

*Moore*



**The Comptroller General  
of the United States**

Washington, D.C. 20548

**Decision**

**Matter of:** Kentucky Bridge and Dam, Inc.

**File:** B-235806

**Date:** July 17, 1989

**DIGEST**

A bid guarantee, in the form of an irrevocable letter of credit, must remain available to the government for at least the entire bid acceptance period.

**DECISION**

Kentucky Bridge and Dam, Inc. (KB&D) protests the rejection of its low bid as nonresponsive for failing to provide an adequate bid guarantee as required by invitation for bids (IFB) No. N62766-88-B-2485, issued by the Department of the Navy for the exterior painting of family housing units.

We dismiss the protest pursuant to section 21.3(m) of our Bid Protest Regulations because it is clear on the face of the protest that it is without merit. 4 C.F.R. § 21.3(m) (1988).

The IFB required bidders to submit a bid guarantee in the amount of 20 percent of the bid price. The IFB also indicated that the government's minimum bid acceptance period was 90 days. Bid opening was April 28, 1989.

KB&D submitted with its bid an irrevocable letter of credit from Pioneer Bank to satisfy the bid guarantee requirements. The letter of credit was dated April 21 and was said to be effective until July 20, 1989.

By letter dated May 26, the Navy advised KB&D that its bid was nonresponsive for failure to provide an adequate bid guarantee. The Navy determined that the bid guarantee was inadequate because it was not effective for the entire bid acceptance period. On June 1, KB&D submitted a "Revised Letter of April 21, 1989," replacing and voiding its original letter of credit and extending the date of effectiveness until July 28.

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On June 7, KB&D filed a protest with our Office. KB&D protests that its bid is responsive, since its letter of credit was binding on its face and it meets or exceeds the general commercial standards for such instruments. According to KB&D, the solicitation contained no separate or specific requirement that the letter of credit extend through the entire acceptance period. Further, the protester argues that inclusion of the July 20 date was a clerical error, a miscalculation by the bank officer, which, because it differed from the protester's offer to be bound by its bid for the full acceptance period, was an apparent mistake, correctable under Federal Acquisition Regulation (FAR) § 14.406-1 (FAC 84-12). The protester says that the contracting officer is required by law to allow clerical errors to be corrected and to seek verification of apparent mistakes. KB&D also argues that the contracting officer should consider the exceptions to the bid guarantee requirements when assessing its guarantee. The protester says that the exceptions available "are wide and varied giving the contracting officer a great amount of latitude in considering bid guarantees."

A bid guarantee, including a properly drawn irrevocable letter of credit, is to secure the liability of a surety to the government for excess costs of procurement in the event that the bidder fails to fulfill its obligation to execute a written contract and furnish payment and performance bonds. Cos-Mil, Inc., B-235480, June 26, 1989, 89-1 CPD ¶ \_\_\_\_\_. The sufficiency of a letter of credit as a bid guarantee depends upon whether the government will be able to enforce it if enforcement becomes necessary. Where, due to the language in a letter of credit, the enforceability of the instrument is uncertain, the letter does not constitute a firm commitment and the bid must be rejected as nonresponsive since the bid guarantee is a material part of the bid. Id.

We agree with the Navy that KB&D did not provide an adequate bid guarantee. Since a bid guarantee is used to protect the government in the event the awardee does not furnish the required performance and payment bonds, we have previously recognized that a bid guarantee in the form of an irrevocable letter of credit must remain available to the government for at least the entire bid acceptance period. Cos-Mil, Inc., B-235480, supra; Kruckenbergs Serv. Co., B-232337, Oct. 18, 1988, 88-2 CPD ¶ 366; Control Cent. Corp. et al., B-214466.2 et al., July 9, 1984, 84-2 CPD ¶ 28. Here, where the IFB specified a 90-day bid acceptance period, a bid guarantee limited to 83 days clearly expires short of the time frame needed for the government to

exercise its rights if the bidder fails to furnish the required bonds.

KB&D asserts that inclusion of the July 20 date was a mistake that it should be allowed to correct under FAR § 14.406-1. However, mistakes that can be corrected under this provision include, for example, the obvious misplacement of a decimal point or the use of obviously incorrect discounts. FAR § 14.406-2 (FAC 84-12). An erroneously prepared bid guarantee relates to the responsiveness of the bid and is not a mistake in bid price. We have consistently held that only bids that are responsive as submitted may be corrected. The Ramirez Co. and Zenon Constr. Corp., B-233204, Jan. 27, 1989, 89-1 CPD ¶ 91; FAR § 14.406-3 (FAC 84-37). A nonresponsive bid cannot be made responsive by actions taken after bid opening. G&G Steel, Inc., B-225750, Apr. 1, 1987, 88-2 CPD ¶ 54. Therefore, the "Revised Letter of April 21, 1989," submitted well after bid opening did not cure the defect in the original bid guarantee.

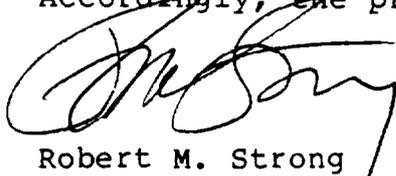
Moreover, contrary to KB&D's assertion that exceptions to the bid guarantee requirement are "wide and varied," and give the contracting officer great discretion, we have consistently held that the failure to furnish a bid guarantee in accordance with the solicitation's terms requires the rejection of the bid as nonresponsive.<sup>1/</sup> McLemore Pump, Inc., B-230031, Jan. 27, 1988, 88-1 CPD ¶ 83. Noncompliance with the bid guarantee requirement can only be waived under those limited conditions specified in the FAR § 28.101-4 (FAC 84-32), none of which are present here. The language in the bid guarantee requirement does not give the

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<sup>1/</sup> The protester also suggests that section 28.101-4 of the FAR, which deals with bid guarantees that are submitted in an amount less than that required by the solicitation, applies in this instance. This section allows a contracting officer to accept a smaller guarantee than required if that guarantee is equal to or greater than the difference between the bid price and the next higher acceptable price. Here, however, the bid guarantee was not found to be too small an amount. Rather, the guarantee was valid for too short a time period. Therefore, this clause is irrelevant to the deficiency cited by the agency in its rejection of the bid guarantee.

contracting officer discretion to waive the bid guarantee requirement except in the limited specified conditions. Fort Steuben Enters., B-233746, Dec. 22, 1988, 88-2 CPD ¶ 621; McLemore Pump, Inc., B-230031, supra.

Accordingly, the protest is dismissed.

A handwritten signature in black ink, appearing to read "R. Strong", written over the typed name.

Robert M. Strong  
Associate General Counsel