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DECISION

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

FILE: B-219600 **DATE:** August 21, 1985

MATTER OF: H.C. Transportation Co., Inc.

DIGEST:

1. A low bid was properly rejected as nonresponsive where the bidder furnished a bid guarantee in the form of an uncertified corporate check. Such an instrument lacks the status of a firm commitment because it is subject to dishonor through events such as insufficient funds in the account and stop payment orders.

2. Since a bid guarantee provision in an IFB is a material requirement which must be met at the time of bid opening, a bid which is nonresponsive due to the lack of an adequate bid guarantee cannot be made responsive by furnishing the guarantee in proper form after bid opening, except under the limited conditions set forth in the Federal Acquisition Regulation, none of which are present here.

3. A certified check tendered to the contracting officer after bid opening does not constitute a permissible late modification of the bid because the bid was unacceptable as originally submitted as it failed to include an adequate bid guarantee.

4. Contracting officer's announcement at bid opening that protester was apparent low bidder did not constitute acceptance of protester's offer since acceptance by the government must be clear and unconditional.

5. An estoppel will not be found against the government unless the government employee, upon whose action the party asserting the estoppel relied, was acting within the scope of his authority. Therefore, the government is not estopped here since a contracting officer cannot accept a nonresponsive bid which is expressly prohibited by

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the Federal Acquisition Regulation, which has the force and effect of law.

H.C. Transportation Co., Inc. (H.C.), protests the rejection of its apparent low bid as nonresponsive and the award of the contract to the next lowest bidder under invitation for bids (IFB) No. 523-22-85, issued by the Veterans Administration (VA). The VA rejected H.C.'s bid as nonresponsive because it was accompanied by a bid guarantee in the form of an uncertified corporate check. H.C. protests on two grounds: (1) that its corporate check was an adequate bid guarantee and (2) that the VA is estopped from awarding the contract to the second lowest bidder because the contracting officer announced at the bid opening that H.C. was the apparent low bidder and made arrangements to replace the corporate check with a certified check before finally deciding that the bid must be considered as originally submitted and rejected as nonresponsive. We deny the protest.

A bidder must provide a bid guarantee "in the form of a firm commitment such as a bid bond, postal money order, certified check, cashier's check, irrevocable letter of credit, or, under Treasury Department regulations, certain bonds or notes of the United States." Federal Acquisition Regulation (FAR), 48 C.F.R. § 52.228-1(b) (1984). An uncertified corporate check is not one of the acceptable forms of bid guarantees listed above. Therefore, H.C.'s corporate check is an inadequate bid guarantee. The purpose of the IFB's bid guarantee provision is to assure the government that the successful bidder "will execute a written contract and furnish required bonds" in an "amount that is adequate to protect the Government from loss should the successful bidder fail to execute further contractual documents and bonds as required." FAR, 48 C.F.R. §§ 28.001 and 28.101-2. An uncertified corporate check lacks the status of a firm commitment because it is subject to dishonor through events such as stop payment orders and insufficient funds in the account. Building Systems Contractors, Inc., B-219416, July 9, 1985, 85-1 C.P.D. ¶ ___.

A bid guarantee is a material requirement which must be met at the time of bid opening. We have consistently held that the failure of a bidder to present an adequate bid guarantee at the time of bid opening renders the bid nonresponsive. Building Systems Contractors, Inc., B-219416, supra. H.C.'s bid is nonresponsive because it was accompanied by an inadequate bid guarantee in the form of an uncertified corporate check.

H.C. asserts that the VA is estopped from awarding the contract to the second low bidder because after bid opening, the contracting officer made arrangements to permit H.C. to replace the uncertified check with a certified one. The contracting officer subsequently decided that the bid must be considered as originally submitted and rejected as nonresponsive. This assertion implies that actions taken after bid opening may convert nonresponsive bids into responsive ones. The protester implies that the contracting officer's actions after bid opening either waived the bid guarantee deficiency or modified the bid guarantee and made it a firm commitment.

In general, contracting agencies do not have the discretion to waive deficiencies in bid guarantees. Building Systems, B-219416, supra; A.D. Roe Company, Inc., B-181692, Oct. 8, 1974, 74-2 C.P.D. ¶ 194. Permitting such waivers would compromise the integrity of the competitive bid system by allowing bidders to decide after bid opening, when competitor's prices have been exposed, whether they want their bids to be responsive. Colorado Elevator Service, Inc., B-206950.2, May 6, 1982, 82-1 C.P.D. ¶ 434. Noncompliance with the bid guarantee requirement can only be waived under those limited conditions specified in the FAR, 48 C.F.R. § 28.101-4, none of which are present here. Therefore, the VA could not have waived the bid guarantee's deficiency and accepted H.C.'s bid.

The contracting officer's attempt to secure a certified check after bid opening is not a permissible late modification of H.C.'s bid. Only a late modification of an "otherwise successful bid" which makes its terms more favorable to the government may be considered and accepted after bid opening. FAR, 48 C.F.R. § 14.304-1(d). H.C.'s bid is not an "otherwise successful bid" because H.C. submitted an inadequate bid guarantee (the uncertified corporate check) which makes its bid nonresponsive. Therefore, the tender of a certified check after bid opening is not a permissible late modification of an otherwise successful bid. Building Systems Contractors, Inc., B-219416, supra.

A bid which is nonresponsive due to the lack of an adequate bid guarantee cannot be made responsive by furnishing a responsive guarantee after bid opening. Building Systems Contractors, Inc., B-219416, supra. As she later recognized, the contracting officer erred in attempting to secure a certified check after bid opening. We have held that a contracting official's erroneous actions cannot estop an agency from rejecting a bid as nonresponsive when it is

required by law to do so. Valley Forge Flag Co., Inc., B-216108, Sept. 4, 1984, 84-2 C.P.D. ¶ 251. Therefore, the VA's decision to reject H.C.'s bid as nonresponsive and award the contract to the next low bidder was correct.

H.C. also argues that the contracting officer's announcement at bid opening that it was the apparent low bidder estops the VA from subsequently rejecting its bid. We disagree. The contracting officer's statement was not an acceptance. The acceptance of an offer by the government must be clear and unconditional, and it must be clear that both parties intended to make a binding agreement at the time of the offer's purported acceptance. Marino Construction Co., Inc., 61 Comp. Gen. 269 (1982), 82-1 C.P.D. ¶ 167. Usually, the government expresses its acceptance by means of a document prepared and signed by a contracting officer. Patton Reading Services, Inc., B-215792, Jan. 8, 1985, 85-1 C.P.D. ¶ 24. The contracting officer's statement at bid opening was not an acceptance intended to bind the government, but merely announced which bid was the lowest at the time of bid opening.

Even if we were to assume for the sake of argument that the contracting officer's announcement had intended to bind the government, the argument fails because the contracting officer does not have the authority to accept a nonresponsive bid. In order to estop the government, the representation relied upon by the party requesting estoppel must be within the government agent's scope of authority. Tri-State Laundry Services Inc., d/b/a Holzberg's Launderers and Cleaners--Request for Reconsideration, B-218042.2, Mar. 11, 1985, 85-1 C.P.D. ¶ 295.

A contracting officer must reject a bid which does not provide a sufficient bid guarantee because "[a]ny bid that fails to conform to the essential requirements of the invitation for bids shall be rejected." FAR, 48 C.F.R. § 14.404-2(a). The contracting officer does not have the authority to accept a bid in violation of the FAR which has the force and effect of law. Tri-State Laundry Services, Inc., d/b/a Holzberg's Launderers and Cleaners--Request for Reconsideration, B-218042.2, supra. Because H.C.'s bid guarantee was insufficient, the contracting officer may not accept the bid and must reject it. Therefore, because the contracting officer does not have the authority to accept a nonresponsive bid, the government could not be bound and is not estopped by her announcement.

The protest is denied.

for Seymour Efros
Harry R. Van Cleve
General Counsel