



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: DDD Company
File: B-233266
Date: December 14, 1988

DIGEST

Where copy of irrevocable letter of credit submitted as a bid guarantee indicates that the agency can only demand payment from the surety upon presenting the original letter of credit, the letter is of questionable enforceability, and the bid therefore is properly rejected as nonresponsive.

DECISION

DDD Company protests the rejection of its low bid for mailroom services under invitation for bids (IFB) No. NASP-N7-B-0103, issued by the National Archives and Records Administration (NARA). The agency rejected the bid as nonresponsive because it found DDD's bid bond, in the form of a copy of a letter of credit, to be unenforceable, and therefore unacceptable. DDD contends that it submitted the original letter of credit with its bid and that its bid therefore is responsive.

We deny the protest.

The IFB required each bidder to submit a bid guarantee in the amount of 20 percent of the bid price, or \$3,000,000, whichever was less. In accord with Federal Acquisition Regulation (FAR) § 52-228-1, the IFB stated that failure to furnish a guarantee in the proper form and amount by the time set for bid opening may be cause for rejection of the bid.

DDD's was the low bid of the six received and included as a bid guarantee an irrevocable letter of credit issued by the Maryland National Bank on September 1, 1988. The letter, in the amount of \$17,540, referenced the NARA in Washington, D.C., and further stated that "the original of this letter of credit must be presented to us with any drawings hereunder for our endorsement of any payments effected by us." However, after further examination of the three copies

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of the bid submitted by DDD, the contracting officials determined that all three copies of the bid contained copies of the letter of credit, and that the original was not furnished. Since the copies submitted expressly stated that the original document must be presented as a condition of payment, the contracting officer determined that DDD had not satisfied the bid guarantee requirement and rejected the bid as nonresponsive.

The protester alleges that it did submit the original letter of credit with its bid, and contends that its position is substantiated by the agency's acknowledgment at the bid opening that the protester's bid guarantee was present. The contracting officer states, however, that DDD's bid documents all were in bound volumes enclosed in a brown paper wrapping, and that at the bid opening there were no loose papers in the brown paper wrapping, and no loose papers in the bound volumes. The NARA official present at the bid opening states that she announced that the protester's bid contained a bid guarantee based on the copy of the letter of credit she saw in one of the three copies submitted; it was never her intent to indicate the acceptability or validity of the protester's bid guarantee.

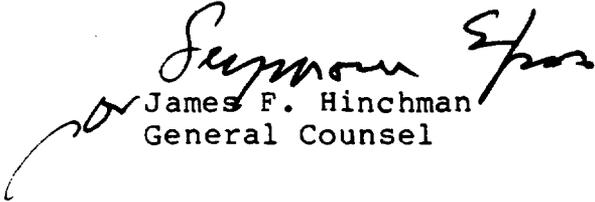
A letter of credit is essentially a third-party beneficiary contract. Upon request of its customer, a financial institution may issue such a letter to a third party, whose drafts or other demands for payment will be honored upon the third party's compliance with the conditions specified in the letter. The effect and purpose of a letter of credit is to substitute the credit of some other entity for the credit of the customer. See Chemical Technology Inc., B-192893, Dec. 27, 1978, 78-2 CPD ¶ 438. The purpose of any bid guarantee, including a letter of credit, is to secure the liability of a surety to the government in the event the bidder fails to fulfill its obligation to execute a written contract and furnish payment and performance bonds. Hydro-Dredge Corp., B-214408, Apr. 9, 1984, 84-1 CPD ¶ 400. Thus, the sufficiency of a bid guarantee depends on whether the surety is clearly bound by its terms. When the liability of the surety is not clear, the guarantee properly may be regarded as defective, Desert Dry Waterproofing Contractors, B-219996, Sept. 4, 1985, 85-2 CPD ¶ 268, and the bid must be rejected as nonresponsive. A&A Roofing Co., Inc., B-219645, Oct. 25, 1985, 85-2 CPD ¶ 463.

Here, since the terms of the letter of credit made payment contingent on presentation of the original, we think it is clear under the above standard that, absent submission of the original instrument with DDD's bid, the enforceability of the guarantee is at best questionable, and the bid had to

be rejected as nonresponsive. We have specifically held, moreover, that a photocopy of a letter of credit is unacceptable as a bid guaranty, since there would be no way (other than by an examination of the original) that the agency could be certain that there had not been alterations to which the surety had not consented. See Imperial Maintenance, Inc., B-224257, Jan. 8, 1987, 87-1 CPD ¶ 34. Our decision thus ultimately turns on whether DDD submitted the original with its bid.

While DDD argues that the original guarantee was received by the agency along with its bid, DDD is in a position to assert only that it included the original when it was preparing its bid package; DDD was not present when the bid was received by NARA, and neither DDD nor any other person saw the original at the bid opening. Since there is no other reason to believe, or evidence establishing, that NARA incorrectly determined that the original was not received, on this record we think it only reasonable to conclude that the original was misplaced during preparation of the bid, or lost in the process of transporting the bid to the agency. Whatever the explanation, since we find no evidence belying NARA's statement that the original guarantee was not received--the contracting official's acknowledgment at bid opening based on examination of a copy does not constitute such evidence--we conclude that the agency properly determined that DDD's bid was nonresponsive.

The protest is denied.


James F. Hinchman
General Counsel