



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Artco Contracting, Inc.
File: B-230979
Date: June 20, 1988

DIGEST

Where letter of credit submitted as a bid guarantee contains a condition which renders the letter, at best, ambiguous, as a result of which the enforceability of the instrument is uncertain, the accompanying bid is properly rejected as nonresponsive since the bid guarantee does not provide a firm commitment as required by the solicitation.

DECISION

Artco Contracting, Inc., protests the rejection of its apparent low bid under invitation for bids (IFB) No. N62472-86-B-0491 issued by the Naval Facilities Engineering Command, Department of the Navy, for the construction of an aircraft maintenance hangar. Artco's bid was rejected as nonresponsive for failure to provide an adequate bid guarantee in accordance with the solicitation requirements. Artco contends that the letter of credit it submitted with its bid complies with the bid guarantee requirements of the solicitation.

We deny the protest.

The solicitation required that each bid be accompanied by a bid guarantee in the amount of 20 percent of the bid price. The solicitation stated that the bid guarantee was to be in the form of a firm commitment, and that failure to furnish a bid guarantee in the proper form and amount by the time of bid opening may be cause for rejection of the bid. See 48 C.F.R. §§ 28.101-3(b) and 52.228-1 (1987).

As its bid guarantee Artco submitted an irrevocable letter of credit issued by Security Trust Company of Arlington, Texas, on March 15, 1988. The letter stated that "strict adherence by the Beneficiary" to several conditions was required. Two of those conditions were that:

"(2) Drafting instruments by wire must be preceded by solicitation No. N62472-86-C-0491 duly

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executed by the Beneficiary hereof to SECURITY TRUST COMPANY or its designee.

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"(4) A fee was paid for the full face value."

The letter further stated that the credit was available against wiring instructions ". . . on or before maturity date which is 90 days from date of acceptance, which date may be no later than 3-15- 1988 and which must state upon its face, 'Drawn under IRREVOCABLE LETTER OF CREDIT, dated 6-13 1988, of SECURITY TRUST COMPANY, Arlington, Texas.'"

The Navy rejected Artco's letter of credit as a bid guarantee on the basis that enforcement of it is conditioned upon the government's execution or assignment of the solicitation to the issuer of the letter or the issuer's designee and, therefore, the letter is not a firm commitment as required by the solicitation.

The Navy also rejected the letter of credit submitted by Artco on the basis that it is ambiguous with respect to the maturity date of the instrument, the date of acceptance, and the stated condition requiring payment of a fee "for the full face value." The Navy states that the enforceability of the instrument is uncertain because the maturity date is unclear in that the letter indicates as its date of maturity the same date that is shown as the date of issuance and, even though the letter also states that its maturity date is 90 days from the date of acceptance, the date of acceptance also is not clear. The Navy further explains that it is unclear from the face of the document whether the requirement for payment of a fee applies to the government or to Artco.

Artco contends that the letter of credit it submitted is a fully enforceable firm commitment. The protester maintains that the conditions stated in the letter have no bearing upon its enforceability, but "merely instruct" the government as to what information must be included in any wiring instructions to the issuer in the event enforcement of the instrument should become necessary.

The protester also expresses the view that there is no ambiguity as to the maturity date, but that the dates referenced in the first paragraph as the maturity and issuance dates, respectively, were transposed and that this "obvious" clerical error should have been waived as a "minor informality." As to the requirement for payment of a fee, Artco says the condition requires only that the government "state that a fee was paid for the issuance of the letter"

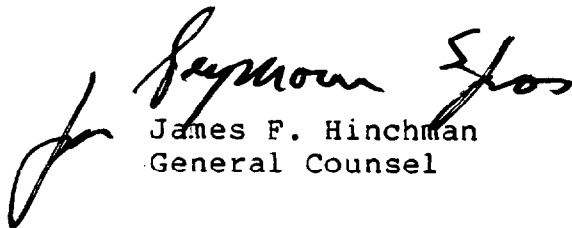
and, in any event, non-payment of a fee to the issuer of the letter does not render the letter unenforceable.

In Meridian Construction Company, Inc., B-230566, June 8, 1988, 88-1 CPD ¶ ___, we considered the enforceability of a similar letter of credit which, as here, was issued by Security Trust Company of Arlington, Texas. The letter of credit in that case contained the same language of condition as the second condition of the letter now under consideration. As we stated in Meridian, this condition does not, as the protester contends, constitute "mere drafting instructions." Rather, the condition is reasonably subject to interpretation as requiring, for enforcement, that the "solicitation" (in actuality, the underlying contract, as is indicated by the deviation in the solicitation number entered on the letter) be executed to the issuer or its designee--an action with which the government could not comply, should the contractor fail to execute the contract properly, since no contract would remain to be assigned following its termination for default.

Thus, we find that, as in Meridian, the Navy's rejection of Artco's bid as nonresponsive for failure to submit a sufficient bid guarantee was not improper because the letter it submitted failed to establish the surety's liability under a firm commitment since the subject condition, at best, renders the letter of credit ambiguous. See Pyramid Contracting, Ltd., B-228752.2, Nov. 2, 1987, 87-2 CPD ¶ 432.

In light of this finding, we need not consider the other questions concerning ambiguity in Artco's letter of credit. BKS Construction Company, B-226346, B-226347, May 28, 1987, 66 Comp. Gen. ___, 87-1 CPD ¶ 558.

The protest is denied.


James F. Hinchman
General Counsel