**Comptroller General**
**of the United States**

**Washington, D.C. 20548**

# Decision

**Matter of:** Metro Monitoring Services, Inc.

**File:** B-274236

**Date:** November 27, 1996

Mark M. Hathaway, Esq., for the protester.
Douglas McCall for Key West Weather Technologies, an intervenor.
Jerry A. Walz, Esq., Alden F. Abbott, Esq., and Lisa J. Obayashi, Esq., Department of Commerce, for the agency.
Adam Vodraska, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

## DIGEST

Low bid should be rejected as nonresponsive where its certificate of procurement integrity identified one person as the certifier but a different person signed the certifier's name on the certificate; the manner of execution of the certificate creates doubt about whether one individual representative of the bidder has made an unequivocal commitment to satisfy the substantial legal obligations imposed by the certificate.

## DECISION

Metro Monitoring Services, Inc. protests the proposed award of a contract to Key West Weather Technologies by the Department of Commerce, National Oceanic & Atmospheric Administration, under invitation for bids (IFB) No. 51RANW600039 for weather observation services at Key West International Airport, Florida.

We sustain the protest.

The agency's Mountain Administrative Support Center in Colorado issued the IFB on behalf of the National Weather Service as a total small business set-aside for the weather observation services for a base period of 1 year with 2 option years. Since the contract was expected to exceed $100,000, the IFB, pursuant to Federal Acquisition Regulation (FAR) § 3.104-10(a), contained the standard certificate of procurement integrity clause found at FAR § 52.203-8. That clause implements the Office of Federal Procurement Policy (OFPP) Act, 41 U.S.C. § 423(e) (1994), which precludes federal agencies from awarding a contract to a firm unless the officer or employee responsible for preparing the offer or bid certifies in writing that neither he nor those employees who participated in preparing the bid has any information concerning violations or possible violations of the OFPP Act, and to certify to the

veracity of that disclosure.[1] Mid-East Contractors, Inc., 70 Comp. Gen. 383 (1991), 91-1 CPD ¶ 342. The certification requirement obligates the officer or employee responsible for the bid or offer to become familiar with the prohibitions of the OFPP Act, and imposes a requirement to make full disclosure of any possible violations of the OFPP Act. Id. Additionally, the signer of the certificate is required to collect similar certifications from all other individuals involved in the preparation of the bid or offer. 41 U.S.C. § 423(e)(1)(B).

The certification clause incorporated in the IFB stated, in pertinent part, the following:

> "CERTIFICATE OF PROCUREMENT INTEGRITY
>
> "(1) I, [Name of certifier] _____, am the officer or employee responsible for the preparation of this offer and hereby certify that, to the best of my knowledge and belief, . . . I have no information concerning a violation of . . . the [OFPP] Act . . . occurring during the conduct of this procurement . . . .
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> "(2) . . . I further certify that, to the best of my knowledge and belief, each officer, employee, agent, representative, and consultant of [Name of Offeror] _____ who has participated personally and substantially in the preparation or submission of this offer has certified that he or she is familiar with, and will comply with, the requirements of . . . [the OFPP] Act . . . , and will report immediately to me any information concerning a violation or possible violation of . . . [the OFPP] Act . . . pertaining to this procurement.
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> . . . . .
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> "(4) I agree that, if awarded a contract under this solicitation, the certifications required by . . . the Act shall be maintained in accordance with paragraph (f) of this provision.

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[1]The Federal Acquisition Reform Act of 1996 eliminated the procurement integrity certification requirements contained in section 27(e) of the OFPP Act, 41 U.S.C. § 423(e). Pub. L. No. 104-106, § 4304, 110 Stat. 642, 659-665 (1996). However, the solicitation at issue here was issued prior to the effective implementation date of the amended provision. Pub. L. No. 104-106, § 4401, 110 Stat. 678.

_____

[Signature of the officer or employee responsible for the offer and date]

_____

[Typed name of officer or employee responsible for the offer]

. . . . .

"THIS CERTIFICATION CONCERNS A MATTER WITHIN THE JURISDICTION OF AN AGENCY OF THE UNITED STATES AND THE MAKING OF A FALSE, FICTITIOUS, OR FRAUDULENT CERTIFICATION MAY RENDER THE MAKER SUBJECT TO PROSECUTION UNDER TITLE 18, UNITED STATES CODE, SECTION 1001."

The low bid at the August 6 bid opening was submitted by Key West Weather Technologies for $474,000; Metro Monitoring Services, Inc. submitted the next low bid at $487,788. Key West Weather Technologies's bid contained the signature of Douglas McCall, who represents that he is the sole proprietor of that firm. The signature of Douglas McCall was also included on the certificate of procurement integrity in Key West Weather Technologies's bid, which listed Douglas McCall as the "certifier" and the "officer or employee responsible for the offer."

In its protest filed with our Office on August 20, Metro contends that Helen McCall--a term employee of the National Weather Service at the location where the contract is to be performed--is also a principal in and exercises substantial control over Key West Weather Technologies, and that award to that firm would thus violate the FAR § 3.601 preclusion of awards to business concerns or other organizations owned or substantially owned or controlled by one or more government employees.[2] Helen McCall is the wife of Douglas McCall. In commenting on the agency report, the protester noted that it is apparent from a comparison of the signatures of Douglas McCall in Key West Weather Technologies bid with his signatures on his bid protest correspondence and with the signature of his wife contained on her affidavit, that Douglas McCall's signatures in Key West Technologies's bid, including the bid's certificate of procurement integrity, were actually executed by Helen McCall, and that Key West Weather Technologies's bid should therefore be rejected.

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[2]This regulation is intended to avoid any conflict of interest that might arise between the employees' interests and their government duties, and to avoid the appearance of favoritism or preferential treatment by the government toward its employees. FAR § 3.601; H H & K Builders, Inc., B-238095, Feb. 23, 1990, 90-1 CPD ¶ 219.

Although Mr. McCall initially stated in an affidavit submitted with the agency report that he "signed the bid as the individual responsible for submission of bids on behalf of [his] company," he now concedes that his signatures in the bid--including his signature on the certificate of procurement integrity--were not executed by him personally but by his wife in his name. Mr. McCall explains that he was unable to sign the bid himself because he was suddenly called out of town on a family emergency just prior to the due date for the submission of bids, and that he authorized his wife to sign the otherwise already prepared bid for him in his absence and to submit the bid to the agency.

As a preliminary matter, the agency argues that Metro's protest is untimely because Metro did not file its protest until August 20, more than 10 calendar days after the basis of protest was assertedly known or should have been known, as required under our Bid Protest Regulations, section 21.2(a)(2), 61 Fed. Reg. 39039, 39043 (1996) (to be codified at 4 C.F.R. § 21.2(a)(2)). In this regard, the agency contends that on August 9, a Metro employee performing another contract at the Key West International Airport discussed the results of the bid opening with Ms. McCall, and, according to Ms. McCall, stated that he knew that she is married to the owner of Key West Weather Technologies and that Metro planned to file a protest alleging a conflict of interest due to her status as a government employee.

Metro denies that its employee mentioned the possibility of a protest to Ms. McCall on August 9 and asserts that the information on which its protest was based is not merely the marital relationship between the McCalls but rather the evidence that Ms. McCall is a principal in, and controls, Key West Weather Technologies. Metro's founder states in an affidavit that Ms. McCall's control of Key West Weather Technologies became apparent in an August 12 telephone conversation with her in which she allegedly stated to him that if she were offered a supervisory position with Metro, Key West Weather Technologies would claim a mistake in its bid and withdraw, making Metro the apparent low bidder. While the specifics of the August 12 conversation are disputed by Ms. McCall, we will resolve doubt as to when the protester became aware of its basis for protest in favor of the protester for purposes of determining timeliness. Eklund Infrared, 69 Comp. Gen. 354 (1990), 90-1 CPD ¶ 328; Warren Pumps, Inc., B-258710, Feb. 13, 1995, 95-1 CPD ¶ 79. Thus, we consider the protest timely filed since it was filed within 10 calendar days of the August 12 date on which the protester assertedly knew of the information forming the basis of its protest.

We believe that Key West Weather Technologies's bid should be rejected as nonresponsive because its owner, who the bid identifies as the individual responsible for the bid, did not personally execute the procurement integrity certificate included in its bid.

As a result of the substantial legal obligations imposed by the certification requirement of the OFPP Act, implemented by the certificate of procurement integrity clause, and given the express requirement for the certificate to be separately signed, a bid with an improperly executed certificate of procurement integrity renders the bid nonresponsive. Mid-East Contractors, Inc., supra; Sweepster Jenkins Equip. Co., Inc., B-250480, Feb. 8, 1993, 93-1 CPD ¶ 111. Specifically, where the manner of execution of the certificate creates doubt about whether an individual representative of the bidder has made an unequivocal commitment to satisfy the substantial legal obligations imposed by the OFPP Act, the bid is nonresponsive. North Central Constr., Inc., B-256839, July 5, 1994, 94-2 CPD ¶ 9.

The reason for this rule is that the procurement integrity certification imposes on one named individual representative of the bidder--the officer or employee of the contractor responsible for the bid or offer--a direct obligation to become familiar with the OFPP Act's prohibitions against certain conduct. This certificate imposes on the bidder, and its representative, a requirement to make full disclosure of any possible violations of the OFPP Act, and to certify to the veracity of that disclosure. The certifying individual also attests that every officer, employee, agent, representative or consultant of the contractor involved in preparation of the bid or offer is familiar with the requirements of the OFPP Act, and has filed a certification indicating no knowledge of any possible violation. In addition, the certifying individual must represent that all individuals involved in the preparation of the bid or offer will report any information concerning a possible violation of the OFPP Act to the officer or employee signing the certification. The certification provisions also prescribe specific contract remedies for a false certification, including withholding of profits from payments and terminating errant contractors for default. These provisions are materially different from those to which the bidders otherwise are bound. Mid-East Contractors, Inc., supra; Aerospace Design, Inc., B-259350, Mar. 23, 1995, 95-1 CPD ¶ 161.

We have recognized that an agent of a bidder may execute the certificate in his or her own name so long as he or she is the "officer or employee responsible for the offer" and has the actual authority to bind the bidder to the legal obligations contained in the certificate at the time the bid is submitted. See Sweepster Jenkins Equip. Co., Inc., supra. However, where the certifier is listed on the certificate as an individual different from the agent who actually signs the certificate, the bid is nonresponsive because the manner of execution of the certificate creates doubt about whether an individual representative of the bidder has made an unequivocal commitment to satisfy the substantial legal obligations imposed by the OFPP Act. Aerospace Design, Inc., supra; North Central Constr., Inc., supra.

Here, Helen McCall, while she may have been authorized to sign Key West Weather Technologies's bid as an agent of her husband and to bind the firm to the terms of

the certificate, was not listed on the certificate as the certifier. Where an agent signs for the named certifier in the certificate of procurement integrity, we have found that the identity and commitment of the individual, who will be the focus of the OFPP Act's obligations, is unclear, such that the failure of the named certifier to personally execute the certificate by properly signing it renders the bid nonresponsive. Aerospace Design, Inc., supra; North Central Constr., Inc., supra. This is so because the OFPP Act, through its implementing regulations, contemplates the execution of the certificate personally by the certifier by requiring the named officer or employee of the contractor responsible for the bid ("I") to certify "to the best of my knowledge and belief" that he or she has no information concerning violations or possible violations, and that individuals who have participated in the preparation of the offer have certified that they are familiar with and will comply with the Act and will report immediately to the certifier any information concerning violations or possible violations. Moreover, the making of a false certification could render the certifier subject to criminal prosecution. Thus, in our view, the execution of the certificate is an act required to be performed personally by the certifier and not through an agent of the certifier. Aerospace Design, Inc., supra, citing State v. Tedesco, 397 A.2d 1352, 1357 (Conn. 1978) (taking of an oath is an act which may not be delegated to an agent).

Since Douglas McCall, the purported certifier, did not personally execute the certificate, we cannot say that he certified "to the best of [his] knowledge and belief" that he has no information of violations or possible violations, and that individuals who have participated in the preparation of the offer have certified that they are familiar with and will comply with the Act and will report information concerning violations to Mr. McCall, as required by the certificate. Further, Mr. McCall's failure to personally execute the certificate creates doubt about whether any individual representative of the bidder has made an unequivocal commitment to satisfy the legal obligations imposed by the OFPP Act and whether a false certification could render the certifier subject to criminal prosecution.

In sum, the manner in which Key West Weather Technologies executed its bid puts into question whether the purported signer of the certificate is legally subject to the material obligations imposed by the certificate and to the penalties that the law

provides for violation of the terms of the certificate, and, accordingly, Key West Weather Technologies's bid should be rejected as nonresponsive.[3] See Aerospace Design Inc., supra; Southwest Maintenance Serv., B-258178, Dec. 15, 1994, 94-2 CPD ¶ 243.

We recommend that the agency make award to Metro, the second low bidder, if that bidder is otherwise eligible. In addition, we recommend that Metro be reimbursed the costs of filing and pursuing the protest, including reasonable attorneys' fees. Bid Protest Regulations § 21.8(d)(1), 61 Fed. Reg. 39039, 39046 (1996) (to be codified at 4 C.F.R. § 21.8(d)(1)). Metro's certified claim for such costs, detailing the time expended and costs incurred, should be submitted directly to the agency within 60 days after receipt of this decision. Bid Protest Regulations, § 21.8(f)(1).

The protest is sustained.

Comptroller General
of the United States

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[3]As we are sustaining the protest on this basis, we need not address whether an award to Key West would violate FAR § 3.106. In this regard, both Helen McCall and Douglas McCall deny that she is a principal in, or exerts any control over Key West Weather Technologies, and point to the fact that she will be serving merely in the capacity of an employee of the firm.