gamboa
Acting General Counsel