



The Comptroller General
of the United States

Washington, D.C. 20548

Timmerman

Decision

Matter of: Pyramid Contracting, Ltd.

File: B-228752.2

Date: November 2, 1987

DIGEST

Where letter of credit submitted as a bid guarantee contains conditional language which creates uncertainty as to whether the letter would be enforceable against the issuing bank, the bid is properly rejected as nonresponsive since such a letter does not provide the required firm commitment.

DECISION

Pyramid Contracting, Ltd. protests the rejection of its low bid under invitation for bids (IFB) No. DACA01-87-B-0035, issued by the U.S. Army Corps of Engineers, Mobile District, for additions and alterations to an aircraft apron at Tyndall Air Force Base, Florida. The Corps found a letter of credit submitted by Pyramid as a bid guarantee to be defective and rejected the bid as nonresponsive. We deny the protest.

The IFB required that the bidders submit a bid guarantee in the amount of 20 percent of the bid price or \$3,000,000 whichever was less. The IFB also provided that the bid guarantee must be furnished in the form of a firm commitment and stated that failure to furnish the guarantee in the proper form and amount, by the time set for opening of bids, might result in rejection of the bid.

Pyramid submitted with its bid an irrevocable letter of credit issued by Security Trust Company of Arlington, Texas. The letter was for 20 percent of amount bid, and stated that "strict adherence by the Beneficiary" to certain conditions was required. One of the conditions read "Drafting instructions by wire must be preceded by the assignment of Solicitation No. DACA01-87-B- 0035 duly executed by the Beneficiary hereof to Security Trust Company or its designee."

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The Corps notified Pyramid that its bid was nonresponsive because the letter of credit was conditioned on the assignment to Security Trust.

Pyramid contends that the condition in the letter of credit required "notification" of the solicitation number, not an assignment. Pyramid submitted after bid opening, a letter from Security Trust indicating that the bank's intent was to require only proper notification for identification purposes, not an assignment. Pyramid makes several arguments which basically allege that a valid solicitation or contract assignment could not occur and therefore the only logical interpretation of the condition in the letter of credit is that the word "assignment" was intended to mean "notification."

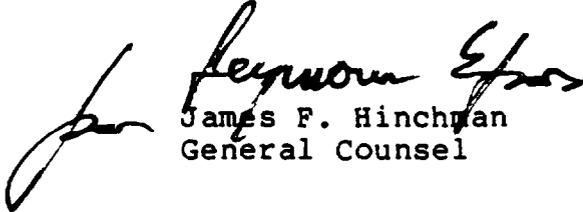
A bid guarantee is a firm commitment that assures that a successful bidder will execute such contractual documents and such payment and performance bonds as may be required. See Hydro-Dredge Corp., B-214408, Apr. 9, 1984, 84-1 CPD ¶ 400. A bid guarantee is, therefore, a material part of the bid, and the guarantee by its terms must clearly establish the liability of the surety or the bid must be rejected as nonresponsive. Tom Mistick & Sons, Inc., B-222326, Apr. 3, 1986, 86-1 CPD ¶ 323.

Pyramid's assertion that a valid solicitation or contract assignment could not occur does not establish that the correct interpretation of the word "assignment" is "notification," particularly since the letter of credit requires "strict adherence by the Beneficiary" to its conditions.^{1/} It is unclear what was intended by the requirement in the letter of credit that the solicitation be assigned to Security Trust prior to payment. Since the solicitation itself contains no interest which can be assigned it appears that the condition would most likely be interpreted as requiring the assignment of the contract awarded pursuant to the solicitation. It seems, however, that the Corps would not be able to enforce the letter of credit in the event of Pyramid's default because of the condition. If Pyramid failed to properly execute the contract the contract would be subject to termination for default. At that point, no valid contract that could be

^{1/} Security Trust's letter, submitted after bid opening, which explained that it did not intend that assignment of the solicitation be a precondition to payment under the letter cannot be considered. A nonresponsive bid cannot be made responsive by actions taken or explanations made after bid opening. BKS Construction Co., B-226346 et al., May 28, 1987, 66 Comp. Gen. _____, 87-1 CPD ¶ 558.

assigned would exist. Consequently, the letter of credit submitted by Pyramid is at best ambiguous and does not clearly establish the surety's liability. See G&G Steel, Inc., B-225750, Apr. 1, 1987, 87-1 CPD ___.

The bid was therefore properly rejected as nonresponsive and the protest is denied.



James F. Hinchman
General Counsel