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Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Metzger Towing, Inc.

File: B-242559

Date: May 6, 1991

Christopher E. Peters, Esq., Cherry, Givens, Tarver, Aldridge, Peters, Lockett & Diaz, P.C., for the protester.
Lester Edelman, Esq., and Calon E. Blackburn, Jr., Esq., Department of the Army, for the agency.
Amy M. Shimamura, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

An irrevocable letter of credit is not an acceptable form of bid guarantee on Department of Defense construction solicitations that contain Department of Defense Federal Acquisition Regulation Supplement § 252.228-7007.

DECISION

Metzger Towing, Inc. protests the rejection of its bid as nonresponsive under invitation for bids (IFB) No. DACA01-90-B-0150, issued by the U.S. Army Engineer District, Mobile, Alabama, for construction work referred to as "Navy Homeport Mitigation" at Pascagoula, Mississippi, and at Mobile.^{1/}

We deny the protest.

The IFB, issued on August 24, 1990, required each bidder to submit with its bid a bid guarantee in an amount equal to the lesser of 20 percent of the bid price or \$3,000,000. The IFB included the clause in Department of Defense Federal Acquisition Regulation Supplement (DFARS) § 252.228-7007, which specifically advised that the bidder shall furnish "a separate bid bond, or United States bonds, Treasury notes or other . . . 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. . . ."

^{1/} The contractor is required to survey, excavate and shape the mitigation area to establish a viable estuarine wetland system.

Five bids were submitted by the October 4 bid opening date. Metzger's low bid (\$1,249,000) was determined nonresponsive because it submitted as a bid guarantee an irrevocable letter of credit in the amount of \$250,000, issued by the Peoples Bank of Alabama.

Metzger contends that the letter of credit is an acceptable form of bid guarantee under Federal Acquisition Regulation (FAR) § 52.228-1, and since DFARS § 252.228-7007 was derived from FAR § 52.228-1 and does not specifically prohibit letters of credit, an irrevocable letter of credit should be acceptable for this IFB.

In MK Consultants & Assocs., Inc., B-242059, Feb. 26, 1991, 91-1 CPD ¶ 221, we held that irrevocable letters of credit may no longer be submitted as bid guarantees on Department of Defense (DOD) solicitations for construction that contain DFARS § 252.228-7007. We found that although FAR § 28.101-1(b) states that all types of bid guarantees are acceptable for solicitations for supplies or services, procuring agencies are given the discretion to specify that only separate bid bonds would be acceptable for solicitations for construction contracts. DFARS § 228.101-1 specifies that only separate bid bonds, or United States bonds, Treasury notes or other public debt obligations of the United States, are acceptable for DOD construction contracts. As noted above, the IFB included DFARS § 252.228-7007, which put bidders on notice of this requirement. An irrevocable letter of credit is not one of the listed permissible bid guarantees on DOD construction contracts, since it is not a bid bond or public debt obligation of the United States. See MK Consultants & Assocs., Inc., B-242059, *supra*; see also Concord Analysis, Inc., B-239730.3; B-241009, Dec. 4, 1990, 90-2 CPD ¶ 452. Therefore, an irrevocable letter of credit is not acceptable as a bid guarantee under the IFB.

Metzger argues that since DFARS § 252.228-7007 only provides that bids "may" be rejected if a proper bid guarantee is not submitted, it should be permitted to submit an irrevocable letter of credit as a bid guarantee, inasmuch as a letter of credit has previously been regarded as an acceptable bid guarantee. However, where a bid guarantee is not submitted in the proper form, the use of the word "may" in this context is just as compelling and material as if more positive language were employed. See Eagle Asphalt & Oil, Inc., B-240340; B-240344, Nov. 14, 1990, 90-2 CPD ¶ 395.

Metzger submitted, after bid opening, a letter from the Peoples Bank stating that the letter of credit is backed by public debt obligations of the United States. Metzger

alleges that this satisfies the IFB requirements. The submission of a required bid bond is a material condition with which there must be compliance at the time of bid opening. Maytal Constr. Corp., B-241501; B-241501.2, Dec. 10, 1990, 90-2 CPD ¶ 476. Metzger cannot clarify its bid after bid opening to make it responsive, since a bidder's intention and the obligation running to the government must be determinable from the bid and bond at bid opening. See H.M. Kern Corp., B-239821, June 22, 1990, 90-1 CPD ¶ 586. Therefore, the letter from the Peoples Bank, which stated that the bank would pledge, assign or deliver public debt obligations in the amount of the letter of credit to the agency upon request, cannot be considered to make the bid responsive.

The protest is denied.

Robert P. Murphy

for James F. Hinchman
General Counsel