

Ms. Curcio



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: MK Consultants & Associates, Inc.

File: B-242059

Date: February 26, 1991

Helen F. Stephenson for the protester.
Lester Edelman, Esq., Department of the Army, Office of the Chief of Engineers, for the agency.
Mary G. Curcio, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Irrevocable letter of credit is not an acceptable form of bid guarantee where solicitation limits types of bid guarantee that may be submitted to bid bonds or public debt obligations of the United States.
2. Bid that does not contain a bid guarantee in the form required by the solicitation is properly rejected as nonresponsive; proper bid guarantee may not be substituted after bid opening since a nonresponsive bid generally may not be corrected after opening.

DECISION

MK Consultants & Associates, Inc. protests the rejection as nonresponsive of the bid it submitted in response to invitation for bids (IFB) No. DACA01-90-B-0172, issued by the Department of the Army for improvements to military housing.

We deny the protest.

The IFB, issued on September 24, 1990, required each bidder to submit with its bid a bid guarantee in the form of a bid bond, or other security specified by the solicitation, in an amount equal to the lesser of 20 percent of its bid price or \$3 million. The IFB also contained Defense Federal Acquisition Regulation Supplement (DFARS) §.252.228-7007, which provides, in pertinent part, as follows:

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"BID BOND (Mar. 1989)

(a) The Offeror (Bidder) shall furnish a separate bid bond, or United States bonds, Treasury notes or other public debt obligations of the United States, in the proper form and amount, by the time set for opening of bids. Failure to do so may be cause for rejection of the bid"

MK submitted the low bid; the bid was rejected, however, because the Army found that MK submitted an unacceptable bid guarantee. First, instead of submitting its bid guarantee in the form of a bid bond, Treasury note, United States bond or other public debt obligation, as required by the solicitation, MK submitted an irrevocable letter of credit drawn on a savings and loan association and a cashier's check.^{1/} In addition, the contracting officer found that MK's irrevocable letter of credit was deficient because it contained certain conditions which made its enforceability uncertain; specifically, it was subject to the Uniform Customs and Practice for Documentary Credits (1983 Revision), International Chamber of Commerce Publication No. 400; it restricted the government's right to draw on it by providing that it would automatically extinguish if the government drew one draft of any amount less than the full amount; and the original term for which it was issued was undefined.

MK protests that the Army improperly determined that the firm submitted an unacceptable bid guarantee. MK first argues that Federal Acquisition Regulation (FAR) §§ 28.203-2(a) and (b) (5) specifically identify irrevocable letters of credit as an acceptable form of bid guarantee and that DFARS § 252.228-7007 does not prohibit the use of irrevocable letters of credit as a bid guarantee. MK therefore reasons that since FAR § 28.201(b) permits offerors to use the types of surety or security permitted by FAR subpart 28 unless prohibited by law or regulation, it was permissible for MK to submit its bid guarantee in the form of an irrevocable letter of credit. MK also asserts that the solicitation included FAR § 52.228-11, Pledge of Assets, which, according to MK, allows bidders to submit bid guarantees other than bid bonds, including other assets described in FAR § 28.203-2. MK asserts that irrevocable letters of credit are acceptable bid guarantees under this FAR provision. Finally, MK asserts that because the irrevocable letter of credit it submitted was issued by a federally insured and regulated financial institution, it

^{1/} The irrevocable letter of credit was in the amount of \$150,000 and the cashier's check was in the amount of \$124,800, for a total of \$274,800, or 24 percent of MK's bid.

qualifies as a public debt obligation of the United States and thus is an acceptable bid guarantee under DFARS § 252.228-7007. MK also states that it is willing to substitute a bond for the irrevocable letter of credit it submitted.

The Army responds that while the FAR generally does permit the use of irrevocable letters of credit as bid guarantees, FAR § 28.101-1 permits agencies to specify that only "separate bid bonds" are acceptable in connection with construction projects. The Department of Defense (DOD), in accordance with this provision, promulgated DFARS § 228.101-1 which requires contractors to submit separate bid bonds, United States bonds, Treasury notes or other United States public debt obligations as bid guarantees for construction contracts. The Army points out that DFARS § 252.228-7007 was included in the solicitation to put bidders on notice of the requirement. The Army concludes that since MK did not submit a bond or one of the types of public debt obligations listed in DFARS § 252.228-7007, its bid was properly rejected.

A bid guarantee is a form of security assuring that the bidder (1) will not withdraw a bid within the period specified for acceptance, and (2) will execute a written contract and furnish required performance and payment bonds, FAR § 28.001. FAR § 28.101-1 states that as a general rule where a bid guarantee is required the bidder may provide any type of guarantee. The section, however, also gives procuring agencies the discretion to specify that only separate bid bonds are acceptable for construction projects. DOD exercised the discretion permitted by FAR § 28.101-1 and promulgated DFARS § 228.101-1 to require that only separate bid bonds and specified types of public debt obligations be provided as bid guarantees for construction projects. Bidders were put on notice of this requirement by the inclusion of DFARS § 252.228-7007 in the solicitation; contrary to the protester's position, this provision does not permit the use of an irrevocable letter of credit as a bid guarantee.

As defined in FAR § 28.001, a bond:

"means a written instrument executed by a bidder or contractor (the 'principal') and a second party (the 'surety' or 'sureties'), to assure fulfillment of the principal's obligations to a third party (the 'obligee' or 'Government'), identified in the bond. If the principal's obligations are not met, the bond assures payment, to the extent stipulated, of any loss sustained by the obligee."

In comparison, a letter of credit is essentially a third-party beneficiary contract by which a customer of a financial institution wishing to transact business induces the financial

institution to issue the letter to a third party whose drafts or other demands for payment will then 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 entity other than the customer for the credit of the customer. S & S Contracting, 63 Comp. Gen. 450 (1984), 84-1 CPD ¶ 670. Unlike with a letter of credit, where a bond is furnished both the principal and surety remain jointly and severally liable for the amount specified. See FAR § 53.301-25 (standard bid bond form). Thus, by definition an irrevocable letter of credit does not qualify as a bid bond as specified in the solicitation.

MK's reliance on FAR §§ 28.203-2(a) and (b) (5) to demonstrate that bidders may submit bid guarantees in the form of irrevocable letters of credit is misplaced. FAR § 28.203 requires the contracting officer to insure that an individual surety has acceptable assets to back up the bond it provides to guarantee a bidder's performance, and defines those assets that the contracting officer may consider acceptable in making that determination. Thus, FAR § 28.203-2(a) specifies that where an individual surety provides a bond for a contractor, that surety may back up the bond with an irrevocable letter of credit if that letter of credit meets the requirements of FAR § 28.203-2(b) (5). These provisions, however, do not give the bidder the option to provide an irrevocable letter of credit as a bid guarantee. They merely specify that an irrevocable letter of credit is an acceptable asset to be pledged by individual sureties as security for bonds.

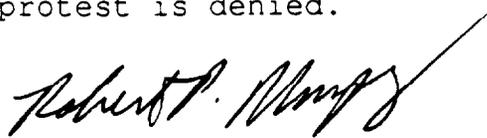
Insofar as MK argues that the incorporation of FAR § 52.223-11, Pledge of Assets, into the solicitation requires a different result because it permits bidders to submit bid guarantees other than bonds, this provision does no more than require bidders submitting bid bonds from an individual surety to obtain a pledge of assets from the surety. See Pete Vicari General Contractor, Inc., 69 Comp. Gen. 191 (1990), 90-1 CPD ¶ 92. It does not in itself authorize bidders to submit bid guarantees in the form of an irrevocable letter of credit.

Finally, as reported to us by the Treasury Department, a public debt obligation is a financial obligation that is included in the public debt, such as Treasury bills or bonds issued by the Treasury Department or other federal agencies, for which the federal government is directly responsible. An irrevocable letter of credit, in contrast, is not issued by the federal government and its payment is the responsibility of the issuing financial institution; it does not become a public debt obligation of the United States merely because it is issued by a financial institution which is regulated and insured by the United States.

Since the solicitation required bidders to submit a bid guarantee in the form of a bid bond or one of the specified types of public debt obligation, and MK failed to comply with this provision, MK's bid was properly rejected as nonresponsive. See Asbestos Management Serv., B-236379, Aug. 25, 1989, 89-2 CPD ¶ 180. Nor is it permissible for MK to substitute a bid bond for the irrevocable letter of credit it submitted, since a nonresponsive bid cannot be made responsive after bid opening. Id.

Since we find that the irrevocable letter of credit was not an acceptable form of bid guarantee, it is unnecessary for us to decide whether it also included unacceptable conditions.

The protest is denied.


for James F. Hinchman
General Counsel