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The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: J.C. & N. Maintenance, Inc.

File: B-229556

Date: December 8, 1987

DIGEST

1. Where letter of credit submitted as a bid guarantee does not cover entire acceptance period, and incorporates terms that create uncertainty as to whether the letter would be enforceable against the issuing bank, the letter is unacceptable as a firm commitment within the meaning of the standard bid guarantee clause included in the solicitation, and the bid is nonresponsive.
2. A nonresponsive bid cannot be made responsive by actions taken after bid opening.

DECISION

J.C. & N. Maintenance, Inc. protests the rejection of its apparent low bid as nonresponsive for failure to provide an adequate bid guarantee as required by invitation for bids (IFB) No. F48608-87-B-A034, issued by the Department of the Air Force for family housing maintenance. J.C. & N. contends that the bank letter of credit submitted with its bid was an acceptable guarantee and that the firm should have been awarded the maintenance contract.

We dismiss the protest.

The IFB required all bidders to submit a bid bond according to the requirements of the Federal Acquisition Regulation provision at 48 C.F.R. § 52.228-1 (1986), which was incorporated into the solicitation by reference. The bid bond was to be a firm commitment for the duration of the bid acceptance period. J.C. & N. submitted a bank letter of credit which contained a clause stating that it was "subject to the Uniform Customs and Practice for Documentary Credits (1974 Revision), International Chamber of Commerce Brochure #290" (UCP). According to the Air Force, such language made the bid guarantee subject to undisclosed conditions and therefore nonresponsive. In addition, the Air Force advised J.C. & N. that since its letter of credit expired under its terms on November 3, 1987, 6 days prior to the scheduled

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expiration of the bid acceptance period, the firm's bid was nonresponsive on that ground as well.

In its protest, J.C. & N. argues that the gap in coverage of its bid guarantee was due to an administrative error on the part of the issuing bank and constituted a minor informality which the Air Force should have waived. In any event, the firm states, it corrected the error on October 14 by obtaining and submitting a 30-day extension of its letter of credit which eliminated the gap in coverage. J.C. & N. does not address the issue of the qualifying language in the guarantee.

A bid guarantee, including a properly drawn irrevocable letter of credit, is a firm commitment to assure the government that a successful bidder will execute contractual documents and provide payment and performance bonds required under the contract. Its purpose is to secure the surety's liability to the government for excess procurement costs in the event the bidder fails to honor its bid in these regards. The key question in determining the sufficiency of a bid guarantee is whether the government will be able to enforce it. Imperial Maintenance, Inc., B-224257, Jan. 8, 1987, 87-1 CPD ¶ 34. When the liability of the surety is not clear, the guarantee properly may be regarded as defective and the bid rejected as nonresponsive. BKS Construction Co., B-226346, et al., May 28, 1987, 87-1 CPD ¶ 558.

In the present case, we agree with the Air Force that the letter of credit provided by J.C. & N. is subject to undisclosed terms not contained in the document itself which render its enforceability against the surety uncertain. (The Air Force informally has furnished our Office with a copy of the letter of credit.) Such a guarantee clearly is inconsistent with the solicitation's requirement for a firm, irrevocable commitment. Accord, BKS Construction, B-226346, et al., supra (letter of credit subject to UCP lacked certainty of enforceability against issuer and was therefore unacceptable within meaning of standard bid guarantee clause).

Even if J.C. & N's letter of credit had not been subject to the UCP conditions noted above, we agree with the Air Force that the letter failed to meet the requirements of the IFB for coverage during the entire bid acceptance period, and also rendered the bid nonresponsive for this reason. Munck Systems, Inc., B-186749, Oct. 19, 1976, 76-2 CPD ¶ 345. J.C. & N's argument that its subsequent modification of the document cured the deficiency is totally without merit: the change was made after bid opening, and a nonresponsive bid

cannot be made responsive by actions taken after bid opening. Imperial Maintenance, Inc., B-224257, supra.

We conclude that J.C. & N.'s letter of credit did not on its face manifest an intent to be irrevocable and thus was properly determined by the Air Force to be unacceptable due to its incorporation of the terms of the UCP. Additionally, we find that J.C. & N.'s letter of credit was properly found by the Air Force not to embrace the entire bid acceptance period, and that J.C. & N.'s attempt to remedy the defect subsequent to bid opening was irrelevant to a determination of responsiveness.

The protest is dismissed.

A handwritten signature in cursive script that reads "Ronald Berger". The signature is written in black ink and is positioned above the typed name and title.

Ronald Berger
Deputy Associate
General Counsel