



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: V. Keeler & Co., Inc.
File: B-231792
Date: September 19, 1988

DIGEST

Where letter of credit submitted as a bid guarantee incorporate 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.

DECISION

V. Keeler & Co., 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. DACW38-87-B-0114, issued by the United States Army Corps of Engineers for waterway excavation and construction work. Keeler contends that the bank letter of credit submitted with its bid was an acceptable bid guarantee and that the firm should have been awarded the contract. We deny the protest.

The IFB required bidders to submit a bid guarantee in the amount of 20 percent of the bid price. The IFB also incorporated Federal Acquisition Regulation § 52.228-1, which requires bid guarantees to be in the form of a "firm commitment," such as an irrevocable letter of credit, and states that a bidder's failure to satisfy this requirement at bid opening may be cause for rejecting the bid.

Keeler submitted with its bid an "Irrevocable Letter of Credit No. 0704," issued by Security Trust Company of Arlington, Texas, and containing the statements that: (1) "the terms and conditions of this credit shall be governed by regulation and guidelines set forth in the Uniform Customs and Practice [UCP] for Documentary Credit (Rev. 1983) in the ICC Publication No. 400;" and that (2) "this Letter of Credit is Irrevocable, when accepted, and is not redeemable after maturity." The Corps considered the

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bid guarantee unacceptable because the first statement made the guarantee subject to undisclosed conditions, and the second statement made the letter of credit revocable by conditioning the effect of the document on acceptance. The Corps thus rejected Keeler's bid as nonresponsive.

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., et al., B-226346, May 28, 1987, 87-1 CPD ¶ 558. We agree with the Corps that the liability of the surety here is not clear.

In our decision, J.C. & N. Maintenance, Inc., B-229596, Dec. 8, 1987, 87-2 CPD ¶ 567, cited by the Corps as controlling here, we specifically held that a letter of credit is not an acceptable bid guarantee where, by its language, it is subject to the UCP or other undisclosed terms not contained in the document itself. In these circumstances, we consider the enforceability of the surety's obligation uncertain. Keeler attempts to distinguish the language in issue here from that in J.C. & N. on the basis that, there, the letter of credit was "subject to" the UCP, while here the terms of the letter of credit were "governed by" the UCP we find the language legally indistinguishable; in our view, an obligation "governed by" the UCP also is "subject to" the UCP in that it renders enforceability of the surety's obligation dependent upon terms outside the document. Keeler has presented no authority for its contrary position.

Although the above deficiency alone was a sufficient basis for rejecting Keeler's bid as nonresponsive, we also previously have held that a letter of credit stating, as here, that it is irrevocable "when accepted," brings the irrevocability into question (because it is unclear by whom the document must be accepted to establish the surety's

obligation), and thus renders the document unacceptable as a bid guarantee. See Freitus-Lancaster, Inc., B-230569.2, June 7, 1988, 88-1 CPD ¶ 539. We conclude that Keeler's bid properly was rejected as nonresponsive.

The protest is denied.

for *Seymour Spos*
James F. Hinchman
General Counsel