

**DECISION**



*8340*  
*8335*

**THE COMPTROLLER GENERAL  
OF THE UNITED STATES  
WASHINGTON, D. C. 20548**

FILE: B-192673

DATE: November 14, 1976

MATTER OF: Howard W. Roughton, III

**DIGEST:**

1. Submission of bid guarantee in form of a cashier's check payable to order of protester and not further endorsed is not a firm commitment as defined by IFB and applicable regulations. Accordingly, the bid is nonresponsive since bid guarantee requirement is material part of IFB which cannot be waived.
2. Cashier's check submitted as bid guarantee required by IFB, not drawn to order of the appropriate Federal agency as required by FPR § 1-10.204-2 and not containing payee's endorsement, was not proper bid guarantee and therefore rendered bid non-responsive.

Howard W. Roughton, III (Roughton) protests the rejection of his bid under invitation for bids (IFB) NTIA5-78 issued July 20, 1978 by National Telecommunications and Information Administration, Department of Commerce, for painting an Experimental Tower at Table Mountain Field Site, Boulder, Colorado.

Upon the opening of bids, August 11, 1978, the protester's low bid was rejected as nonresponsive pursuant to Federal Procurement Regulations (FPR) § 1-10.103-4, which provides for the rejection of a bid (except under circumstances not relevant here) when a bid guarantee is required and the bidder fails to furnish such guarantee in accordance with the requirements of the IFB.

The IFB included Standard Form (SF) 22, paragraph 4 of which provides:

"Bid Guarantee. Where a bid guarantee is required by the invitation for bids, failure 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.

"A bid guarantee shall be in the form of a firm commitment, such as a " \* \* cashier's check \* \* \*. (Emphasis added.)

"If the successful bidder \* \* \* fails to execute such further contractual documents \* \* \* as may be required by the terms of the bid \* \* \* his contract may be terminated for default. In such event he shall be liable for any cost for procuring the work which exceeds the amount of his bid, and the bid guarantee shall be available toward offsetting such difference." (Emphasis added.)

FPR § 1-10.204-2 provides in part:

"Any person required to furnish a bond has the option, in lieu of furnishing surety or sureties thereon, of depositing a certified or cashier's check, a bank draft, a Post Office money order, currency, or an irrevocable letter of credit, in an amount equal to the penal sum of the bond. Certified or cashier's checks, bank drafts, or Post Office money orders shall be drawn to the order of the appropriate Federal agency." (Emphasis added.)

Roughton's bid when opened contained, in lieu of a security constituting a "firm commitment", a cashier's check made payable to the order of Howard W. Roughton, III. There was no endorsement on the check by Howard W. Roughton, III. Thus the contracting officer determined that Roughton's bid was nonresponsive as it was not accompanied by a valid bid guarantee, i.e., the check without endorsement by the payee did not constitute a "firm commitment."

Since 1959 this Office has held that a bid guarantee requirement is a material part of an IFB and that,

except as provided in applicable regulations, a procuring activity must reject as nonresponsive a bid that does not comply with that requirement. Edward D. Griffith, B-188978, August 29, 1977, 77-2 CPD 155.

The security that is the bid guarantee must be a firm commitment. In order for the guarantee to be a firm commitment the instrument must be sufficient for the Government to be able to take the action provided in paragraph 4 of SF 22.

In order for the Government to apply the proceeds of the check, it must be a holder. The Uniform Commercial Code (UCC), section 1-201(20), defines "Holder" as a person who is in possession of an instrument drawn, issued or endorsed to him. Section 3-202 of the UCC further provides that negotiation is the transfer of an instrument in such form that the transferee becomes the holder. If the instrument is payable to order it is negotiated by delivery with any necessary indorsement. Colorado has adopted the UCC. See Colorado Revised Statutes, Annotated (1973) Title 4.

The Government did not become a holder of the check such as to constitute a firm commitment at the time of bid opening. It could only become a holder by further action by Roughton after bid opening, i.e., endorsement. Thus the bid was nonresponsive and properly rejected.

Additionally, we note that FPR § 1-10.204-2 requires that when a cashier's check is furnished as the bid guarantee it shall be drawn to the order of the appropriate Federal agency. Here the check was only drawn to the order of Howard W. Roughton, III and not further endorsed to the order of the appropriate Federal agency. Thus it failed to comply with the requirements of the above section of the FPR which was further grounds for rejection.

Accordingly, the protest is denied.

*Wilton J. Austin*  
for Comptroller General  
of the United States